



OFFICE OF THE DISTRICT ATTORNEY

Eric J. Toney, District Attorney  
Douglas R. Edelstein, Deputy  
Kristin R. Menzl, Assistant  
Curtis A. Borsheim, Assistant  
Michael E. O'Rourke, Assistant  
Catherine A. Block, Assistant  
Tessa L. Button, Assistant  
Kristian K. Lindo, Assistant  
Sara Christensen, Assistant  
Tatiana Shirasaki, Assistant  
Joan M. Korb, Special Prosecutor  
Victim/Witness Services (920) 929-3048

April 12, 2022

Governor Tony Evers  
Wisconsin State Capitol  
2 E. Main St.  
Madison, WI 53703

Re: Verified Complaint for §17.16(3) Removal of Five Wisconsin Election Commission Board Members

Dear Governor Evers:

This letter summarizes the verified complaint I have attached requesting that you remove five of the Wisconsin Election Commission (hereinafter "WEC") board members, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson and Mark Thomsen, for cause based on their actions in knowingly exceeding their statutory authority by violating Wisconsin laws during the August and November elections in 2020. The basis for this verified complaint is my review of a copy of the Racine County Sheriff's Office investigation into election-related activity at the Ridgewood Care Facility in Racine County, including the WEC directives that Special Voting Deputies (hereinafter "SVD") be suspended and not dispatched to nursing homes and care facilities during 2020 elections, which is a violation of the SVD requirement in Wis. Stat. §6.875.

The purpose of my review of these materials was to investigate whether criminal charges should be filed in Fond du Lac County against the WEC board members for violations of: Wis. Stats. §§ 6.875, 5.05(6a)1, 5.05(6a)2, 12.13(2)(b)7 and §946.12(2) as a criminal conspiracy pursuant to §939.31. Fond du Lac County election clerks relied upon this same guidance as SVDs were not dispatched in Fond du Lac County for the August and November elections in 2020.

Based upon my review of the Racine County Sheriff's investigative file, which includes WEC documents, conversations with the lead investigator and Fond du Lac County Clerk Lisa Freiberg, City of Fond du Lac Clerk Margaret Hefter, along with statutory and case law research, it is apparent the WEC had no legal authority to suspend SVDs and numerous Wisconsin criminal law violations have been committed by the WEC. Based on these law violations, those five WEC board members must be removed for cause, pursuant to your statutory authority to do so under §17.07(2), if the legislature is

determined to be in recess and §17.07 (3). I am not asking that the sixth board member, Robert Spindell, be removed based upon his public abandonment of the conspiracy and subsequent votes against suspending SVDs.

The WEC board, as unelected appointed officials and without lawful authority, assumed they had more power than the Governor of Wisconsin and the Wisconsin Legislature by directing election clerks in Wisconsin not to dispatch SVDs, thus breaking Wisconsin law. The WEC could have sought an Attorney General's opinion on this issue but instead the WEC went rogue and stole the power from our elected legislature and governor in violation of Wisconsin law. Legal "cause" exists for the removal of five of these WEC board members.

Based upon a conspiracy, the Fond du Lac County District Attorney's Office would have jurisdiction to file criminal charges against the WEC except for §971.19(12), §978.05(1), and *State v. Jensen* 782 N.W.2d 415 (2010). *Jensen* and these statutes require any criminal charges against a defendant to be filed in the county of their residence for election and election-related violations, thus depriving Fond du Lac County of venue to file charges.

Wisconsin law allows the WEC to issue formal and informal advisory opinions related to elections pursuant to §5.05(6)(a)1, which requires a request for an opinion from the WEC. If the WEC gives out an opinion, under §5.05(6)(a)2, they are required to state the specific legal authority for their opinion. The WEC violated both §5.05(6)(a) 1 and 2 and §6.875. The WEC gave out a directive, not an opinion, that SVDs were not required and shall not be dispatched, going beyond their statutory authority.

These acts created election fraud violations of §12.13(2)(b)7 as well as misconduct in public office violations of §946.12(2), as §939.31 Conspiracy, because the WEC knowingly exceeded their lawful authority.

The Milwaukee County District Attorney's Office provided analysis as to why they believed criminal charges against the WEC board could not be proven beyond a reasonable doubt. They are wrong on the law. That analysis misapplies "directory" versus "mandatory" election law to the actions of the WEC. The Milwaukee County District Attorney also failed to account for the difference between 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.

Additionally, §5.05(6a)(a)3 effectively provided immunity to any clerk, nursing home staff, and residential care staff that relied upon the unlawful WEC guidance. The Milwaukee County District Attorney does not have venue to file criminal charges against the Ridgewood Care employees, but they are also protected by law from prosecution.

The Milwaukee County District Attorney's Office analysis misinterprets §5.01 and case law by incorrectly applying that law to the illegal actions of the WEC board in prohibiting SVDs. The intent of §5.01 is to protect an elector's vote despite informality in following a law that is "directory" in nature. The cases analyzed by the Milwaukee District Attorney do not protect those, such as the WEC, from criminal charges, even if the law would be "directory" to allow ballots to be counted based on their illegal directive regarding SVDs.

Put another way, if the SVD provisions were considered “directory” it would invoke the “will of the elector,” pursuant to Wis. Stat. §5.01, allowing the ballots to be counted, despite informality in the law. It would not protect the WEC from illegally ordering the SVD statute not be followed because it exceeds the WEC’s lawful authority to direct others to violate state law.

Attached to this letter is a verified complaint, as required in §17.16(3), outlining the violations with supporting documentations. It is important to note that all members of the WEC are presumed innocent of any crimes unless or until proven guilty beyond a reasonable doubt. It does not allow the Governor to abdicate his responsibility of holding the WEC accountable by removing them from office for violating of state election laws. Removal is necessary in order to hold the WEC accountable and restore confidence in our election process because our elections are the cornerstone of democracy and must be defended at every turn.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric J. Toney". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping underline.

Eric J. Toney  
District Attorney

## REFERENCES:

### 5.05 Elections commission; powers and duties.

(6a) ADVISORY OPINIONS.

(a)

1. 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. Except as authorized or required for opinions specified in sub. (5s) (f), the commission's deliberations and actions upon such requests shall be in meetings not open to the public. A member of the commission may, by written request, require the commission to review an advisory opinion.

### 5.05 Elections commission; powers and duties.

(6a) ADVISORY OPINIONS.

(a)

2. 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.

### 5.05 Elections commission; powers and duties.

(6a) ADVISORY OPINIONS.

(a)

3. 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.

### 5.01 Scope.

(1) 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.

<https://docs.legis.wisconsin.gov/statutes/statutes/6/iv/875>

### 6.875 Absentee voting in certain residential care facilities and retirement homes.

(2)

(a) 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.

### **12.13 Election fraud.**

(2) ELECTION OFFICIALS.

(b) No election official may:

7. In the course of the person's official duties or on account of the person's official position, intentionally violate or intentionally cause any other person to violate any provision of chs. 5 to 12 for which no other penalty is expressly prescribed.

**939.31 Conspiracy.** Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

**946.12 Misconduct in public office.** Any public officer or public employee who does any of the following is guilty of a Class I felony:

(2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity

### **Wisconsin Jury Instruction 1731: Misconduct in Public Office**

- 1) The defendant was a public officer
- 2) The defendant in their capacity as a public officer took actions noted above in this complaint
- 3) The conduct described above was in excess of the defendant's lawful authority and
- 4) The defendant knew the conduct was in excess of their lawful authority.

### **971.19 Place of trial.**

(12) Except as provided in s. 971.223, in an action for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 a defendant who is a resident of this state shall be tried in circuit court for the county where the defendant resides. For purposes of this subsection, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

**978.05 Duties of the district attorney.** The district attorney shall:

(1) CRIMINAL ACTIONS. Except as otherwise provided by law, prosecute all criminal actions before any court within his or her prosecutorial unit **and have sole responsibility for prosecution of all criminal actions arising from violations of chs. [5](#) to [12](#), subch. [III of ch. 13](#), or subch. [III of ch. 19](#) and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. [5](#) to [12](#), subch. [III of ch. 13](#), or subch. [III of ch. 19](#), that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in his or her prosecutorial unit** unless another prosecutor is substituted under s. [5.05 \(2m\) \(i\)](#) or [19.49 \(2\) \(h\)](#) or this chapter or by referral of the elections commission under s. [5.05 \(2m\) \(c\) 15.](#) or [16.](#) or the ethics commission under s. [19.49 \(2\) \(b\) 13.](#) or [14.](#) For purposes of this subsection, a person other than an individual is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.