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07-28-2023
Clerk of Circuit Court
Waukesha County
2022CV001603

BY THE COURT:

DATE SIGNED: July 28, 2023

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

CONCERNED VETERANS OF
WAUKESHA COUNTY, et al.,

Plaintiffs,

vs.

Case: 2022CV1603

WISCONSIN ELECTIONS
COMMISSION,

Defendants,

UNION VETERANS COUNCIL, et al.,

Intervenor-Defendants.

DECISION AND ORDER

STATEMENT OF RELEVANT FACTS

Concerned Veterans of Waukesha County (“Concerned Veterans”) is bringing a suit against the Wisconsin Elections Commission (“WEC”) because of an alleged failure to maintain a military elector list. A military elector list, controlled by *Wis. Stat. § 6.22(6)*, provides a way for local election officials to further check on the validity of absentee military ballot requests. Concerned Veterans has raised concerns over the insufficiency of two alleged guidance

documents, the *Military and Overseas Voting Manual* and the *Military and Overseas Voting Cheat Sheet*. (*Summons and Complaint* (“*Complaint*”), *Doc. 2*, ¶18, p. 7). Both WEC and the Intervenor have filed a motion to dismiss for failure to state a claim.

DISCUSSION

The Court can only consider facts well plead in a complaint and any “reasonable inferences therefrom” upon request for a motion to dismiss. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 676, 849 N.W.2d 693, 699 (citing *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205).

Wisconsin uses a decentralized approach to voting by relying on WEC to provide general guidance for lower electors. *State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶, 396 Wis. 2d 391, 400, 957 N.W.2d 208, 212 (2021) (citing *Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556).

When dealing with Wisconsin election matters, such as rules and guidance put out by WEC, Wisconsin statutes provide for a form of declaratory relief by proclaiming 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 brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business.

Wis. Stat. § 227.40(1).

This statute allows a Court to issue a ruling on both rules and guidance documents that do not comport with proper rule-making procedures set up by Wisconsin Statutes. *Heritage Credit Union v. Office of Credit Unions*, 247 Wis. 2d 589, 607, 634 N.W.2d 593, 602 (Ct. App. 2001) (explaining that logically a Court can declare rules invalid if those rules are not properly promulgated). Guidance documents are reviewable as a result 2017 Wis. Act 369 Sections 65-71

which incorporated them into Wis. Stat. § 227.40 but the methods of judicial review for both rules and guidance documents remain the same. *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ 111, 393 Wis. 2d 38, 107-110, 946 N.W.2d 35, 71 (2020).

I. In Order to Properly Bring a Claim Under Wis. Stat. § 5.06, “an elections official”, not WEC, Would Need to be a Defendant in the Lawsuit.

Concerned Veterans allege that they have standing to sue under *Wis. Stat. § 5.06*. (*Complaint, Doc. 2, ¶ 6, p. 4*). Concerned Veterans also name WEC as the sole defendant in their complaint. (*Id., at ¶ 5*). Standing under *Wis. Stat. § 5.06* requires that complaints can only be filed against election officials, not WEC in its capacity as the “commission.” *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶47, 403 Wis. 2d 607, 641-642, 976 N.W.2d 519, 537. While this comes from the plurality opinion in *Teigen*, this logically follows the language of the statute which grants a cause of action as a result of “a decision or action of the official or the failure of the official to act.” *Wis. Stat. § 5.06*. WEC itself cannot be an “official.” Further, this language is not something that Wisconsin Courts will construe into referring to WEC as the proper terminology to refer to WEC has been made clear in statute. *State ex rel. Zignego*, 2021 WI 32 at ¶4 (explaining that the phrase “board of election commissioners” within a statute is not referring to WEC); *Wis. Stat. § 5.025* (2015). To put it simply, it is non-sensical to think that the Legislature intended WEC to initially adjudicate complaints against itself.

Wis. Stat. § 6.22(6) provides that “[e]ach municipal clerk shall keep an up-to-date list of all eligible military electors who reside in the municipality in the format prescribed by the commission. The list shall contain the name, latest-known military residence and military mailing address of each military elector. The list shall indicate whether each elector whose name appears on the list is a military elector, as defined in s. 6.34 (1), and has so certified under s.

6.865 (3m). All persons over 18 years of age or who will be 18 years old prior to an election shall be listed and remain on the list for the duration of their tour of duty. The list shall be kept current through all possible means. Each clerk shall exercise reasonable care to avoid duplication of names or listing anyone who is not eligible to vote. Each clerk shall distribute one copy of the list to the each polling place in the municipality for use on election day.”

The statute provides important safeguards to ensure that the votes of the men and women in our armed forces are not fraudulently cast by someone else. WEC, as the guidance agency for local elected officials, should be ensuring that local election clerks are complying with this statute. Unfortunately, there is not a sufficient basis in Concerned Veterans’ complaint to properly test this proposition.

The Plaintiffs should not have brought suit against WEC in order to have a successful § 5.06 claim, rather they should have brought suit against the clerk or other election official that they believe either acted improperly or failed to act properly. Had there been “an elections official” listed as a Defendant, the people of this County and this State might know if the important safeguards of *Wis. Stat.* § 6.22(6) are being adhered to. That answer will have to wait for another day.

II. The Court Cannot Rule the Guidance is Improper Because No Such Guidance Exists and it is Beyond This Court’s Authority to Declare the Non-Issuance of Guidance as Improper.

Concerned Veterans is arguing that the guidance on military ballots is necessary for the election because the lists play a crucial role in ensuring the integrity of special privilege for military electors where they can vote in an election regardless of where they are residing. (*Plaintiff Brief, Doc. 56, p. 13*). Concerned Veterans want an updated list in order to audit the

performance of the government to see if they are complying with the laws to ensure these protections are met. (*Id. at p. 14*). They further allege that this Court can review and adjudicate the issue under *Wis. Stat. § 227.40. (Id. at p. 16)*.¹

The Court can review guidance documents in the same way as rules and can only declare them invalid under § 227.40 if said rule or guidance is improper under one of three ways, “(1) if the rule violates the constitution; (2) if it exceeds the statutory authority of the agency adopting it; or (3) if it was adopted without compliance with statutory rulemaking procedures.” *Debeck v. Department of Natural Resources*, 172 Wis. 2d 382, 385, 493 N.W.2d 234, 236 (Ct. App. 1992).

To violate the constitution, a specific rule or guidance must exceed those constitutional limits. To violate statutory authority, a rule or guidance must exceed the limits of that authority. To not meet proper procedures, a rule or guidance must violate the procedures that are required before that said rule or guidance can come into being. Therefore, this Court only has authority to declare invalid those such rules or guidance that exceed provided limits on authority or that which WEC has passed and promulgated improperly. Even though there are guidance documents complained about, they do exceed any constitutional authority and there is no allegation they were created by WEC improperly.

WEC points out in their brief that Plaintiffs are not alleging that the guidance document from WEC exceeds any authority or is otherwise improper, but rather that no such guidance exists or the guidance documents that exist do not go far enough and that this Court should claim that such abdication of duty itself is the improper action the Court must rule on. (*WEC Brief, Doc. 42, p. 14*). This Court does not have the authority to order WEC to add language to a guidance document – only to determine if the guidance document issued is proper under the law.

¹ Plaintiff's brief makes reference to *Wis. Stat. § 277.40*, however no such statute exists. This is presumably a typographical error as the correct statute, *Wis. Stat. § 227.40*, is referenced at other points within the brief.

To be clear, the Court agrees with the assertion that WEC's guidance ought to have more information for local election officials on how to utilize the military ballot list and perhaps how to audit the list and ballots to ensure that there are not fraudulent military ballots being cast, but the Court does not have the authority to require such additional guidance.

CONCLUSION

The Court can only grant a motion to dismiss if there are no facts sufficient in the complaint accepted as true and any reasonable inferences therefrom that plead a claim on which relief may be granted. *See Data Key Partners*, 2014 WI 86 at ¶19. Here, the complaint, taken as true, does not plead sufficient enough facts to relief that may be granted. The complaint only names WEC as a defendant which is insufficient to bring a claim for relief under *Wis. Stat. § 5.06*. The complaint further alleges that it is an absence of proper guidance that has resulted in the municipal clerks not maintaining proper military voter lists. (*Complaint, Doc. 2, ¶¶ 18-26, pp. 7-9*). However, even taken as true, this does not give rise to a claim for relief under *Wis. Stat. § 227.40* which requires rules or guidance documents to either exceed constitutional or statutory authority or have not been passed with proper procedures. Accordingly, it is proper for the Court to grant the motion to dismiss in favor of the defendants.

IT IS HEREBY ORDERED,

- 1) The Defendant's Motion to Dismiss is GRANTED.
- 2) The matter is dismissed with prejudice.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL