
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: SENATOR STEPHEN NASS

FROM: Katie Bender-Olson, Senior Staff Attorney

RE: Elections Commission Authority to Suspend Special Voting Deputies

DATE: February 8, 2021

The Wisconsin Elections Commission recently directed clerks not to dispatch special voting deputies (SVDs) to care facilities for the upcoming Spring Primary, and instead, to mail absentee ballots to facility residents who requested them. You asked whether the commission has authority to suspend the statutory requirement to send SVDs to these facilities.

State law does not empower the Elections Commission to waive the requirement for clerks to dispatch SVDs to qualifying care facilities, nor does it contain an exemption for clerks based on the pandemic. While the statutes permit clerks to mail absentee ballots to facility residents, they may do so only after two SVD visits to the facility.

SVD VOTING PROCEDURES IN CERTAIN CARE FACILITIES

State law provides a procedure for SVDs appointed by municipal clerks to conduct absentee voting in residential care facilities and certain retirement homes.¹ SVDs must be used at residential care facilities that have five or more registered voters, if at least one voter has applied for an absentee ballot. SVDs may also be used for “qualified retirement homes,” which are retirement homes that qualify to use SVD procedures because the municipal clerk determined that a significant number of the occupants lack adequate transportation to the polling place, may need assistance in voting, are aged 60 or over, or are indefinitely confined voters. [s. 6.875 (1) (at) and (4) (a) and (am), Stats.]

SVDs must meet certain qualifications, including being an eligible voter in the county, completing training, taking an oath to fully and fairly implement the absentee voting law, and not being an employee of a residential care facility or qualified retirement within the prior two years. The two political parties may submit nominations for appointment as SVDs, and a clerk must send SVDs affiliated with two different political parties to a facility whenever SVDs from different parties are available. [ss. 6.785 (4) (a) and (b), 7.30 (2) (a), and 7.315 (1), Stats.]

¹ The statute governing SVD voting, s. 6.875, Stats., *Absentee Voting in Residential Care Facilities and Retirement Homes*, defines “residential care facility” to mean an adult family home, community-based residential facility, nursing home, or residential care apartment complex. The statute separately defines “retirement home” and “qualified retirement home.” Once a clerk designates a facility as a “qualified retirement home,” the facility must be served by SVDs until the clerk makes a different determination regarding the facility. [s. 6.875 (1) (at) and (c) and (2) (a), Stats.]

A clerk must appoint at least two SVDs for the municipality, if it contains any qualified retirement home or residential care facility, and must send SVDs to conduct absentee voting at these facilities. The statute specifically states that a clerk “shall dispatch 2 special voting deputies to visit the home or facility for the purpose of supervising absentee voting procedure by occupants of the home or facility.” [s. 6.875 (4) (a), Stats.]

A clerk must also keep a publicly available list of each facility where SVDs are dispatched, along with the dates and times when SVDs intend to visit those facilities. [s. 6.875 (4) (a), Stats.] These visits must happen during the approximately three weeks before Election Day, and must be publicly noticed at least five days in advance.² The statute further states that two SVDs “shall visit the home or facility” at the designated times. [s. 6.875 (6) (a), Stats.]

Absentee voting in a facility served by SVDs differs from absentee voting for other individuals. At a residential care facility or qualified retirement home where SVDs conduct absentee voting, the SVD procedures are the “exclusive means of absentee voting in person” inside that facility. [s. 6.875 (2) (a), Stats.] This means a clerk generally cannot mail an absentee ballot to a resident in a facility served by SVDs, and instead, SVDs must deliver all absentee ballots to residents during in-person visits.

However, the statute allows a clerk to mail an absentee ballot to a resident in a facility if that resident was unable to vote with SVDs after two separate SVD visits to the facility. Specifically, the statute provides:

If a qualified elector is not able to cast his or her ballot on 2 separate visits by the deputies to the home or facility, the deputies shall so inform the municipal clerk or executive director of the board of election commissioners, who may then send the ballot to the elector no later than 5 p.m. on the Friday preceding the election. [s. 6.875 (6) (e), Stats.]

State law also limits who may serve as an absentee ballot witness for a resident in a care facility served by SVDs, and who may assist a resident in completing a ballot. At facilities where SVDs conduct voting, only the SVDs may serve as absentee ballot witnesses, and only an SVD or a relative of the voter may assist that resident in completing his or her absentee ballot. Any assistance provided by a relative, and all voting by the resident, must be conducted “in the presence of” the SVDs. [s. 6.875 (6) (c) 1., Stats.]

A facility resident who cannot vote using SVDs engages in regular absentee voting by mail. As noted, the statute authorizes a clerk to mail an absentee ballot to a resident who was unable to vote during two SVD visits to the facility. For these voters, the regular rules of absentee voting apply. A resident receiving an absentee ballot by mail may receive help from any person in completing his or her ballot (other than his or her employer or a union representative),³ and any adult U.S. citizen may witness the resident’s absentee ballot. [s. 6.87 (4) (b) 1. and (5), Stats.]

² SVD voting must be conducted at a facility no earlier than the fourth Monday before the election and no later than 5:00 p.m. on the Monday before the election. [s. 6.875 (6) (a), Stats.]

³ An absentee voter who has difficulty reading, writing, or understanding English or is unable to mark his or her ballot due to disability may select any individual, other than the voter’s employer or union representative, to assist in marking the ballot. [s. 6.87 (5), Stats.]

ELECTIONS COMMISSION ACTION REGARDING SVDs

The Elections Commission directed clerks to suspend use of SVDs in care facilities for all elections held in 2020,⁴ and recently issued similar instructions for the upcoming Spring Primary on February 16, 2021. On January 15, 2021, the Elections Commission adopted a motion directing clerks to mail absentee ballots to voters in care facilities, rather than dispatching SVDs to conduct absentee voting.

Commission members noted that policies implemented at care facilities prohibit visitors, which they believed would prevent SVDs from being admitted. Certain members expressed the opinion that requiring SVDs to visit facilities twice, despite knowing the SVDs would be denied entry, is inefficient and futile. The commissioners then adopted a motion advising clerks to skip the statutory requirement to dispatch SVDs to facilities, and instead, proceed directly to the step of mailing absentee ballots to the facility.

The precise motions adopted by the Elections Commission at the January 15, 2021 meeting are included below. The first motion directs clerks to mail absentee ballots to care facilities at the upcoming Spring Primary in February because SVDs cannot complete the required SVD visits, and the second relates to researching approaches to use at future elections:

MOTION: Because of the prohibition on visitors in care facilities, including Special Voting Deputies (SVD), clerks will be unable to accomplish the two in-person SVD visits and should therefore proceed directly to mailing ballots to voters who request them who reside in a care facility that would be otherwise served by SVD's for the February 16, 2021 primary.

Roll call vote: Bostelmann: Aye Glancey: Aye
Jacobs: Aye Knudson: Aye
Spindell: No Thomsen: Aye

Motion carried 5-1.

MOTION: The commission directs staff to proceed with researching alternative ways to operate the SVD program should prohibitions on visiting nursing homes and care centers continue due to COVID-19. Moved by Commissioner Spindell, seconded by Commissioner Bostelmann on the condition that the motion not be limited to COVID-19 but any kind of pandemic or other infection.

Roll call vote: Bostelmann: Aye Glancey: Aye
Jacobs: Aye Knudson: Aye
Spindell: Aye Thomsen: No

Motion carried 5-1.

⁴ The Elections Commission issued several publications in 2020 regarding SVDs, including the following memoranda to clerks: [March 12, 2020 memorandum](#); [June 24, 2020 memorandum](#); and [July 13, 2020 memorandum](#).

Following adoption of the motions, the Elections Commission issued a [memorandum](#) to clerks directing them not to send SVDs to facilities, and instead, to immediately mail absentee ballots to facility residents who requested them. Specifically, the January 15, 2021 memorandum states that:

The Wisconsin Elections Commission determined on January 15, 2021 that Special Voting Deputies (SVDs) will not be dispatched to care facilities or nursing homes to administer voting for the February 16, 2021 Spring Primary. Due to prohibitions of visitors at qualified care facilities, the required two visits by SVDs will not be allowed, and clerks should mail absentee ballots to residents of care facilities with absentee requests on file who would normally be served by SVDs. Please note that this decision will be revisited by the Commission prior to the April 6, 2021 Spring Election.

The memorandum further advises clerks that facility residents may need assistance from facility staff to vote, and that staff may assist residents in completing absentee ballots, absentee certificate envelopes, voter registration forms, or absentee ballot requests, and may serve as absentee witnesses or sign special certificate envelopes.⁵

ELECTIONS COMMISSION LACKS STATUTORY AUTHORITY TO WAIVE SVD REQUIREMENTS

State law does not exempt clerks from the statutory requirement to send SVDs to qualifying care facilities based on a pandemic, nor does it empower the Elections Commission to waive the requirement. If even one resident at a residential care facility has applied for an absentee ballot, then state law mandates that the clerk “shall dispatch 2 special voting deputies” to conduct absentee voting within the facility. [s. 6.875 (4) (a), Stats.] The statute explicitly exempts a clerk from the requirement to dispatch SVDs to a residential care facility if there are fewer than five registered voters at the facility. There is no similar exemption based on contagious disease or conditions within the facility.

Further, there is no legal obstacle to clerks dispatching SVDs as required, so the commission cannot argue it is interpreting statutes to reconcile conflicting requirements. There is no current statewide order prohibiting admission of SVDs into care facilities, nor is it clear that the Department of Health Services (DHS) would have authority to issue such an order.⁶ Individual care facilities may choose to implement policies limiting visitors or to follow guidelines issued by regulating agencies, such as the federal Department of Health and Human Services’ Centers for Medicare and Medicaid Services (CMS). However, facility policies and agency guidance do not have the force of law and do not exempt clerks from statutory requirements. Moreover, the CMS guidelines do not suggest a blanket prohibition on visitors, and instead, allow for some in-person visitation if facilities follow best health practices.⁷ CMS

⁵ State law generally requires voters to provide photo identification (“Voter ID”) before receiving a ballot, but provides an alternative for residents of care facilities. An absentee voter living in a residential care facility or qualified retirement home where SVDs are not sent may provide a signed statement from an authorized representative of the facility certifying that the resident’s name and address are correct, in lieu of Voter ID. [s. 6.87 (4) (b) 5., Stats.]

⁶ In *Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court invalidated DHS Emergency Order #28 (the “Safer-at-Home Order”), in part because it was not promulgated under rulemaking procedures in ch. 227, Stats. A court may apply similar reasoning and invalidate a DHS statewide order prohibiting all visitors to care facilities, if DHS were to issue such an order.

⁷ See the [memorandum](#) issued by CMS on September 17, 2020, entitled: “*Nursing Home Visitation - COVID-19.*”

guidance specifically addressing voting rights also reminds facilities that they must allow and facilitate voting for their residents.⁸

Finally, state law does not permit clerks to mail absentee ballots to facility residents prior to sending SVDs. The statute authorizes clerks to mail absentee ballots to residents, but only after “2 separate visits by the deputies to the home or facility.” [s. 6.875 (6) (e), Stats.] Bypassing the required step of dispatching SVDs to facilities that might deny entry may be efficient and economical, but it is not authorized by state law. The Elections Commission has authority over the administration of elections laws, but this authority does not include exempting clerks from duties imposed by the statutes.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

KBO:ksm

⁸ See the [memorandum](#) issued by CMS on October 5, 2020, entitled “*Compliance with Residents’ Rights Requirement related to Nursing Home Residents’ Right to Vote.*”