

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

Kenneth Brown,
Plaintiff,

vs.

Wisconsin Elections Commission,
Tara McMenamain,
Defendants,

And

Wisconsin Alliance for Retired Americans,
Democratic National Committee,
Black Leaders Organizing for
Communities,
Intervenors.

Case No. 2022CV1324

FILED

APR - 1 2024

CLERK OF CIRCUIT COURT
RACINE COUNTY

DECISION AND ORDER

The above-styled matter is before this Court on a request to stay the decision and order entered on January 10, 2024 (Amended Decision and Order [Doc. 99]) pending appeal. An appeal from this Court's decision was filed by all Defendants and Intervenors as well as a cross-appeal filed by the Plaintiff, Kenneth Brown.

There was an agreed upon briefing schedule among the parties and all briefs and reply briefs have been filed and reviewed by this Court.

BRIEF FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Although the facts were fully outlined in this Court's Amended Decision and Order [Doc. 99], a brief summary is warranted.

On August 10, 2022, the Plaintiff, Kenneth Brown (Brown), filed a verified written complaint with the Defendant, Wisconsin Elections Commission (WEC), against the Racine City Clerk Tara McMenamain's (City Clerk) use of a mobile elections unit (MEU). Following briefing, WEC issued its written decision on November 4, 2022 authored by Administrator Wolfe. The decision was adverse to the complaint of the Plaintiff.

The Plaintiff, Brown, appealed WEC's decision to this Court. Review was pursuant to Wisconsin Statute 5.06(9), limited to the primary of 2022 and for the purpose of determining contested issues of law. Although this Court was required to give "due weight" to WEC's interpretation of the

applicable law, applicable law mandates that the judicial branch, not an administrative agency, determines the law in Wisconsin.

This Court's Amended Decision and Order [Doc.99] was filed on January 10, 2024. Thereafter, appeals were filed. Intervenor Wisconsin Alliance for Retired Americans filed a notice of appeal on February 9, 2024 [Doc. 104] challenging this Court's decision that the "use of a mobile voting unit in the 2022 primary was not lawful." Intervenor Black Leaders Organizing for Communities filed its notice of appeal on February 15, 2024 [Doc. 108] challenging this Court's decision regarding interpretation of Wis. Stat. § § 6.84, 6.855 as to "partisan bias," and "from using a vehicle to service" alternate sites. Intervenor Democratic National Committee filed its appeal on February 16, 2024 [Doc. 111] challenging this Court's decision regarding the chosen locations used by the MEU affording a political advantage to one political party. The City Clerk filed her appeal on February 27, 2024 [Doc.120] challenging this Court's decision regarding the locations chosen for absentee ballots, that those locations afforded a political advantage to one political party and the use of a MEU. WEC filed its notice of appeal on February 29, 2024 [Doc. 127] challenging this Court's ruling that WEC's decision regarding the Brown complaint was based on a misinterpretation of Wisconsin law. Brown filed his cross-appeal on March 8, 2024 [Doc. 143] challenging this Court's decision regarding the physical proximity of alternate absentee voting sites to the Clerk of Court's office, that the alternate site of absentee voting within the same building at the Clerk of Court's office was lawful and that the absentee voting sites utilized violated statutory requirements.

The Defendants and all Intervenors now request this Court to issue a stay on its order of January 10, 2024 pending decision from either the Court of Appeals or the Wisconsin Supreme Court.¹

In August of 2022, one day after the primary election, Brown filed a complaint under Wis. Stat. § 5.06 against the City Clerk with the Wisconsin Elections Commission. Brown alleged that Racine's designation and provision of alternate absentee balloting sites and the use of a MEU during the primary election had violated applicable Wisconsin statutes. After briefing, WEC concluded that Brown's complaint did not show probable cause to believe that a violation of law or an abuse of discretion occurred. Brown then appealed the WEC decision to this Court. Although the WEC decision had concerned only the August 2022 primary election, Brown's complaint to this Court also raised allegations about the November 2022 general election. Brown sought relief from this Court beyond mere reversal of WEC's finding of no probable cause. Brown sought declaratory judgment relief and the issuance of a permanent injunction regarding actions taken by the City Clerk preventing her from engaging in the same conduct complained of in future elections.

The City Clerk filed a motion to dismiss and Judge Nielsen, who was then handling this case, granted the City's motion to dismiss in part. Judge Nielsen ruled that the Court's authority was limited under Wis. Stat. § 5.06 to reviewing WEC's decision and affirming, reversing, or modifying that decision. Judge Nielsen expressly held that the Court lacked authority in the case to enter an injunction or declaratory judgment. Specifically, Judge Nielsen ruled the November 2022 general election to be outside the proper scope of Brown's appeal. This Court, which took over the handling of this case in December of 2023, honored Judge Nielsen's previous rulings and

¹ There is a pending petition before the Supreme Court of Wisconsin to grant bypass to hear this appeal.

advised that any forthcoming decision would be limited to his previous rulings.

Following briefing, this Court issued an amended decision and order reversing the decision of WEC. [Doc. 99] This Court began by reiterating that the scope of the appeal was limited to the August 2022 primary election and that the remedy was limited to affirming, reversing, or vacating WEC's lack of probable cause finding. Subject to those constraints, this Court ruled in favor of Brown in two respects and against him on other issues. First, with regard to whether Racine's alternate-site designations afforded an advantage to any political party, this Court found WEC's determination to be procedurally deficient and contrary to the evidence and applicable law. Specifically, this Court found that WEC had improperly disregarded an unopposed statistical study found in the record that, if considered, would have provided a basis for a probable cause finding. This Court further ruled that a mandated statutory requirement could not be ignored because it required a complex analysis. This Court did not announce any general rule of law other than reciting existing law to govern municipalities' future alternate site designations. This Court held only that on the administrative record before it, WEC's decision was in error.

Had the partisan-advantage standard been the only issue in this case, this Court may well have remanded the matter for further proceedings before WEC; however, such a decision became moot given this Court's ruling that there existed no statutory authority for the use of mobile election units (MEUs) in Wisconsin. Given this ruling, the City's use of the subject alternate sites was unlawful whether they violated the partisan-advantage prohibition or not. The remedy then chosen by this Court was to just reverse WEC's determination.

All Defendants and Intervenors have appealed, and Brown has cross-appealed. The Court of Appeals declined to apply expedited treatment to the appeal. See *Brown v. Wis. Elections Comm'n*, No. 2024AP000232, unpublished order (Ct. App. Feb. 19, 2024). There is a pending motion for bypass before the Wisconsin Supreme Court which has yet to be ruled on as of the date of this decision.

Several of the filed appeals suggest that the present decision stands in direct contradiction to the federal court decision in *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, (W.D. Wis. 2016). This Court devoted a large portion of its decision discussing the correctness of the *One Wisconsin* ruling and how it was the impetus for modification of Wisconsin law specifically allowing multiple alternative absentee voting sites. This Court is at a loss to see how any appellant could read its decision otherwise.

LEGAL STANDARD

Under Wis. Stat. § § 808.07(2)(a)1 and 809.12, courts are to consider four factors when determining whether to grant a motion for a stay pending appeal:

1. Whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal;
2. Whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
3. Whether the movant shows that no substantial harm will come to other interested parties; and
4. Whether the movant shows that a stay will do no harm to the public interest.

Waity v. LeMahieu, 2022 WI 6, ¶ 49, 400 Wis.2d 356, 969 N.W.2d 263. The Wisconsin Supreme Court has also said that these considerations “are not prerequisites but rather are interrelated considerations that must be balanced together.” *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225 (1995).

DISCUSSION

Movants will not suffer irreparable harm

The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *Gudenschwager*, 191 Wis. 2d at 441. When considering potential harm, this Court must consider whether the harm can be undone if, on appeal, this Court’s decision is reversed. *Waity*, 2022 WI 6, ¶ 57. Courts are to consider the period of time the case is on appeal, not any harm that could occur in the future.

The amount of harm that must be shown is directly inverse to the likelihood of success on appeal. Even if the Defendants and the Intervenor have shown more than a mere possibility of success on the merits of their appeals² they have not shown any irreparable harm necessary for the issuance of a stay.

Intervenor DNC argues that this Court’s decision would severely restrict a voter’s ability to successfully exercise their right to vote. They argue irreparable harm will occur here because there is no possible remedy that could compensate an eligible voter who has been deprived of his or her right to vote.

This Court’s decision only prevents the use of a MEU as being against applicable state law. It does not prevent the use of absentee ballot locations so long as they are in compliance with applicable law. This Court has not imposed new prohibitions into voting rights or opportunities. It was the City Clerk that introduced legislatively unauthorized MEUs into the election cycle. Wisconsin has amended its laws to provide for alternate-absentee balloting locations as long as they are compliant with other provisions of the election laws.

² In *Priorities USA v. WEC*, No. 2024AP166, The Wisconsin Supreme Court granted review of a single issue: “Whether to overrule the Court’s holding in *Tiegen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.” The *Tiegen* case was influential in this Court’s decision in the present case.

Voters in the City of Racine can submit their absentee ballots by mail. Such voters can vote at early in-person absentee voting sites selected by the City Clerk that comply with this Court's decision. Voters can also vote on Election Day. The only thing they cannot do is vote at sites that do not comply with the Court's decision. There exists no deprivation of anyone's right to vote. The City of Racine can continue to offer early in-person absentee voting at multiple locations, it just may not do so as it did in August of 2022, at locations which conferred an illegal partisan advantage, and it must do so without the use of a MEU.³

DNC will suffer no harm from this Court's decision, which simply found that the City Clerk for the City of Racine violated the election law by use of MEUs and their chosen locations. Again, the City of Racine is still free to have multiple in-person absentee voting sites; those sites cannot be a mobile van; and they must confer no partisan advantage as Wisconsin law mandates.

WEC will suffer no harm at all, much less irreparable harm, and they offer no real argument that they will. They focus on irreparable harm to interested parties and the public which is not the only criteria that should be considered by this Court.

The City Clerk emphasizes that she would suffer irreparable harm if a stay were not granted because of her flawed understanding of this Court's decision that the "one-location rule" has been restored by overturning WEC's decision in this case. That interpretation is in error. The City Clerk can continue to utilize more than one location for early in-person absentee voting. Those locations must be selected in accordance with the applicable statute and cannot utilize a MEU.

Movants likelihood of success on appeal

When reviewing a motion for stay, a court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted. The relevant inquiry is whether the movant has made a strong showing of success on appeal. *Waity*, 2022 WI 6, ¶ 52. It is axiomatic that this Court consider that appellate courts may reasonably disagree with its legal analysis.

The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. *Gudenschwager*, 191 Wis.2d at 441. Simply stated, the greater the potential injury, the less a movant must prove in terms of success on appeal. A movant is always required to demonstrate more than a mere 'possibility' of success on the merits. *Id.*

The issue in this case is not complicated, and Wisconsin statutory law and applicable case law is clear. The legislature has directed that absentee voting procedures "must be carefully regulated to prevent the potential for fraud and abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election" and "to prevent undue influence on an absent elector." Wis. Stat. § 6.84(1). This Court correctly applied that unambiguous legislative mandate with applicable case law to the issues currently on appeal.

³ It is believed that the City of Racine is the only municipality in the State of Wisconsin which has utilized a MEU.

Movant DNC offers no reason why they will be successful on appeal. They correctly state that appellate courts will review statutory interpretations de novo. While a possibility of reversal of this Court's decision exists on a de novo review, such a review on its own is not persuasive enough for this Court to grant a stay especially in view of no showing of irreparable harm.

Movant WEC offers argument regarding this Court's decision finding standing on the part of Brown to bring the underlying action. Although the Wisconsin Supreme Court granted limited review of the *Tiegen* case (See footnote 2), the plurality decision finding standing will not be reviewed. Accordingly, this Court finds no probable merit to WEC's lack of standing argument.⁴

Lastly, WEC argues they will succeed on the merits regarding the use of mobile election units. The argument here is a repeat version of one proffered and rejected by this Court in the challenged decision. The decision regarding the illegal use of MEUs was based on sound principles of legislative interpretation, a finding of unambiguous language and current case law. This Court finds no more than an asserted possibility that this ruling would be overturned on appeal.

The City Clerk joined both stay motions mentioned above and focused on perceived harms offering no argument or reasoning for success of the appeals.

Accordingly, no movant has shown more than a possibility for success on appeal, let alone a great likelihood of success given the inverse proportional injury standard.

Plaintiff will suffer harm if a stay is granted

This Court must consider the extent of harm Brown would experience if a stay is entered but ultimately this Court's decision is affirmed on appeal. *Waity*, 2022 WI 6, ¶ 58. Brown is a voter who wants to ensure that Wisconsin election laws are followed by the election officials where he resides. In essence, the movant's request for a stay would allow the City Clerk to violate what this Court has ruled as illegal activity while the appeal proceeds. Such a stay would allow the exact harm that Brown brought this action to remedy. If the appeal is unsuccessful, the City Clerk would have been allowed to continue in violating state law. This Court's ruling in this case, although limited in scope, did find the use of MEUs to be illegal under current Wisconsin law, which means that the City of Racine may not use them in the future.⁵ Granting a stay would completely eviscerate Brown's rights under Wis. Stat. § 5.06, causing him significant harm in the process. This factor weighs against granting a stay.

⁴ See also this Court's decision regarding Brown's compliance with Wis. Stat. § 5.06(1)

⁵ See footnote 3 wherein the City of Racine is the only Wisconsin municipality currently using MEUs, eliminating the "statewide" implication argument proffered.

Granting a stay will harm the public interest

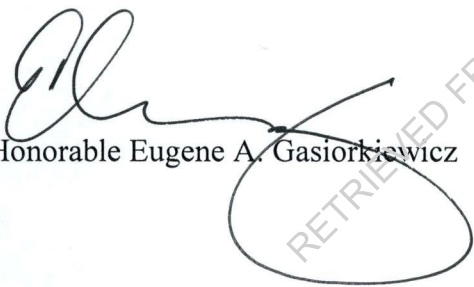
Granting a stay will also harm the public interest. The Plaintiff, and indeed all Wisconsin voters, have a strong interest in elections being conducted in accordance with state law, *see Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 15, 394 Wis.2d 602, 951 N.W.2d 556 (holding that erroneous interpretation and application of Wisconsin election law affect matters of great public importance). An election conducted in violation of state law cannot be undone. *Trump v. Biden*, 2020 WI 91, 394 Wis.2d 629, 951 N.W.2d 568. As stated previously, there is not harm without a stay. The City of Racine can still use multiple absentee voting locations in a way that complies with the statute and voters can still easily return their ballots by mailing them pursuant to Wisconsin law. Voters can also vote at their local polling place on Election Day.

For all the foregoing reasons, the burden required to obtain a stay pending appeal has not been met by the moving parties.

Accordingly, upon all the files, pleadings and proceedings heretofore had in this matter,

IT IS ORDERED, that all pending motions for stay of execution of this Court's Amended Decision and Order pending appeal are **DENIED**.

Dated this 1st day of April, 2024,


Honorable Eugene A. Gasiorkiewicz



CC: File.
All parties via e-File.