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Clerk of Circuit Court
Waukesha County
2022CV001603

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF WAUKESHA COUNTY, et al.,

Plaintiffs,

v. Case No. 22-CV-1603

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

UNION VETERANS COUNCIL, et al.,

Intervenors.

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DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

In response to the Wisconsin Elections Commission's motion to dismiss, Plaintiffs raise a variety of misplaced legal theories but ultimately fail to counter the Commission's central arguments showing that dismissal is required. (Doc. 42.) The allegations in Plaintiffs' complaint, even if taken as true, do not establish any grounds for invalidating the guidance documents they challenge under Wis. Stat. § 227.40. This action should therefore be dismissed.[1]

[1] As a threshold matter, much of Plaintiffs' response brief is concerned with standing and whether they failed to exhaust their administrative remedies as a precondition to filing suit—two arguments raised by Intervenor-Defendants in this case. (*See* Doc. 50:2.) The Commission has not moved for dismissal on these bases, and thus will not address them.

I. A separate administrative complaint pending before the Commission, involving different parties and different claims, does nothing to prevent dismissal of this case for failure to state a claim.

Plaintiffs try to defend against the Commission's motion to dismiss using a "primary jurisdiction" theory involving an administrative complaint filed by Dennis Barthenheier, an elector who is not a plaintiff here, against Amy Dishinger, a municipal clerk who is not a defendant here. (Doc. 56:4.) Plaintiffs' argument is without merit.

First, "[a] motion to dismiss for failure to state a claim tests the legal sufficiency *of the complaint*." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (emphasis added) (citations omitted). Thus, on a motion to dismiss, the reviewing court must analyze the facts *in the complaint* to determine whether it properly states a claim, and "a court cannot add facts in the process of construing a complaint." *Id.* Here, Plaintiffs try to defend against the Commission's motion by submitting new facts not included in their complaint. Plaintiffs cannot use new facts to defend against a motion to dismiss, and their "primary jurisdiction" defense may be rejected on this basis alone.

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Next, even if this Court were to consider materials outside the pleadings, the Commission has not "conceded" jurisdiction to this Court by virtue of holding in abeyance an entirely separate administrative matter involving different parties and different claims. The primary jurisdiction doctrine is inapplicable here.

Barthenheier filed a complaint with the Commission against Dishinger, the Village Clerk for Menomonee Falls, under Wis. Stat. § 5.06. (Doc. 56:4 (*Barthenheier v. Dishinger*, EL 22-105).) Wisconsin Stat. § 5.06(1) allows an elector to file an

administrative complaint with the Commission against an election official whenever he or she "believes that a decision or action of the official or the failure of the official to act" is contrary to law or an abuse of discretion. Plaintiffs describe Barthenheier's administrative complaint, which apparently alleges some error or abuse of discretion on the part of Dishinger, as "similar to the underlying complaint here." (Doc. 56:4–5.) The Commission is holding adjudication of the Barthenheier matter in abeyance pending the resolution of this case.

The primary jurisdiction doctrine applies in cases where a court and an agency both have jurisdiction over the *same* issues in dispute, and concerns the circumstances under which the agency, not the court, should perform the fact-finding necessary to resolve the dispute. *See Wis. Prop. Tax Consultants, Inc. v. DOR*, 2022 WI 51, ¶ 5, 402 Wis. 2d 653, 976 N.W.2d 482. The primary jurisdiction doctrine is thus plainly inapplicable here. The individuals involved in the Barthenheier matter are not parties to this action. And the underlying claims are different, too.[2] Barthenheier's administrative complaint under Wis. Stat. § 5.06 seeks an order from the Commission directing the local election official to conform her conduct to the law. Here, Plaintiffs' Wis. Stat. § 227.40 declaratory judgment action seeks to invalidate certain guidance documents issued by the Commission.

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[2] At one point in their brief, Plaintiffs argue that Barthenheier's administrative complaint and the present action are both actions "filed under Wisconsin Statutes § 5.06." (Doc. 56:1.) This is not true, nor could it be. This case is a declaratory judgment action pursuant to Wis. Stat. § 227.40 filed against the Commission to challenge the validity of certain guidance documents. It is not an administrative complaint filed against a local election official for adjudication by the Commission pursuant to Wis. Stat. § 5.06.

In short, nothing about the Commission's abeyance of the Barthenheier matter impacts the present motion to dismiss and whether Plaintiffs here have failed to state a claim under Wis. Stat. § 227.40.

II. Plaintiffs misstate the grounds for invalidating a guidance document under Wis. Stat. § 227.40, which are expressly provided by statute.

The Commission has argued that Plaintiffs have failed to state a claim under Wis. Stat. § 227.40 for three reasons. First, under Wis. Stat. § 227.40, a court can invalidate a guidance document only if it is unlawful, and Plaintiffs have alleged nothing unlawful about the guidance documents at issue here. (Doc. 42:12–14.) A claim that the Commission has unlawfully *failed* to issue guidance regarding the requirements imposed on municipal clerks by Wis. Stat. § 6.22(6) is not actionable under Wis. Stat. § 227.40. Second, even if Plaintiffs could advance a claim under Wis. Stat. § 227.40 based on the *absence* of guidance, the claim would fail as a matter of law because the Commission has no legal duty to issue the type of guidance demanded by Plaintiffs. (Doc. 42:15–17.) Third, Plaintiffs' allegations about the alleged impact of the guidance documents, (while both factually and legally unfounded), do not provide a basis for invalidating the guidance documents. (Doc. 42:18–21.)

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In response, Plaintiffs offer an alternative interpretation of the meaning of the word "validity" in Wis. Stat. § 227.40(1). (Doc. 56:5–6.) Wisconsin Stat. § 227.40(1) provides that "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document." Plaintiffs argue that the word "validity" in this statute should be interpreted broadly and pursuant to a dictionary definition, such

that an agency's rule or guidance document may be invalidated whenever a court believes that it is "based on erroneous information or unsound reasoning." (Doc. 56:6 (quoting the New Oxford American Dictionary).) Plaintiffs go on to argue that the challenged guidance documents' lack of reference to municipal clerks' obligations under Wis. Stat. § 6.22(6) "reflects unsound reasoning," and thus they may be invalidated under Wis. Stat. § 227.40. (Doc. 56:6.)

Plaintiffs' argument fails because subsection (4) of Wis. Stat. § 227.40 expressly defines what invalidity means in this context, and it does not mean what Plaintiffs say it does. Pursuant to Wis. Stat. § 227.40(4)(a), a court may find that a rule or guidance document is invalid on three grounds: if "it violates constitutional provisions," if it "exceeds the statutory authority of the agency," or if it meets the definition of a rule and was thus required to be promulgated and adopted as such. There is no need to turn to a dictionary because the statute itself explains what makes a rule or guidance document invalid under Wis. Stat. § 227.40. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") (citation omitted); *see also* Wis. Stat. § 990.01(1) ("All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.").

For example, in *Teigen v. WEC*, the Wisconsin Supreme Court invalidated guidance documents pursuant to Wis. Stat. § 227.40 because they endorsed absentee

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ballot drop boxes and the court determined that ballot drop boxes are not permitted under Wisconsin's election statutes. 2022 WI 64, ¶ 72, 403 Wis. 2d 607, 976 N.W.2d 519. In contrast, the guidance documents challenged here by Plaintiffs do not conflict with any statute, and Plaintiffs fail to allege any of the specified grounds for invalidation under Wis. Stat. § 227.40(4)(a). They have thus failed to state a claim.

III. Plaintiffs have not established that the Commission has a "policy" of omitted guidance regarding military elector lists, and in any event, Plaintiffs cannot challenge a policy under Wis. Stat. § 227.40.

Lastly, Plaintiffs claim that "[t]he omission" of guidance regarding municipal clerks' statutory obligations under Wis. Stat. § 6.22(6) "is a policy as it occurs for each election cycle in which military elector lists are created." (Doc. 56:15.) And it purports to challenge this supposed policy under Wis. Stat. § 227.40. This argument fails for two reasons.

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First, the Commission's issuance of two guidance documents regarding certain statutes is not an "omitted guidance-policy" regarding a different statute. (Doc. 56:16.) Plaintiffs try to support their omitted guidance-policy argument using inapplicable case law from the Seventh Circuit.[3] (Doc. 56:15 (citing *Calhoun v. Ramsey*, 408 F.3d 375 (7th Cir. 2005)).) But even this case shows that they are wrong.

Calhoun involves a prisoner's claim under 42 U.S.C. § 1983 alleging deliberate indifference to his medical needs in violation of his rights under the Eighth

[3] Pursuant to Local Rule 3.3, "[c]opies of non-Wisconsin authorities cited in a brief shall be filed with the Clerk of Circuit Court at the same time as the brief." Plaintiffs failed to do so.

Amendment. 408 F.3d at 377. The portion of the decision quoted (misleadingly) by Plaintiffs says that, regardless of whether a plaintiff is challenging a widespread practice that creates an implicit policy or a gap in an express policy, "what is needed is evidence that there is a true municipal policy at issue, not a random event." *Id.* at 380. "If the same problem has arisen many times and the municipality has acquiesced in the outcome, it is possible (though not necessary) to infer that there is a policy at work . . . ." *Id.*

The facts alleged in Plaintiffs' complaint do not establish that the Commission has a "true . . . policy" of omitting guidance. *Id*. Nor do those facts establish that "the same problem has arisen many times," as they challenge the issuance of just two guidance documents. *Id*. Nor do those facts establish an actionable *problem*. Plaintiffs' challenge to the two guidance documents is based on their complaint that the documents do not reference municipal clerks' obligations under Wis. Stat. § 6.22(6)—a statute that the clerks have an independent duty to interpret and apply. But as explained in the Commission's opening brief, the Commission is not required to issue guidance on every provision in Wisconsin's election statutes, nor is it required to reference military elector lists in guidance documents pertaining to related but different subjects. The statutes prescribing the Commission's powers and duties generally *empower* the Commission to issue advisory opinions, publish election manuals, respond to inquiries from local election officials and conduct education programs for voters and election officials, but, except where expressly specified, those

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statutes do not *require* the Commission to issue guidance on particular subjects. *See generally* Wis. Stat. §§ 5.05, 7.08(3), (11), 7.31(5), 7.315(1)–(2).

Second, even if the facts in Plaintiffs' complaint did establish that the Commission has a genuine policy of omitting guidance, Plaintiffs would still not have a valid declaratory judgment claim under Wis. Stat. § 227.40 because Plaintiffs cannot challenge an agency *policy* under Wis. Stat. § 227.40. *See* Wis. Stat. § 227.40(1).

Wisconsin Stat. § 227.40(1) provides that "[t]he court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that *the rule or guidance document* or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Thus, the statute requires that the plaintiff first identify a specific rule or guidance document as unlawful before the court may evaluate whether it interferes with the plaintiffs' legal interests such that it may be invalidated. Both rules and guidance documents are specialized types of agency communications, defined under chapter 227, and neither definition encompasses an agency's general policy or practice. *See* Wis. Stat. § 227.01(3m), (13).

Plaintiffs cannot challenge an agency policy pursuant to a Wis. Stat. § 227.40 declaratory judgment action, even if Plaintiffs had established that such a policy exists.

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CONCLUSION

Plaintiffs have failed to state a claim on which relief may be granted. This Court should grant the Commission's motion and dismiss this case.

Dated this 15th day of March 2023.

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendant's Reply Brief in Support of Motion to Dismiss with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of March 2023.

Electronically signed by:

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