

**VERIFIED COMPLAINT FOR REMOVAL OF WEC BOARD MEMBERS PURSUANT
TO WIS. STATS. §§ 17.07(2), 17.07(3), and 17.16(3)**

Now comes the complainant, Fond du Lac County District Attorney Eric J. Toney and as and for a verified complaint pursuant to Wis. Stats. §§ 17.07(2), 17.07(3) and 17.16(3) demands Governor Tony Evers remove five Wisconsin Election Commission (hereinafter “WEC) Board members for cause for their violations of Wisconsin election laws, and alleges and complains as follows is true and accurate to the best of my knowledge:

1. I am a resident taxpayer of the State of Wisconsin, and my residential Address is N7115 Leonard Dr., Fond du Lac, Wisconsin 54935.

2. The WEC is a state of Wisconsin government board in which all board members are officers representing the “government unit” consisting of the entire state of Wisconsin.

3. Wis. Stat. §15.61(1)(a) states that WEC members shall serve a fixed 5 year term.

4. Wis. Stat. §15.61(1)(a)1-4 details that the WEC members are appointed by as follows: one member each by: the senate majority leader, senate minority leader, speaker of the assembly, and assembly minority leader.

5. Wis. Stat. §15.61(1)(a)5 details that two additional WEC members are appointed by the governor with the advice and consent of the Wisconsin Senate.

6. That Marge Bostelmann, whose residence is in Green Lake County, Wisconsin, was on January 1, 2020 through present time a WEC Board member and that board, council, commission or committee is a government body within the meaning of Wis. Stats. §§ 5.025, 5.05, and 15.61.

7. According the WEC website¹, Marge Bostelmann was appointed by the Governor of Wisconsin to the WEC board with the advice and consent of the Wisconsin Senate.

8. That Julie M. Glancey, whose residence is in Sheboygan County, Wisconsin, was on January 1, 2020 through present time a WEC Board member/commissioner and that board, council, commission or committee is a government body within the meaning of Wis. Stats. §§ 5.025, 5.05, and 15.61.

9. According the WEC website, Julie Glancey was appointed by the Governor of Wisconsin to the WEC board with the advice and consent of the Wisconsin Senate.

10. That Ann S. Jacobs whose residence is in Milwaukee County, Wisconsin, was on January 1, 2020 through present time a WEC Board member and that board, council, commission or committee is a government body within the meaning of Wis. Stats. §§ 5.025, 5.05, and 15.61.

11. According the WEC website, Ann S. Jacobs was appointed by the Democrat Wisconsin Senate Minority Leader to the WEC board.

12. That Mark L. Thomsen whose residence is in Milwaukee County, Wisconsin, was on January 1, 2020 through present time a WEC Board member and that board, council, commission or committee is a government body within the meaning of Wis. Stats. §§ 5.025, 5.05, and 15.61.

¹ <https://elections.wi.gov/about/members>

13. According the WEC website, Mark L. Thomsen was appointed by the Democrat Wisconsin Assembly Minority Leader to the WEC board.

14. That Dean Knudson whose residence is in St. Croix County, Wisconsin, was on January 1, 2020 through present time a WEC Board member/commissioner and that board, council, commission or committee is a government body within the meaning of Wis. Stats. §§ 5.025, 5.05, and 15.61.

15. According the WEC website, Dean Knudson was appointed by the Republican Wisconsin Speaker of the Assembly to the WEC board.

16. Megan Wolfe is the administrator of the WEC.

17. §17.07(2) allows state officers appointed by the legislature may be removed by legislature at their pleasure or if the legislature is in recess, by the governor for cause.

18. §17.07(3) allows the Governor to remove state officers filled by the governor for a fixed term and with the advice and consent of the senate for cause.

19. The WEC Board took numerous votes in 2020 suspending SVDs in Wisconsin and directing that clerks not dispatch the statutorily required SVDs based on Covid-19 and guidance from other government agencies.

20. Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson and Mark Thomsen on the 12th day of March, 2020 via Zoom, June 24, 2020 via Zoom, and September 16, 2020 via Zoom knowingly attended a meeting of said governmental body and voted to direct that no special voting deputies (here in after "SVD") shall be dispatched to residential care facilities and qualified retirement homes. This directive was a 6-0 vote on March 12, 2020 and the WEC Board reaffirmed this directive with 5-1 votes on June 24, 2020 and September 16, 2020 (Commissioner Robert Spindell Jr. voted no both times) in violation of Wis. Stats. §§ 6.875, 5.05(6a)1, 5.05(6a)2, 12.13(2)(b)7 and §946.12(2) sections as a conspiracy pursuant to §939.31. in that:

- a. I have personally reviewed a copy of the Racine County Sheriff's Office investigation into the WEC and Ridgewood Care, spoken with the lead investigator, Racine County Sheriff's Lieutenant Michael Luell, regarding his investigation, spoken with Fond du Lac County Clerk Lisa Freiberg, City of Fond du Lac Clerk Margaret Hefter, and my review of Wisconsin statutes, case law, and emergency orders issued during the Covid-19 pandemic. I have found Deputy Luell, Clerk Freiberg, and Clerk Hefter to be truthful and reliable when speaking with them and have found information they have shared with me corroborated by documentation contained within the Racine investigation into the WEC.
- b. I reviewed this information for the possibility of criminal charges being filed in Fond du Lac County based upon the WEC directives that SVDs "shall not" be deployed during various elections in 2020. Fond du Lac County Lisa Freiberg shared with me that she and other Fond du Lac County clerks relied upon these WEC SVD directives mentioned in this complaint. Clerk Hefter shared that no special voting deputies were deployed in Fond du Lac County. Upon my review of the available facts, law, and information I concur with the Racine County District Attorney that members of the WEC violated Wisconsin laws. Specifically, Wis. Stats. §§ 5.05(6)(a)1, 5.05(6)(a)2 (WEC formal and informal opinions), §6.875 regarding SVDs, thus creating

violations of §12.13(2)(b)7 (Election Fraud) and §946.12(2) (Misconduct in Public Office) as a Conspiracy pursuant to §939.31.

- c. Traditionally a violation of this scope would appear to have statewide venue given the WEC SVD directive was intended to go to every clerk in the state of Wisconsin. I do not believe the Fond du Lac County District Attorney's Office has venue for these crimes because of Wis. Stats. §971.19(12), §978.05(1), and *State v. Jensen* 782 N.W.2d 415 (2010). *Jensen* and these statutes require the charges against a defendant be filed in the county of their residence for election and election related violations, thus depriving Fond du Lac County of venue.
- d. Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson and Mark Thomsen, are members of the WEC and I am requesting that they be removed from the WEC pursuant to your statutory authority outlined in this verified complaint for their repeated violations of Wisconsin election laws. I am not requesting that Commissioner Robert Spindell Jr. be removed based on his public abandonment of the conspiracy and the legal uncertainty during his lone vote to suspend SVDs on March 12, 2020. The remaining five WEC members voted to in favor of mandatory directives to all Wisconsin Election Clerks in Wisconsin, which impacted the August and November 2020 elections and they knowingly exceeding their authority as WEC Commissioners and violating Wis. Stats:
 - i. Conspiracy to violate: §5.05(6a) and §12.13(2)(b)7
 - ii. Conspiracy to violate: §6.875 and §12.13(2)(b)7 and
 - iii. Conspiracy to commit: §946.12(2).
- e. Wisconsin law allows WEC to issue formal and informal advisory opinions related to elections pursuant to Wis. Stat. §5.05(6a)1, which states, in part:

Any individual, either personally or on behalf of an organization or governmental body, may make a request of the commission in writing, electronically, or by telephone for a formal or informal advisory opinion regarding the propriety under chs. 5 to 10 or 12 of any matter to which the person is or may become a party. Any appointing officer, with the consent of a prospective appointee, may request of the commission a formal or informal advisory opinion regarding the propriety under chs. 5 to 10 or 12 of any matter to which the prospective appointee is or may become a party. The commission shall review a request for an advisory opinion and may issue a formal or informal written or electronic advisory opinion to the person making the request.

- f. Additionally, §5.06(6a)(a)2 requires that:

To have legal force and effect, each formal and informal advisory opinion issued by the **commission must be supported by specific legal authority under a statute or other law, or by specific case or common law authority.** Each formal and informal advisory opinion **shall include a citation to each statute or**

other law and each case or common law authority upon which the opinion is based, and shall specifically articulate or explain which parts of the cited authority are relevant to the commission's conclusion and why they are relevant.

- g. There appears to be no other statutory authority for WEC to give out directives and §5.05(6)(a) allows the WEC to give out guidance. WEC appears to have given out advisory opinions that were directive in nature, beyond their lawful authority and without any specific request for such an opinion, nor the appropriate legal rationale for their opinion. On March 12, 2020, WEC suspended SVD in nursing homes, which are required under Wis. Stat. §6.875. WEC cited Executive Order #72 from Governor Tony Evers in suspending SVD, perhaps complying with Wis. Stat. §5.05(6a)2 in pointing to specific authority upon which the directive was based. However, Order #72 was a public health emergency and did not limit or place restrictions on Wisconsinites. Those restrictions did not occur until Safer at Home Order #12, which limited gatherings and placed other restrictions on Wisconsinites, which was not in effect until approximately two weeks after WEC took this first vote to direct clerks not to dispatch SVD to nursing homes.
- h. WEC voted 6-0 on March 12, 2020, to give out this directive suspending SVDs to Wisconsin Municipal Clerks, Wisconsin County Clerks, City of Milwaukee Elections Commissions, and the Milwaukee County Elections Commission.
- i. Public Health Emergency from Order #72 was issued March 12, 2020 and expired 60 days after it was issued because it was not extended by the Wisconsin Legislature. Safer at Home Order #12 took effect March 25, 2020 and was later extended under the illegal extended Safer at Home Order #28 taking effect April 24, 2020, which was struck down by the Wisconsin Supreme Court on May 13, 2020. WEC issued their first directive forbidding SVD on March 12, 2020, nearly two weeks before any restrictions were placed on Wisconsinites through Safer at Home Order #12.
- j. On June 24, 2020, the WEC commissioners voted 5-1 to extend the directive suspending SVD, after Order #72 expired and after Order #28 was struck down as being unlawful. WEC provided no additional legal rationale to attempt to comply with §5.05(6a)2, cited no other legal authority for such a directive, and acknowledged that Governor Tony Evers' public health order was no longer in effect. The WEC then stated it was relying on "state and federal agencies that regulate nursing homes and care facilities have issued guidance that non-essential visitors to these facilities, such as SVDs, should be restricted." The WEC commissioners again extended its directive that SVD "shall not" be used by municipalities on September 16, 2020, with a 5-1 vote, again failing to comply with §5.05(6a)2. Commissioner Spindell was the only commissioner to vote against prohibiting SVDs. Both the June 24, 2020 and September 25, 2020 votes occurred after Order #72 expired and no updated guidance or legal analysis was provided to support the issuance of the directive, which violated Wis. Stat. §6.875. The WEC simply researched and generated a documenting

highlighting what they felt would be challenges in reinstating SVDs, which is documented in a September 10, 2020 memo.

- k. In fact, the WEC commissioners seemed to acknowledge they were in violation of the SVD law and by May 13, 2020, when the extended Safer at Home Order was struck down, there was no legal authority, order, law, or cases for the WEC Commissioners to minimally point to in an effort to comply with Wis. Stats. §5.05(6a)1 and 2.
- l. This is a clear violation of Conspiracy to violate: §5.05(6a)1 and 2 and §12.13(2)(b)7, Conspiracy to violate: §6.875 and §12.13(2)(b)7, and Conspiracy to violate: Misconduct in Public Office pursuant to Wis. Stat. §946.12(2), which requires four elements be proven according WIS JI 1731:
 - i. The defendant was a public officer
 - ii. The defendant in their capacity as a public officer took actions noted above in this complaint
 - iii. The conduct described above was in excess of the defendant's lawful authority and
 - iv. The defendant knew the conduct was in excess of their lawful authority.
- m. The Milwaukee County District Attorney's Office provided analysis as to why they believed criminal charges could not be proven beyond a reasonable doubt. That analysis appears partially correct but misapplies various aspects of past Wisconsin court cases and fails to account for other Wisconsin laws. It also failed to account for the fact that the Wisconsin court cases used in their analysis evaluated Wisconsin law in 1955 and 1981, which is different than Wisconsin law in 2020. In fact, there were no SVD laws in 1955 or 1981. Furthermore, the Milwaukee County letter failed to account for Wis. Stat. §5.05(6a)(a)3 which provides:

No person acting in good faith upon a formal or informal advisory opinion issued by the commission under this subsection is subject to criminal or civil prosecution for so acting, if the material facts are as stated in the opinion request.
- n. This section effectively provided immunity to any clerk or nursing home staff that relied upon the unlawful WEC guidance. The Milwaukee County District Attorney did not have venue to file criminal charges against the Ridgewood Care employees, but they are also protected by law from prosecution.
- o. The Milwaukee County District Attorney's Office analysis also misinterprets Wis. Stat. §5.01 and case law. They incorrectly applied "will of the elector" protections to an elector's vote to the illegal actions of the WEC Commissioners in prohibiting SVDs. §5.01 states:

CONSTRUCTION OF CHS. 5 TO 12. 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.

- p. The meaning of §5.01 protects an elector's vote despite some informality in following the law. The cases analyzed by Milwaukee District Attorney do not protect those, such as the WEC, from criminal or illegal actions, even if the law would be "directory" to allow ballots to be counted based on their illegal directive regarding SVDs.
- q. This is a complex area of the law, and it curiously took the Milwaukee County District Attorney nearly a year to determine they didn't have venue to investigate the "alternate electors" from the November 2020 election, but it only took the Milwaukee District Attorney a matter of weeks to issue a "no charging" prosecution decision in this circumstance.

- r. Additionally, the 2020 SVD law is specific in Wis. Stat. §6.875(2)(a) stating that:

Absentee voting in person inside residential care facilities and qualified retirement homes **shall be conducted by municipalities only in the manner prescribed in this section.** At any residential care facility or qualified retirement home where a municipality dispatches special voting deputies to conduct absentee voting in person under this section, **the procedures prescribed in this section are the exclusive means of absentee voting in person inside that facility or home for electors who are occupants of the facility or home.**

- s. The 2020 SVD law could align with the decision in *Olson v. Lindberg* 2 Wis. 2d 229 (1957), in which the prior 1957 Wis. Stat. §11.57 declared any absentee ballot not delivered as prescribed by law "shall not be counted." The Wisconsin Legislature clearly stated in 2020 Wis. Stat. §6.875 that absentee voting in nursing homes and retirement homes shall be conducted only in the manner prescribed in §6.875 and is the "exclusive" means of absentee voting in the facility or home rendering these provisions as mandatory, not directory. This is an unsettled area of law, but a court would likely determine SVDs were "directory" thus allowing the nursing home ballots, absent any circumstance of proven fraud, were appropriately counted in the 2020 elections to protect the "will of the elector" as the residents' right to vote should not be punished because of the illegal actions of five WEC Board members. This "directory" protection does not extend backwards to the WEC board members.
- t. The WEC did not rely upon *In the Matter of Hayden*, 1-5 Wis. 2d 468, 475, 313 N.W.2d 869 (1981), *Somerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 301, 69 N.W. 2d 235 (1955), or any other case to consider SVDs as a directory provision that need not be followed. Additionally, even with SVDs law likely being a "directory" provision of the election law, it would simply allow the ballots from nursing home and care facility residents to be counted based on §5.01 as well as *Hayden* and *Somerfeld*. It would *not* authorize or immunize the WEC from prosecution for directing clerks to violate election law. Nothing in the Wis. Stat.

§5.05 or *Hayden* and *Somerfeld* empowers the WEC to disregard Wisconsin election laws.

- u. Put another way, if the SVD law is “directory” it would invoke the “will of the elector,” pursuant to Wis. Stat. §5.01, allowing the votes to be counted despite informality in the law but would not protect the WEC from ordering SVD statutes not be followed because it is beyond WEC’s lawful authority to direct others to violate state law.
- v. WEC Commissioners Dean Kundson and Ann Jacobs, as well as WEC Administrator Meagan Wolfe, were concerned about the safety of residential care facility and nursing home residents and conveyed that concern to Governor Tony Evers in letter on March 10, 2020. However, this letter also requested that Governor Tony Evers suspend SVD laws in nursing homes but made no effort to find ways to comply with the SVD law. Commissioner Knudson then emailed Governor Tony Evers on March 11, 2020, indicating he was aware the Governor’s Office was uncertain if Governor Evers had the authority to suspend a statute during an emergency. Commissioner Knudson suggested that Governor Evers had the power to act in suspending a statute during an emergency. Commissioner Knudson was then asked to call the Chief Legal Counsel for Governor Evers, Ryan Nilsestuen. Not even the elected Governor of Wisconsin had the authority to suspend the SVD law and the WEC took it upon themselves to circumvent the Governor of Wisconsin and the Wisconsin Legislature to change Wisconsin law with no authority to do so.
- w. On February 11, 2021, the Joint Committee for Review of Administrative Rules (hereinafter “JCRAR”) sent then WEC Chair Jacobs and WEC Administrator Meagan Wolfe a letter stating that the Legislative Council provided JCRAR an opinion that “state law does not empower the Elections Commission to waive the requirement to dispatch SVDs...” JCRAR voted to require WEC to proceed with emergency rule making if WEC wished to suspend SVDs in 2021.
- x. On March 2, 2021, Administrator Wolfe responded to the February 11, 2021 JCRAR memo with a lengthy memo which ultimately concluded that WEC would not be seeking to suspend SVDs for the April 6, 2021 election.
- y. Based on the Racine Sheriff’s Office Investigation, led by Lt. Mike Luell, WEC, on their own accord, without a §5.06(a)1 request for a formal or informal advisory opinion ordered that §6.875 SVD shall not be dispatched. WEC failed to point to any law, statute, or cases as required by §5.06(a)(2), thus knowingly exceeding their statutory authority in violation of §946.12(2). As unelected appointed officials and without lawful authority, WEC assumed they had more power than the Governor of Wisconsin and directed election clerks in Wisconsin not to send out SVD, thus breaking Wisconsin law. WEC could have sought an Attorney General’s opinion on this issue but instead WEC went rogue and stole the power from our elected legislature and governor in violation of Wisconsin law and legal “cause” exists for the removal of five of these WEC board members.

21. That Commissioners: Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, and Mark Thomsen are thereby subject to the removal provision of Wis. Stats. §§ 17.07(2), and/or 17.07(3), and 17.16(3).

22. That the following witnesses can testify to said acts or omissions:

- a. Governor Tony Evers
- b. WEC Commissioner Robert Spindell Jr.
- c. WEC Administrator Meagan Wolfe
- d. Racine County Sheriff Christopher Schmaling
- e. Racine County Sheriff's Office Investigator Michael Luell
- f. Ryan Nilsestuen, Chief Legal Counsel to Governor Tony Evers
- g. Fond du Lac County Clerk Lisa Freiberg
- h. City of Fond du Lac Clerk Maragaret Hefter
- i. The Racine County Sheriff's Office will also be able to provide additional witness

information.

23. That the following documentary evidence of said acts or omissions is attached as: Exhibit 1 and incorporated in my complaint.

24. That this complaint is made to Governor Tony Evers for the State of Wisconsin under the provisions of Wis. Stat. §§ 17.07(2), 17.07(3), and 17.16(3), and that the Governor shall conduct a speedy hearing.

WHEREFORE, complainant prays that Wisconsin Governor Toney Evers, timely institute a speedy public hearing against Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson and Mark Thomsen to remove them the Wisconsin Elections board as provided in Wis. Stats. §§ 17.07(2), 17.07.(3), and 17.16(3).

STATE OF WISCONSIN)
)ss.
COUNTY OF FOND DU LAC

Eric J. Toney being first duly sworn on oath deposes and says that he is the above-named complainant, that he has read the foregoing complaint and that, based on his knowledge, the contents of the complaint are true.

E. J. Toney

COMPLAINANT
Eric J. Toney
State Bar # 1079214
District Attorney
Fond du Lac County

Subscribed and sworn to before me
this 12th day of April, 2022.

Kristin R. Menzl

Notary Public, State of Wisconsin
My Commission is permanent
Name: *Kristin Menzl*
State Bar # *1088891*

