



OFFICE OF THE DISTRICT ATTORNEY
Milwaukee County

JOHN T. CHISHOLM · District Attorney

Chief Deputy Kent L. Lovern, Deputies Lovell Johnson, Jr., Jeffrey J. Altenburg, Karen A. Loebel,
Elisabeth Mueller, Matthew J. Torbenson, Bruce J. Landgraf

March 7, 2022

Sheriff Christopher Schmaling
Lieutenant Michael Luell
Racine County Sheriff's Office
717 Wisconsin Avenue
Racine, WI 53403

RE: RCSO Election Referral

Sheriff Schmaling and Lieutenant Luell,

The Milwaukee County District Attorney's Office has received your emailed referral, dated February 17, 2022, regarding alleged criminal acts committed by the Wisconsin Elections Commission. In particular, your referral alleges that WEC commissioners Ann Jacobs and Mark Thomsen engaged in Misconduct in Public Office and Election Fraud through the advice they provided regarding Special Voting Deputies in care facilities.

At this time, my office is declining to file criminal charges relating to this matter. The Milwaukee County District Attorney's Office's statutory mandate is limited to prosecuting crime. Upon a review of the facts and law, it has been determined that there is insufficient evidence to prove beyond a reasonable doubt that a crime was committed. At this time, this office has no basis to issue criminal charges in this matter. Please find attached a memorandum providing the District Attorney's Office's analysis of the relevant law and facts.

Thank you for your time.

Regards,

A handwritten signature in blue ink, appearing to read "Matthew Westphal".

Matthew Westphal
Assistant District Attorney



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INTRODUCTION

The Milwaukee County District Attorney's Office has received a referral from the Racine County Sheriff's Office (RCSO) regarding alleged criminal acts committed by five of the six commissioners on the Wisconsin Elections Commission (WEC).¹ In particular, that referral alleges that five of the six WEC commissioners provided guidance regarding Special Voting Deputies (SVDs) in care facilities that was contrary to law. The charges referred are as follows:

1. Misconduct in Public Office, Wis. Stat. § 946.12(3)
2. Election Fraud, Wis. Stat. § 12.12(2)(b)(7)
3. Election Fraud (PTAC), Wis. Stat. § 12.13(3)(n), 939.05
4. Election Fraud (PTAC), Wis. Stat. § 12.13(3)(p), 939.05
5. Election Fraud (PTAC), Wis. Stat. § 12.13(3)(s), 939.05

The only commissioners residing in Milwaukee County are Commissioners Ann Jacobs and Mark Thomsen. As such, the Milwaukee County District Attorney only has jurisdiction over these two commissioners. *See* WIS. STAT. § 971.19(12). This memorandum lays forth a discussion of the factual basis for the charges and a legal assessment of whether there exists sufficient evidence to believe a crime was committed.²

ELECTIONS AND WISCONSIN ELECTIONS COMMISSION

I. Law Relating to Elections

In Wisconsin, laws governing elections are located within Chapters 5 to 10 and 12 of the Wisconsin Statutes. Those chapters define the mode, manner, and procedures of elections, as well as the prohibited election practices. In discussing the scope of these chapters, the statutes state, "Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." WIS. STAT. § 5.01(1).

¹ The WEC is a six-person commission consisting of Ann Jacobs, Mark Thomsen, Marge Bostelmann, Dean Knudson, Julie Glancey, and Robert Spindell. The RCSO recommends charges against all commissioners except Robert Spindell.

² This review solely relates to allegations of criminal activity by the WEC commissioners. While Milwaukee's jurisdiction is limited to Commissioners Jacobs and Thomsen, this review will consider the actions of the commission as a whole in determining the propriety of criminal charges.

Further, actions by employees of Ridgewood Care Center and/or employees of the Village of Mount Pleasant clerk's office are outside the scope of this review. There is no indication that any of the individual employees reside within Milwaukee County. Under Wisconsin Statute § 971.19(12), ". . . for a violation of any other law arising from or in relation to . . . any matter that involves elections, ethics, or lobbying regulation . . . a defendant who is a resident of this state shall be tried in circuit court for the county where the defendant resides." WIS. STAT. § 971.19(12); *See State v. Jensen*, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415.

The Wisconsin Elections Commission (WEC) was created by the Legislature in December of 2015. *See* 2015 Wis. Act 118, § 4; Wis. Stat. § 5.05. It was entrusted with the responsibility for administration of chapters 5 to 10 and 12 of the Wisconsin Statutes, and any other laws relating to elections and election campaigns. *See* WIS. STAT. §§ 5.05(1) and (2w). The WEC is authorized to issue guidance to election officials in interpreting new state and federal court decisions. WIS. STAT. § 5.05(5t). It is further authorized to provide formal and informal advisory opinions for issues under chapters 5 to 10 or 12. WIS. STAT. § 5.05(6a). In addition, the WEC is granted the authority to promulgate rules “for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns” WIS. STAT. § 5.05(1)(f). These statutory grants of authority provide the WEC with the “responsibility for the administration of chs. 5 to 10 and 12.” WIS. STAT. § 5.05(2w). As such, providing advice and guidance regarding the administration of elections is the explicit duty of the WEC.

II. Absentee Voting and Special Voting Deputies (SVDs)

In Wisconsin, absentee voting is regulated by sections 6.84 through 6.89 of the Wisconsin Statutes. Under Wisconsin Statute § 6.84(1), the statutes notes that absentee voting is a privilege that must be carefully regulated. *See* WIS. STAT. § 6.84(1). Subsection 2 of § 6.84 expressly defines what statutes regulating absentee ballots are construed to be mandatory. Those statutes are §§ 6.86 (relating to methods for obtaining an absentee ballot), 6.87(3) to (7) (defining absentee voting procedures), and 9.01(1)(b)2 and 4 (relating to recounts). *See* WIS. STAT. § 6.84(2). Section 6.875 applies specific procedures to absentee voting in residential care facilities; this section is not included among those sections statutorily defined as mandatory. *See* WIS. STAT. §§ 6.84(2) and 6.875.

Under § 6.875(3), an occupant of a qualified residential care facility is able to make an application to receive an absentee ballot. From there, the municipality appoints at least two special voting deputies (SVDs) and dispatches them to the facility to supervise absentee voting procedures by the occupants. WIS. STAT. § 6.875(4). SVDs are required to take an oath and comply with specific requirements. *See* WIS. STAT. § 6.875(5). The SVDs are to personally offer each elector the opportunity to cast the absentee ballot they requested, and then accept those ballots to present to the clerk or elections commission of the municipality. *See* WIS. STAT. § 6.875(6)(c) and (d). Where a qualified elector is unable to cast their ballot on two visits by the SVDs, the municipal clerk or executive director of the election commissioners is authorized to send the absentee ballot to the elector. *See* WIS. STAT. § 6.875(6)(e).

III. WEC Guidance Surrounding SVDs and the COVID-19 Pandemic

In March of 2020, the COVID-19 pandemic spread at an alarming rate throughout the country. All aspects of public life were effected, including voting. On March 12, 2020, the WEC issued guidance to municipal clerks instructing them that, in light of the public health emergency, SVDs should not be used and that absentee ballots should be sent to voters by mail.³ This was a unanimous decision by all six commissioners on the WEC. On March 13, 2020, a memorandum

³ *See* WEC MARCH 12, 2020, MEMO, <https://elections.wi.gov/sites/elections/files/2020-03/Clerk%20comm%20re%20Coronavirus%20COVID-19%20SVD%20Voting%20and%20Polling%20Place%20Relocation%203-12-20.pdf>, and also <https://elections.wi.gov/sites/elections/files/2020-03/Comm.%20memo%20re.%20Coronavirus%20guidance%203.12.pdf>.

from the Division of Public Health State Health Officer was sent to all local health officers and long term care and assisted living facilities. That memorandum recommended limiting individuals entering into facilities to situations such as end-of-life situations or where the visitor is essential for the resident's emotional well-being and care.⁴

Further, the Center for Medicare & Medicaid Services (CMS) is a subagency under the Department of Health and Human Services. *See* FEDERAL REGISTER, <https://www.federalregister.gov/agencies/centers-for-medicare-medicaid-services>. It was created to provide administration and oversight to the Medicare and Medicaid Programs, to ensure that program beneficiaries are aware of the services they are eligible for, and to administer several health-related programs. *Id.* On March 13, 2020, the CMS issued guidance regarding control of the coronavirus in nursing homes. That guidance stated, “[f]acilities should **restrict** visitation of **all** visits and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation.” *See* CMS MARCH 13, 2020 GUIDANCE, <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf> (emphasis in original).

On June 24, 2020, the WEC continued that guidance for the remaining elections of 2020.⁵ In that vote, five of the six commissioners, Commissioners Jacobs, Thomsen, Gostelmann, Glancy, and Knudson, voted to continue the guidance. Commissioner Spindell voted against the motion to continue the March 12, 2020, guidance. The WEC then provided additional guidance and information on how to conduct voting in care facilities on July 13, 2020.⁶ At a meeting on September 16, 2020, the guidance related to SVDs was again discussed and affirmed by the WEC commissioners, excluding Commissioner Spindell. On January 15, 2021, the WEC again met and discussed the SVD guidance. The guidance surrounding prohibiting SVDs at care facilities was again affirmed by the same commissioners.⁷

On March 2, 2021, during a public meeting, the WEC voted to allow the previous guidance regarding SVD visits to expire and issued new guidance and procedures on best practices for SVD visits.⁸ All six commissioners voted in favor of the new guidance.

INVESTIGATION OF RIDGEWOOD

On December 8, 2020, the RCSO received a citizen complaint from JAW-M. JAW-M's mother, SMW, was a resident of Ridgewood Care Center in 2020. JAW-M reported that her mother suffered from dementia. She reported that she had been the Power of Attorney agent for her mother since approximately 2012. JAW-M filed a complaint on November 24, 2020, with the Wisconsin

⁴ *See* DIVISION OF PUBLIC HEALTH MEMO, <https://elections.wi.gov/sites/elections/files/2020-03/Comm.%20memo%20re.%20Coronavirus%20guidance%203.12.pdf>.

⁵ *See* WEC JUNE 24, 2020, MEMO, <https://elections.wi.gov/sites/elections/files/2020-06/WEC%20Directs%20No%20SVD%20Voting%20for%20Remaining%202020%20Elections%2006-24-2020.pdf>.

⁶ *See* WEC JULY 13, 2020, MEMO, <https://elections.wi.gov/sites/elections/files/2020-07/Clerk%20Memo%20Care%20Facilities.pdf> and <https://elections.wi.gov/sites/elections/files/2020-09/Absentee%20Voting%20at%20Care%20Facilities%20Informational%20Packet.pdf>.

⁷ *See* WEC JANUARY 15, 2021, MEMO, <https://elections.wi.gov/sites/elections/files/2021-01/Clerk%20Memo%20Care%20Facilities%202021.pdf>, and also <https://elections.wi.gov/sites/elections/files/2021-01/Care%20Facility%20Voting%20Informational%20Packet%20Spring%20Primary%202021.pdf>.

⁸ *See* WEC MARCH 4, 2021, MEMO, <https://elections.wi.gov/sites/elections/files/2021-03/SVD%20Clerk%20Memo%203-4-2021.pdf>, and also <https://elections.wi.gov/sites/elections/files/2021-03/Statement%20of%20Scope-6.07.pdf>.

Election Commission. She reported that her mother had received a ballot and voted absentee in the November 2020 general election. JAW-M informed RCSO investigators that her mother lacks the necessary capacity to either request a ballot or choose who to vote for. SMW passed away on October 9, 2020; as such, she was not interviewed during this investigation.

As part of this investigation, RCSO investigators spoke with the Mount Pleasant Village Clerk, as well as reviewing the absentee ballot application for SMW. Further, investigators gathered information regarding the different individuals who voted absentee from Ridgewood. Using that information, investigators interviewed the different employees of Ridgewood to determine what procedures were used and what actions were taken by employees during the 2020 election season in relation to absentee ballots.⁹

In conjunction with their investigation of Ridgewood employees, RCSO investigators also gathered information regarding the guidance provided by the WEC in relation to the SVDs. That guidance is described above. Investigators gathered the different memorandums and recommendations provided by the WEC. They also reviewed WEC meetings from multiple dates. As noted, the substance of that investigative work is described above.

Following the completion of this investigation, on or about October 28, 2021, the RCSO referred charges, as described above, to the Racine County District Attorney. Those charges related to the allegation that the WEC committed criminal conduct by eliminating the use of SVDs in care facilities. District Attorney Patricia Hanson, in a letter dated February 10, 2022, declined to file charges against any of the WEC commissioners, finding she lacked jurisdiction under Wisconsin Statute § 971.19(12).

After that denial, additional referrals were made to the counties of residence of each of the WEC Commissioners discussed above.¹⁰ In Milwaukee County, the referral alleged violations of the statutes recited above. Each of these alleged violations arises from the same initiating acts: the WEC guidance in relation to SVDs. To assess whether there is any reason to believe a crime was committed, it must first be determined whether the WEC guidance was in violation of chapters 5 to 12 or an instruction to others to violate those chapters.

ANALYSIS

I. The Special Voting Deputies provisions are directory statutes that do not require mandatory compliance. This determination ensures the will of the electors will be preserved.

As an initial matter, it must be noted that the overarching purpose of the election laws is to give effect to the will of the electors. *See* WIS. STAT. § 5.01(1). This provision expressly recognizes the potential for a failure to fully comply with all of the provisions of chapters 5 to 10 and 12. Our Supreme Court has “repeatedly recognized and given effect to this policy, holding that voters should not be disenfranchised through no fault of their own because of technical mistakes

⁹ A full description of the procedures used and the actions taken by Ridgewood employees is beyond the scope of this memorandum. The Milwaukee County District Attorney’s Office would lack jurisdiction over any Ridgewood employees. This memorandum will focus primarily on the actions of the WEC commissioners.

¹⁰ Referrals were made to Milwaukee County (Jacobs and Thomsen), Green Lake County (Bostelmann), Sheboygan County (Glancy), and St. Croix County (Knudson).

committed by election officials.” *Matter of Hayden*, 105 Wis. 2d 468, 482, 313 N.W.2d 869 (1981)(internal citations omitted). “Absent connivance, fraud or undue influence, substantial compliance with the statutory voting procedures is sufficient.” *Id.* at 479, 313 N.W.2d at 874 (citing *Lanser v. Koconis*, 62 Wis. 2d 86, 90, 214 N.W.2d 425 (1974)).

The courts have “consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their terms.” *See Roth v. La Farge School District Board of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis. 2d 708, 634 N.W.2d 882 (citing *McNally v. Tollander*, 100 Wis. 2d 490, 497, 302 N.W.2d 440 (1981)). Further, our Court has “consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector.” *Lanser*, 62 Wis. 2d 91, 214 N.W.2d 427 (citing *Gradinjan v. Boho*, 29 Wis. 2d 674, 682, 139 N.W.2d 557, 561 (1966)).

“The difference between mandatory and directory provisions of election statutes lies in the consequences of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid.” *Lanser*, 62 Wis. 2d at 91, 214 N.W.2d at 427. “A statute which ‘merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election’ should be construed as directory.” *Hayden*, 105 Wis. 2d at 483, 313 N.W.2d at 875 (quoting *Lanser*, 62 Wis. 2d at 91, 214 N.W.2d at 427).

A review of the relevant case law and statutory law establishes that the SVD provisions from 6.875 are directory and thus not mandatory. In *Sommerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 301, 69 N.W.2d 235, 236-37 (1955), the Court addressed a statute regulating how absentee ballots were delivered to the voter. Despite a statute stating how the ballots “shall” be delivered, the Court found the provision directory, finding that the courts “should look to the whole and every part of the election laws, the intent of the entire plan, the reasons and spirit for their adoption, and try to give effect to every portion thereof.” *Id.* at 303-04. In *Lanser v. Koconis*, 62 Wis. 2d 86, 89, 214 N.W.2d 425 (1974), the Court addressed a statute stating how absentee ballots “shall” be delivered to a nursing home. The Court held that provision of “shall” was directory and that the mandate of sec. 5.01 required that the absentee ballots be counted. *See Id.* at 93-94. Further, in *In the Matter of Hayden*, 105 Wis. 2d 468, 475, 313 N.W.2d 869 (1981), the Court addressed a provision on how absentee ballots “shall” be requested by nursing home residents. There, the Court again found that “shall” was directory. *See Id.* at 478. Each of these cases supports the conclusion that the SVD provisions are directory and not mandatory.

In addition to case law, the statutes themselves define the SVD provisions as directory, not mandatory. Section 6.84(2) explicitly defines which provisions of the absentee ballot process are mandatory.¹¹ That section does not define the SVD statute under § 6.875 as mandatory. Under *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 217 Wis. 2d 633, 681 N.W.2d 110, statutory interpretation stops with the language of the statute if it is plain and unambiguous. Further, [u]nder the doctrine of *expression unius est exclusion alterius*, the “express mention of one matter excludes other similar matters [that are] not mentioned. *See James v. Henrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350 (citations omitted). In this instance, the statutory language is clear and unambiguous on which provisions of the absentee ballot statutes

¹¹ “Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2 and 4, shall be construed as mandatory.” WIS. STAT. § 6.84(2).

are mandatory. The fact the legislature excluded the SVD statute from the list of mandatory provisions means that it is not included as a mandatory provision. As such, section 6.875 is a directory provision.

Furthermore, section 6.875 does not include an express statement that noncompliance with its terms is fatal or will render a doubtful result. *See Lanser v. Koconis*, 62 Wis. 2d 86, 91, 214 N.W.2d 425. That section defines the mode and manner of how absentee voting should be conducted in residential care facilities. Nothing in that section declares that “conformity to such provisions is essential to the validity of the election.” *See id.* Limiting itself to the mode and manner of voting and failing to assert the importance of conformity further demonstrate the directory nature of the provision.

In addition, it should be noted that there is no showing of any “connivance, fraud or undue influence” that would affect whether the SVD provisions are mandatory instead of directory. Several claims have been raised surrounding potential fraud in the balloting process. There does not appear to be any support for such propositions.

Claims have been made that residents who did not request a ballot voted because someone requested a ballot on their behalf and voted on their behalf. There has been no evidence submitted that any of the individuals who received ballots did not request them. There has been no evidence that someone voted on the behalf of one of the residents. There were interviews done with family members, where the family questioned the ability of their loved one to request a ballot and vote. The family’s belief about the resident’s competency to vote is not the same as a competency determination by a court that the person is disqualified from voting. *See WIS. STAT. § 6.03(3)*. The assessment of a layperson, even where that person is close family, is not the equivalent of an adjudication by a court that a person is incompetent. Absent such a court adjudication, a family’s concerns about an individual’s ability to vote would not disqualify that person from requesting a ballot and voting. Further, none of the individual electors were interviewed to determine whether they did request a ballot or request someone do so on their behalf. Regardless, the WEC had no role in requesting ballots or voting on behalf of residents. The specific WEC guidance to clerk was that ballots should only issue to those who request one. There is no evidence they conspired or encouraged anyone to improperly request or submit a ballot.

A second avenue raised for potential fraud was the inability of SVDs to question the competency of a voter. However, nothing in the SVD statutes authorize them to question the competency of voters. Under Wisconsin Statute § 6.03(3), “[n]o person may be denied the right to register to vote or the right to vote by reason that the person is alleged to be incapable of understanding the objective of the elective process unless the person has been adjudicated incompetent in this state.” It is not the role of SVDs to monitor competence, nor are they statutorily authorized to. SVDs are solely for the purpose of assisting with the process of voting. *See WIS. STAT. §§ 6.875(5) and (6)*. An elector lacks competency to vote *only* where that person has been adjudicated incompetent by the state. *See WIS. STAT. § 6.03(3)* (emphasis added). A challenge based on competency does not relate to whether the challenger believe the elector is not competent; it only applies where the challenger believe the elector has been *adjudicated* not competent. *See WIS. STAT. §§ 6.03(3) and 6.935*. As such, outside of the SVDs having personal knowledge of any adjudications, their personal observations of competence would not be a valid basis to challenge electors.

A third avenue raised for potential fraud was the increased number of ballots that were returned from the Ridgewood Care Center. However, the increase in ballots returned cannot be considered an indicia of fraud. It is indisputable that there was an increase in ballots. However, it is an axiom of mathematics that correlation does not equal causation. Correlation describes the relationship between two variables, but does not mean that a change in one variable inevitably results in a change in the second variable. In contrast, causation requires that the change in one variable automatically results in the second variable changing as well. Here, the increase of ballots requested and higher voter turnout are *correlated* with the guidance regarding SVD. Both the guidance and turnout occurred simultaneously. That does not lead to the conclusion that the turnout was *caused* by the guidance. The turnout just as easily could have been caused by the increased publicity surrounding the election, the belief it would be a close race, a change in the demographic of the facility, or just a general desire for civic engagement. Any or none of these could account for a higher voter turnout. The result is that, while the increased turnout correlates to the guidance, there is no evidence there is a causative relationship. This correlation, without any evidence of causation, cannot be considered the result of fraud.

Based on the above case law and statutory law, as well as the absence of any indicia of fraud in the implementation of the guidance, leads to the conclusion that the SVD statute is a directory statute.

After determining that the SVD statute is a directory statute, it must now be determined whether commissioners of the WEC violated any criminal statutes through the guidance provided related to SVDs.

II. There is insufficient evidence to establish that any crime was committed by the WEC commissioners.

To establish criminal liability for any of the WEC commissioners, every element of a criminal offense must be met. If the evidence fails to support any element of a proposed charge, then the charge necessarily fails to be provable beyond a reasonable doubt.

a. Misconduct in Public Office (Dishonest Advantage)

The RCSO referred in a charge of Misconduct in Public Office, in violation of Wisconsin Statute § 946.12(3). This version of Misconduct relates to gaining a dishonest advantage through exercise of a discretionary power. To prove this form of Misconduct, the State must prove the following elements beyond a reasonable doubt:

1. At the time of the alleged offense, the defendant was a public employee.
2. The defendant, in their capacity as a public employee, exercised a discretionary power of their office.
3. The defendant exercised a discretionary power in a manner inconsistent with the duties of their office or the rights of others.
4. The defendant exercised discretionary power with intent to obtain a dishonest advantage for themselves or others.

WIS JI-Criminal 1732. In analyzing this offense, each element must be considered and must be proven beyond a reasonable doubt. As to the first element, there is no dispute that commissioners

on the WEC are public officials.¹² It also seems clear that, in providing guidance regarding SVDs, the WEC was exercising a discretionary power of office, as the WEC is statutorily authorized to provide guidance and advisory opinions in the administration of elections. *See* WIS. STATS. §§ 5.05(1) (1)(f), (2w), (5t), (6a).

The next element relates to whether this power was exercised in a manner inconsistent with the duties of office or the rights of others. As noted above, the WEC's statutory mandate is to be responsible for the administration of chapters 5 to 10 and 12 on the Wisconsin Statutes. *See* WIS. STAT. § 5.05(2w). In doing so, they are obligated to construe the statutes to "give effect to the will of the electors," even if there is a failure to formally comply with some provisions of the chapters. *See* WIS. STAT. §5.01(1). The duty of the WEC is to administer the elections. Providing guidance on the SVD process is not inconsistent with the administration of elections. It does not prevent an election from occurring or disenfranchise any elector. The guidance on the SVD process is solely guidance relating to the mode and manner of elections, which is well within the purview of the duties of the WEC.¹³

Further, in providing guidance suspending the SVD process, the WEC explicitly noted that the absentee voting provisions of § 6.875(6)(e) were to apply. This provides a statutorily authorized avenue to ensure the rights of others are met. There is no evidence that any individual who wanted to vote was unable to, or that any individual that did not want to vote was forced to based on the WEC guidance. There is no evidence that any votes were requested and cast by any individual outside of the actual elector based on the WEC guidance. No other information has been provided to show what rights of others were violated due to that guidance. If individual actors within the care facilities engaged in any misconduct, those individual actions cannot be imputed to the WEC, as the WEC guidance was specifically that the general absentee laws should be followed. As such, there is insufficient evidence to establish the third element of Misconduct.

As to the fourth element, there is no evidence of any dishonest advantage the WEC intended to obtain. No commissioner obtained anything of value for putting forth this guidance. There is no evidence of any commissioner obtaining any benefit from this guidance. The WEC guidance on SVDs addressed a global pandemic and a vulnerable community that may have been unable to exercise their constitutional right to vote. The WEC commissioners gained no advantage from additional people exercising their constitutional rights, let alone a dishonest advantage. This element requires intentionality in the defendant's actions. This would require the WEC act with mental purpose to achieve some dishonest advantage or the belief it was substantially certain to result. *See* WIS. STAT. 939.23(3). There is no evidence to support that the WEC received or intended to receive any advantage. It is impossible to say the dishonest advantage was the result of

¹² "A 'public official' is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units." WIS. STAT. §939.22(30). The WEC commissioners are appointed via statutory procedures. *See* WIS. STAT. § 15.61(1)(a).

¹³ The Eastern District of Wisconsin, in *Donald Trump v. The Wisconsin Elections Commission, et. al.*, 20-CV-1785-BHL, arrived at a similar result following substantially similar allegations. In that matter, it was alleged that WEC guidance regarding indefinitely confined voters, absentee ballot drop boxes, and corrections to witness addresses on absentee ballots violated the Electors Clause in Article II, Section 1 of the US Constitution because the guidance purportedly deviated from the laws passed by the Legislature. *See Trump v. WEC*, 20-CV-1785-BHL, 2020-12-20 Decision and Order, at 10. The district court found that the WEC was acting pursuant to the Legislature's directives in issuing guidance and advisory opinions regarding the administration of the election. *See Id.* at 20-21. The district court found that such challenges were disagreements over election administration, which was expressly entrusted to the WEC via statute. *See Id.* at 21.

the election, as there is no way of knowing who each elector voted for, let alone that the WEC was practically certain the SVD guidance would result in votes for a particular candidate. As such, there is insufficient evidence to establish the fourth element of Misconduct.

As all four elements of Misconduct in Public Office (Dishonest Advantage) under Wisconsin Statute § 946.12(3) cannot be proven beyond a reasonable doubt, charges would be inappropriate.

b. Misconduct in Public Officer (Excess of Lawful Authority)

To ensure a complete review of this matter, even though it was not referred in for review, the allegations were also reviewed under Misconduct in Public Office (Excess of Lawful Authority), under § 946.12(2). This version relates to doing an act in excess of the officials lawful authority. To prove this version of Misconduct, the State must prove the following elements beyond a reasonable doubt:

1. At the time of the alleged offense, the defendant was a public officer.
2. The defendant, in their capacity as a public officer (description of conduct).
3. The conduct was in excess of their lawful authority or conduct they were forbidden by law to engage in their official capacity.
4. The defendant knew the conduct was in excess of their lawful authority or that they were forbidden by law to engage in that conduct.

As described above, there is no real dispute as to elements one or two. The WEC commissioners are public officials who engaged in the conduct of providing guidance regarding SVDs. Here, the primary consideration will be whether the guidance was in excess of WEC's lawful authority or whether they were forbidden by law to do. As discussed above, the WEC is statutorily entrusted with the administration of elections and providing guidance and advisory opinions. *See* WIS. STATS. §§ 5.05(1), (1)(f), (2w), (5t), and (6a). The legislature has declined to make the provisions for SVDs mandatory. *See* WIS. STAT. § 6.84(2). Our Supreme Court has held that election provisions can be considered directory and not mandatory, where the provisions deal with the mode and manner of voting. *See Lanser*, 62 Wis. 2d at 91, 214 N.W.2d at 427. As such, both the statutes and case law establish that the WEC guidance was in conformance with their obligation to administer elections and the guidance was within their lawful authority to provide. Nor is there evidence that the WEC was forbidden by law to give their SVD guidance. Giving guidance was their statutory obligation. As the WEC was acting in conformance with their statutory obligation, there is insufficient evidence to establish the third element of Misconduct.

There is also insufficient evidence to establish the fourth element of Misconduct. This element requires the WEC to have acting knowing their guidance was in excess of their authority. Here, the WEC repeatedly noted that their guidance was based upon their interpretation of the Governor's Executive Order 72.¹⁴ It was the WEC's interpretation that SVDs were "non-essential" individuals who would be prohibited from entering care facilities, such that clerks should not be required to send them to such facilities. The WEC determined that, pursuant to Wisconsin Statute § 6.875(6)(e), clerks should send absentee ballots directly to residents. The WEC made a reasonable determination based upon the facts known to them. They followed a statutorily authorized procedures for mailing ballots once that determination was made. Even if their conduct was in

¹⁴ Order proclaiming a public health emergency.

excess of their authority, these measures indicate a lack of knowledge as to any violations. The evidence fails to demonstrate the WEC commissioners knew providing such guidance, as they were statutorily authorized to provide, would be considered in excess of their authority. Further, as these provisions are directory in nature and not mandatory, it cannot be said that a failure to strictly follow the provision was knowingly in excess of their authority. As such, there is insufficient evidence to establish the fourth element of Misconduct.

As all four elements of Misconduct in Public Office (Excess of Authority) under Wisconsin Statute § 946.12(2) cannot be proven beyond a reasonable doubt, charges would be inappropriate.

c. Election Fraud and Party to a Crime Liability

In addition to a charge of Misconduct, the RCSO refers in multiple charges against the WEC related to Election Fraud. One count, in violation of § 12.13(2)(b)(7), alleges direct liability by the WEC commissioners. The remaining counts, in violation of §§ 12.13(3)(n), (p), and (s), allege criminal liability via a Party to a Crime theory (PTAC).

To prove Election Fraud under Wisconsin Statute § 12.13(2)(b)(7), the State must prove that, “[i]n the course of the person’s official duties . . ., [the election official] intentionally violate[d] or intentionally cause[d] any other person to violate any provision of chs. 5 to 12” In this instance, the argument is that the WEC violated the SVD procedures under section 6.875 and caused the municipal clerks to violate that provision through their guidance suspending the SVD procedures. This argument fails. First, this argument presupposes that the SVD procedures are mandatory rules the WEC must comply with. They are not. As described above, the SVD procedures are directory and not mandatory. By providing guidance on how to proceed in relation to SVDs, the WEC was fulfilling its statutory duties of administering the elections and providing guidance and advisory opinions. *See* WIS. STATS. §§ 5.05(1), (1)(f), (2w), (5t), and (6a). As the SVD procedures are directory provisions, mandatory compliance is not required; there need only be substantial compliance with the terms. *See Roth v. La Farge School District Board of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis. 2d 708, 634 N.W.2d 882 (*citing McNally v. Tollander*, 100 Wis. 2d 490, 497, 302 N.W.2d 440 (1981)).

Further, the WEC did not instruct municipal clerks to completely disregard the law. The WEC directly encouraged clerks to comply with Wisconsin Statute § 6.875(6)(e). This is a provision in the SVD procedures that accounts for the inability for SVDs to engage with electors. By encouraging clerks to comply with the law, the WEC was assuring there was substantial compliance with the law’s terms in a way to fulfill their duty of “giv[ing] effect to the will of the electors.” WIS. STAT. § 5.01(1). The WEC commissioners engaged in providing election administration guidance, as required by statute. The provision of this guidance complied with the directory nature of the SVD procedures, as well as the overarching purpose of honoring the will of the electors. There is no sufficient basis to find a violation of Election Fraud, section 12.13(2)(b)(7).

As to the remaining assertions of Election Fraud, each of these provisions concerns prohibited acts a person cannot do. The RCSO alleges violations of the following:

- 12.13(3)(n) – “No person may receive a ballot from or give a ballot to a person other than the election official in charge.”
- 12.13(3)(p) – “No person may receive a completed ballot from a voter unless qualified to do so.”
- 12.13(3)(s) – “No person may solicit another elector to offer assistance under s. 6.82(2) or 6.87(5), except in the case of an elector who is blind or visually impaired to the extent that the elector cannot read a ballot.”

The WEC commissioners did not engage in any of these acts directly; as such, their potential criminal liability would be based on Party to a Crime (PTAC) Liability. There exists three scenarios in which a person can be PTAC:

- a) Directly commits the crime;
- b) Intentionally aids and abets the commission of it;
- c) Is a part to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

Wis. STAT. § 939.05(2)(a)-(c). Liability under § 939.05(2)(a) would not apply, as none of the commissioners directly committed any of these acts. To establish either remaining form of PTAC liability, the State needs to establish the actors either aided in the commission of the offense, or conspired with another to commit the offense. As to an aiding and abetting theory, a defendant aids in the commission of a crime where the defendant “(1) undertakes conducts (either verbal or overt action) which as a matter of objective fact aids another in the execution of the crime, and 2) consciously desires or intends that the conduct will yield such assistance.” *State v. Simplot*, 180 Wis. 2d 383, 401-402, 509 N.W.2d 338 (Ct. App. 1993). Further, intent is shown by showing “knowledge or belief that another person is committing or intends to commit a crime” *See State v. Ivy*, 119 Wis. 2d 591, 606, 350 N.W.2d 622 (1984). In this investigation, there is no evidence to support such liability. There is no evidence that any WEC commissioner had any interaction with any member of a care facility in relation to the SVD procedures. There is no evidence any commissioner provided any aid to any care facility worker in relation to providing ballots or voting. Nothing suggests the WEC commissioners had any knowledge of how care facility workers were conducting their ballot practices. If there is no showing of knowledge, then the State is unable to establish the requisite intent needed for aiding and abetting liability.

As to PTAC liability under a conspiracy theory, to establish liability the State needs to prove two elements: “(1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective. (2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have a ‘stake in the venture.’” *State v. Hecht*, 116 Wis. 2d 605, 624-25, 342 N.W.2d 721 (1984)(citing *State v. Nutley*, 24 Wis. 2d 527, 556, 129 N.W.2d 155 (1965)). In this investigation, there is no evidence any WEC commissioner conspired with another to commit any form of Election Fraud. The WEC guidance on SVD did not provide any instruction that everyone should receive a ballot, or that someone who did not request a ballot should receive one. The WEC guidance was that clerks should follow the absentee ballot procedures under Wisconsin Statute § 6.875(6)(e). That guidance

explicitly noted that when the absentee ballots are sent by mail, the regular rules for absentee voting apply. Absentee ballots are mailed out by election officials. The WEC guidance was the ballots should only be mailed out to electors that request them. The guidance did not instruct any care facility workers to solicit another elector to offer assistance in filling out the ballots. Even if the guidance could be interpreted as an agreement, there is no evidence to show any agreement to achieve a criminal objective, nor that any member of the WEC intended to realize a criminal objective. There is no evidence establish what the criminal objective would even be. The only evidence is that the WEC commissioners intended to provide residents of care facilities with the ability to exercise their constitutional right to vote.

Based on the above, there is no sufficient basis to find the WEC commissioners acted as a Party to a Crime to Election Fraud violations under sections 12.13(3)(n), (p), or (s).

III. Even if a crime were committed, the WEC commissioners could raise the defense of Privilege under Wisconsin Statute § 939.45(3).

This memorandum has determined that there is insufficient evidence to establish a crime was committed. However, even if a crime were committed, in assessing the viability of a prosecution, potential defenses to criminal liability must also be addressed. In this case, the defense of Privilege (§ 939.45(3)) would be relevant. To be clear, this provides a defense to criminal liability and thus would be an affirmative defense that were only raised after a determination a crime was committed. This analysis has determined that there is insufficient evidence to believe a crime was committed and thus the defense of Privilege would not need to be raised. This section is included in the interests of providing a full analysis of the potential for conviction if criminal charges were issued.

Where an individual's conduct is privileged, even if otherwise criminal, that privilege is a defense to prosecution based on that conduct. WIS. STAT. § 939.45. Among other circumstances, an individual can claim the defense of privilege, "[w]hen the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office." WIS. STAT. § 939.45(3). "The statutory privilege defense was intended to protect a public officer who, but for the defense provided in sec. 939.45, would be guilty of a crime if he or she were acting as a private citizen, and whose unlawful conduct has 'sufficient value to society so that it ought not subject the actor to criminal liability.'" *State v. Stoehr*, 134 Wis. 2d 66, 85-86, 396 N.W.2d 177 (1986).

To establish a defense of privilege, the defendant must put forth evidence in support of the privilege. The following two elements must be shown:

1. The defendant acted in good faith.
2. The defendant's conduct was an apparently authorized and reasonable fulfillment of the duties of a public office.

See WIS JI-Criminal 870, and WIS. STAT. §939.45(3). The State must then prove beyond a reasonable doubt that the defendant did not act lawfully within the scope of privilege. WIS JI-Criminal 870.

In these circumstances, it appears likely that the defense of Privilege would be a valid defense to any charges revolving around the WEC guidance issued relating to SVDs and that the State would be unable to prove beyond a reasonable doubt that the WEC did not act lawfully within the scope of

privilege. First, is the element of good faith. “‘Good faith’ means that the defendant[s] believed that [their] conduct was an authorized and reasonable fulfillment of [their] duties” WIS JI-Criminal 870. Here, there is no evidence to support the position that the WEC guidance on SVDs was for any nefarious purpose. There is no evidence the guidance was provided with the intent to disenfranchise any elector or to ensure any elector voted in any specific way. The only evidence presented supports the position that the guidance was intended to ensure all electors would have the opportunity to cast their vote. Commissioner Knudson specifically noted at a June 24, 2020, WEC meeting that following the letter of the SVD law would put hundreds of nursing home residents’ lives at risk. This further supports the belief that the WEC acted with a motive to allow for voting in a safe manner and did not act with bad faith. At a January 15, 2021, WEC meeting, Commissioner Jacobs stated that her belief was that in suspending SVD access, the WEC was attempting to reconcile multiple laws. During that same meeting Commissioner Thomsen noted that WEC has interpreted laws in a ways to allow people to vote safely and to protect lives. The expressed intent to attempt to reconcile different laws, even if incorrect on the laws being reconciled, and the stated purpose to ensure access to voting does militate against a finding that the WEC were acting in bad faith. The State would be unable to establish the WEC failed to act in good faith.

The second element the State would be required to disapprove is the conduct was apparently authorized and a reasonable fulfillment of the duties of public office. Voting is a constitutional right. *See* WIS. STATS. §§ 5.01 and 6.84, and WI CONSTITUTION ar. II, § 1. The WEC is statutorily entrusted with the responsibility for the administration of elections and providing guidance and opinions on election-related laws. *See* WIS. STATS. §§ 5.05(1) (1)(f), (2w), (5t), (6a). Providing administration and guidance on election-related issues is directly authorized by statute. Providing the guidance and information WEC is authorized to provide via statute is a fulfillment of the duties of WEC. As such, the State would be unable to establish WEC’s conduct was not apparently authorized or was an unreasonable fulfillment of their duties.

Based on this, even if it were determined a crime was committed, WEC would be entitled to assert the defense of privilege.

CONCLUSION

In March of 2020, the WEC provided guidance relating to the use and dispatch of SVDs. There is disagreement about that guidance. What is clear, however, is that the WEC is statutorily entrusted with the administration of elections under Wisconsin Statute § 5.05. Any guidance provided must be seen in the lens of those statutory duties. The WEC guidance on SVDs was an exercise of those statutory duties. It was not inconsistent with the exercise of their obligation to administer elections. There is no evidence to support the belief that the guidance was provided for any motive other than ensuring electors were able to exercise their constitutional right of voting. For all the reasons stated in this memorandum, the evidence does not support the issuance of any criminal charges.