

STATE OF WISCONSIN
BEFORE THE STATE OF WISCONSIN ELECTIONS COMMISSION

IN THE MATTER OF the January 22, 2020
Amended Decision of the City Clerk of the City
of Oconomowoc on the sufficiency of the
Nomination Papers filed by Louis Kowieski
with Respect to the 2020 Spring Election for
Mayor of Oconomowoc

VERIFIED COMPLAINT OF LOUIS KOWIESKI

This Complaint is made pursuant to Wis. Stat. § 5.06(1) and all other applicable laws and regulations applicable to elections and election campaigns.

1. The Complainant, Louis Kowieski, is an elector of the City of Oconomowoc residing at 131 N. Locust Street, Oconomowoc, WI 53066. Mr. Kowieski is a candidate running for Mayor of Oconomowoc.

2. Respondent, Diane Coenen, is the City Clerk of the City of Oconomowoc (hereinafter “Ms. Coenen” or the “Clerk.”). Ms. Coenen is the duly authorized municipal Clerk of the City of Oconomowoc whose duties include the supervision and administration of elections in the City. Ms. Coenen is the local filing officer for nomination papers for elections within the City of Oconomowoc.

3. This Complaint alleges that Ms. Coenen abused her discretion and misapplied the applicable law to exclude Mr. Kowieski’s from the ballot based on her review of the sufficiency of his nomination papers.

FACTS

4. Louis Kowieski filed his nomination papers with the Clerk timely on January 7, 2020. (Ex. A).

5. On January 10, 2020 an elector named Tara Fox filed a challenge to the sufficiency of Mr. Kowieski's nomination papers. (Ex. B.)

6. Mr. Kowieski responded on January 13, 2020 and provided information sufficient to clarify and/or correct any errors in his nomination papers. (Ex. C.)

7. On January 15, 2020, the Clerk issued a decision on the challenge. (Ex. D.) The Clerk struck certain signatures and denied the challenges to certain other signatures. Ultimately, the Clerk determined that Mr. Kowieski had filed 200 valid nomination signatures and would be placed on the ballot for Mayor.

8. On January 17, 2020, Ms. Fox filed an appeal to the Wisconsin Elections Commission alleging that the Clerk should have struck additional signatures and denied Mr. Kowieski a place on the ballot. (Ex. E).

9. On January 22, 2020, prior to Mr. Kowieski being able to respond to Ms. Fox's WEC Appeal, the Clerk issued an Amended Decision. That Amended Decision is a single sentence long, contains no analysis and simply concludes "after consulting with the Wisconsin Elections Commission, I am persuaded that the sufficiency of the nomination papers ... did not meet the requisite number of valid nominations to qualify to be on [sic] ballot." (Ex. F.)

10. The Amended Decision fails to state how many signatures short of the 200 required signatures the Clerk now believes Mr. Kowieski is or which additional signatures were deemed invalid after the Clerk consulted with the WEC staff.

11. Mr. Kowieski has spoken to the Clerk and has been informed that after her consultation with WEC staff, she has determined that two (2) additional signatures were invalid leaving him with 198 valid signatures. Mr. Kowieski, however, does not know which additional signatures have been deemed invalid.

ARGUMENT

I. Legal Standards Applicable to this Complaint.

12. The purpose of Wisconsin Election Law is to give voice to the electors. Indeed, the Legislature has made this clear:

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 comply with some of their provisions*.

Wis. Stat. § 5.01(1) (emphasis added).

13. Accordingly, information contained in nomination papers is presumed to be valid and incomplete information is to be accepted as sufficient if there has been substantial compliance with the requirements of Chapter 8. Wis. Admin Code § EL 2.05(4) & (5).

14. And consistent with the goal of giving effect to the will of the elector, the burden of proof on a challenger is high. A challenge to a nomination signature will only be sustained if the challenger presents “clear and convincing evidence” that the signature is invalid. Wis. Admin Code § EL 2.07(4).

II. The Clerk’s January 22, 2020 Amended Decisions is either *Void Ab Initio* or should be voided as an abuse of discretion.

15. On January 15, 2020, the Clerk resolved MS. Fox’s challenge and determined that Mr. Kowieski had presented 200 valid signatures, enough to be placed on the ballot.

16. At the time the Clerk rendered her January 22, 2020 Amended Decision on Ms. Fox’s challenge, the Clerk was without jurisdiction to render a decision. After the Clerk issued her January 15, 2020 Decision, Ms. Fox appealed that decision to the WEC and the WEC ordered the Clerk to transfer the record materials to the WEC. Thus, as of January 17, 2020, the date of Ms. Fox’s appeal, jurisdiction to decide Ms. Fox’s challenge to Mr. Kowieski’s

nomination papers rested with the WEC and not the Clerk. Indeed, the Clerk was no longer the official with responsibility for determining the sufficiency of the nomination papers, she was the respondent in a matter pending before this body.

17. Allowing a local filing officer the ability to amend her decision after it has been appealed to the WEC would harm both candidates and challengers by effectively denying them their right to review by this body and ultimately by the Courts. Proceedings before the WEC are governed by Chapter 227 and Courts have confirmed that absent a decision from this body neither a candidate nor a challenger may seek redress in the Circuit Court. *See* Wis. Stat. § 5.06(1) (judicial review only available after WEC renders a decision) & § 5.06(9) (noting that WEC proceedings and judicial review of the same are governed by Ch. 227) and *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992) (circuit court lacked jurisdiction because plaintiff filed before the Elections Board issued its decision).

18. Further the Amended Decision constitutes an abuse of discretion by the Clerk. The Amended Decision is devoid of any analysis of the law or the facts and does not even inform the parties of the basis of the Clerk's decision. *See Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175, 184 (1982) (an abuse of discretion occurs when the relevant official fails to "examin[e] the relevant facts, appl[y] a proper standard of law, and, us[e] a demonstrated rational process" to reach a reasonable conclusion.) Here, the Clerk not only failed to examine the facts or apply the law, she failed even to identify the facts or law she was reconsidering. Further, the Amended Decision is devoid of any reasoning, does not indicate which challenges she reconsidered and does not even indicate how many valid signatures remain after her reconsideration.

19. Accordingly, the WEC should vacate the January 22, 2020 Amended Decision and reinstate the January 15, 2020 Decision and order the Clerk to place Mr. Kowieski's name on the ballot.

III. Mr. Kowieski Submitted More Than 200 Valid Nomination Signatures.

20. Pursuant to the January 15, 2020 Decision, Mr. Kowieski has submitted 200 valid signatures. This is sufficient for his name to appear on the ballot.

21. The January 22, 2020 Amended Decision does not explain which additional signatures the Clerk struck after her consultation with the WEC; however, the Clerk verbally informed Mr. Kowieski that she struck two additional signatures. There are only two categories of challenges that the Clerk denied in her January 15, 2020 Decision that involved two signatures each. Deductive reasoning suggests that the Clerk must have reversed her conclusion for one of these two categories. Each will be addressed below.

A. The Signatures at Page 2, Line 5 and Page 21 Line 10 are Valid.

22. Ms. Fox challenged the signatures at page 2, line 5 and page 21 line 10 because they are each missing a date for the elector's signature. The Clerk initially rejected the challenge to both of these signatures and that decision was correct and these signature should be counted.

23. The elector who signed at page 2, line 5 is Bob Johnson. There is no evidence that Mr. Johnson did not sign the nomination papers or that he is not qualified as an elector in the City of Oconomowoc. Upon her initial review, the Clerk consulted maps as permitted by Wis. Admin Code § EL 2.05(3) and concluded that it is more likely that Mr. Johnson's signature was obtained on 12/1/31 at the same time as his neighbors.

24. This is completely appropriate as the Clerk is required to presume the information provided is valid and is required to accept incomplete information provided there is substantial

compliance. Here, Mr. Johnson provided all of the required information except the date and the date can be deduced as explained above. This in order to give effect to the will of Elector Johnson, as required by Wis. Stat. § 5.01(1), his signature must be deemed valid.

25. Likewise, the will of Elector Curtis Loss, who signed at page 21, line 10, should be given effect. Again, there is no evidence that Mr. Loss did not sign the nomination papers or that he is not qualified as an elector in the City of Oconomowoc. Upon her initial review, the Clerk consulted the dates of the other signatures on the page and concluded that he signed on December 22, 2019. Every date of an elector's signature on that page is December 22. This is signature should be deemed valid.

B. The Signatures at Page 7, Line 8 and Page 10, Line 1 are Valid.

26. Ms. Fox also challenged the signatures at page 7, line 8 and page 10, line 1 as being collected after the date the circulator signed the verification. In her January 15, 2020 Decision, the Clerk rejected the challenge to these two signatures and that decision was correct.

27. The elector who signed at page 10, line 1 is Patricia Foti. There is no evidence that Ms. Foti did not sign the nomination papers or that she is not qualified as an elector in the City of Oconomowoc. Ms. Foti dated her signature 12/1/19. There is an extra mark near the "1", which Ms. Fox claimed indicates that the date of the signature was actually 12/11/19. The 11th would be after the date of the circulator's signature. Upon her initial review, the Clerk consulted the information provided by other electors on the page. She noted that 12/1/19 would be in sequence with regard to the other electors. Elector number 2 also signed on 12/1/19. Indeed, electors 2-9 all signed on dates prior to 12/11/19. It is beyond ridiculous to suggest that the first elector to sign the sheet did so after the next 8 electors did. The Clerk also noted that elector 2 was a relative of Ms. Foti and thus it was more likely than not that they signed at the

same time. In total, 5 members of the Foti family expressed their will to see Mr. Kowieski's name on the ballot. The will of Elector Foti must be given effect. Her signature is valid.

28. The Clerk's original analysis was completely appropriate as the Clerk is required to presume the information provided is valid and is required to accept incomplete information provided there is substantial compliance. Here, Ms. Foti provided all of the required information and the will of Elector Foti should not be disregarded on account of a stray pen mark.

29. Likewise, the WEC must give effect to the will of Elector Tyler, who signed at page 7, line 8. Ms. Fox challenged this signature claiming that Mr. Taylor signed on 12/8/19 – two days after the circulator signed the nomination papers. Upon her review, the Clerk found that she was unable to determine whether the date associated with Elector Tyler's signature was 12/6/19 or 12/8/19. As such, she correctly concluded that the presumption of validity controlled and the signature must be counted. The clerk was correct. Ms. Fox's burden of proof to prove a signature was invalid is by "clear and convince evidence." Sloppy handwriting that left the Clerk uncertain cannot satisfy this standard. Especially, in light of the fact that of the nine signatures on that page all of them were dated either 12/6/10 or 12/14/19. It is implausible that a single elector would have signed on the 8th. This signature was must be counted.

30. The clerk was correct to accept all four of the signatures discussed above. Assuming that two of these four account for her unexplained reconsideration, Mr. Kowieski has submitted at least 200 valid signatures and should be on the ballot.

IV. The Clerk Incorrectly Rejected 14 Additional Signatures Because They Were Dated After the Date the Circulator Signed the Papers. No Less Than 7 of Those Signatures should be Counted.

31. In her January 15, Decision, the Clerk rejected 14 signatures because the date of the signatures post-dated the date upon which the circulator signed the nomination papers. This decision was incorrect because there was record evidence that the circulators collected the signatures prior to the filing deadline.

32. Mr. Kowieski provided a sworn affidavit stating that he was “notifying [the Clerk] that I and other circulators were in complete control of the nomination papers being circulated, we did so in substantial compliance with the law and that that the date provided by the circulator in the Certificate of Circulator section by some were not corrected after additional signatures were collected.”

33. With regard to 7 of the 14 signatures at issue Mr. Kowieski himself was the circulator. See pages 2 & 12. Mr. Kowieski supplied a second corrective affidavit also on January 13th that directly addressed the signatures he collected, stating “I make this Affidavit for the purpose of confirming that at all times I had control of the Nomination Papers which were circulated by me and were submitted to the City of Oconomowoc on my behalf.”

34. The Clerk improperly ignored Mr. Kowieski’s corrective affidavits despite receiving them well before she rendered her January 15, 2020 Decision.

35. The fact that the corrective affidavits were not supplied within 3 days of the original filing deadline is immaterial. Wis. Stat. § 5.01(1) makes it clear that the deadline must give way to the giving effect to the will of the elector even if there has been a “failure to comply” with the provisions of Chapters 5 through 12. Wis. Stat. § 5.01(1)(“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 comply with some of their provisions.”)

36. Moreover, the Code makes clear that substantial compliance is all that is required. Wis. Admin Code § EL 2.05(5). There has been substantial compliance here. The affidavits were filed within 3 days of receipt of Ms. Fox's challenge and 2 days prior to the Clerk's review of the challenge. The Corrective Affidavits should have been considered.

37. The Corrective Affidavits supplied all the necessary information that would allow the Clerk to give effect to the will of the 14 electors who clearly expressed their will to see Mr. Kowieski's name on the ballot. There are no other deficiencies noted with these 14 signatures.

38. The Certification of a Circulator states that "I personally circulated this nomination paper and personally obtained each signature on this paper." The fact that an elector signed after the date of Circulator signed the Certification does not render the will of the elector invalid or unimportant it merely creates a question as to whether that Circulator obtained the signature. The corrective affidavit supplies that missing information and answers the question in the affirmative.

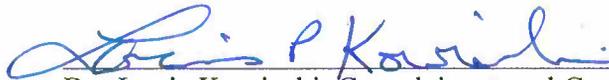
39. When considered, the Corrective Affidavits make clear that at least 7, if not all 14, of the challenged signatures must be deemed valid as there is no doubt that they were personally collected by the Circulators who signed the pages and that the Circulators maintained control of the pages at all relevant times. The will of these 14 Electors must be given effect.

40. Adding these signatures back in would give Mr. Kowieski more than the required 200 signatures. If only the 7 from the two pages he circulated himself stand he would have 207 valid signatures, based on the Clerk's January 15, 2020 Decision that found 200 valid signatures and 205 based on the Clerk's verbal statement that she removed two additional signatures. If all

14 are added back in, the total would be 214 or 212¹; either number is more than sufficient and Mr. Kowieski's name should be on the ballot.

For all the forgoing reasons the Wisconsin Election Commission should vacate the January 22, 2020 Amended Decision, determine that the 14 signatures excluded for being collected after the date of the signature of the circulators are Valid, and Order the Mr. Kowieski's name appear on the ballot for Mayor of Oconomowoc.

Dated at Milwaukee, Wisconsin, this 30th day of January 2020.



By: Louis Kowieski, Complainant and Candidate for Mayor of Oconomowoc.

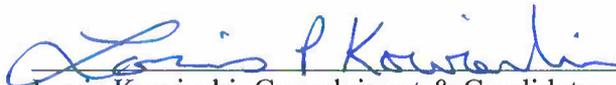
¹ There is some confusion regarding the Clerk's initial January 15, 2020 Decision. They concluded that there were 200 valid signatures and based on that finding Ms. Fox filed her appeal with the WEC. A review of her analysis and the nomination papers themselves; however, could result in a total of 197 valid signatures. Ultimately, this is a distinction without a difference. Adding back in even just the 7 signatures from the two pages Mr. Kowieski circulated would still yield 204 valid signatures. Adding all 14 back in would yield 211.

VERIFICATION

I, Louis Kowieski, being first duly sworn, on oath, deposes and states as follows:

1. That I am an elector and a resident of the City of Oconomowoc, in the County of Waukesha, Wisconsin.
2. That I am a candidate for Mayor of the City of Oconomowoc.
3. That I have read the forgoing Verified Complaint and that the same is true and correct and that I have personal knowledge of the matters contained in the same.

Dated at Milwaukee Wisconsin this 30th day of January 2020,



Louis Kowieski, Complainant & Candidate

Subscribed and Sworn to before
me this 30th day of January 2020



Notary Public State of Wisconsin
My Commission Expires 11-3-21