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April 24, 2024

Hon. Josh Kaul
Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53703

**Re: Request for Legal Opinion:
Interpreting Article III § 7(2) of the Wisconsin Constitution**

Dear Attorney General Kaul:

The Dane County Corporation Counsel respectfully requests an Attorney General opinion interpreting the recent amendment to the Wisconsin Constitution regarding Election Officials. Our County Clerk and municipal clerks have raised many questions regarding the application of this amendment and its impact on upcoming elections. This is an issue of statewide importance that warrants guidance from the Attorney General for county clerks, municipal clerks and election officials to prepare for the upcoming partisan primary on August 9, 2024 and the general election in November.

2023 Senate Joint Resolution 78 placed two referendum questions on the ballot for the 2024 Spring election that proposed amendments to the Wisconsin Constitution. Both referenda questions were approved by the voters. Question 2 presented the following proposed amendment: “**Election officials.** Shall section 7(2) of article III of the constitution be created to provide that only election officials designated by law may perform tasks in the conduct of primaries, elections, and referendums?” The effect of the referendum election is that the Wisconsin Constitution now includes a provision stating, “No individual other than an election official designated by law may perform any task in the conduct of any primary, election, or referendum.” Wis. Const. art. III, §7(2).

While the amendment creating Article III Section 7(2) seems simple and straightforward on its face, it is not so in application. Who is an “election official designated by law” is not clearly defined in the Wisconsin Statutes. Likewise, what constitutes a “task” in the conduct primaries, elections, and referendums is not defined.

The Wisconsin Supreme Court has provided guidance for construing constitutional amendments in *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408:

The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328. Constitutions should be construed so as to

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promote the objects for which they were framed and adopted. *Id.* “The constitution means what its framers and people approving of it have intended it to mean, and that intent is to be determined in light of the circumstances in which they were placed at the time[.]” *State ex rel., Bare v. Schinz*, 194 Wis 397, 404 N.W. 509 (1927) We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Schilling v. Wisconsin Crime Victims Rights Bd.*, 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623 (citing *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 44, 270 Wis. 2d 318, 677 N.W.2d 612; *Cole*, 264 Wis. 2d 520, ¶ 10, 665 N.W.2d 328.) See also *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

Wisconsin Statutes § 5.02(4e) defines an “Election official” as “an individual who is charged with any duties relating to the conduct of an election.” Section 5.02(4) defines an “election” as “every public primary and election.” Sub(16s) defines a referendum as an election. If these statutes are controlling, the issue of who is an election official is easily resolved. However, the issue is complicated by Wis. Stat. § 7.30(2)(a) which states “only election officials appointed under this section or s. 6.875 may conduct an election.” (Wis. Stat. § 6.875 applies to special voting deputies who assist residents of residential care facilities and retirement homes.) Section 7.30(2)(a) is much more restrictive than Section 5.02(4)(e), as only chief inspectors, inspectors, tabulators, and special voting deputies are mentioned in that section. A literal and textual interpretation of that statute would mean that county clerks and municipal clerks and their employees, and other officials with a role in elections like boards of canvassers are not election officials that may conduct elections.

There are many county and municipal officials that have statutory roles in elections that are not appointed under Wis. Stat. § 7.30(2)(a). Wisconsin Stat. § 60.33(4)(a) states town clerks “perform the duties required by chs. 5 to 12 relating to elections.” Village Clerks “perform any duties prescribed by law relative to elections, to keep subject to inspection all election returns required to be filed in the clerks office” pursuant to Wis. Stat. § 61.25(1). All municipal clerks including city clerks have “charge and supervision of elections and registration in the municipality.” Wis. Stat. § 7.15(1). The county clerk is designated as the chief election officer of the county by Wis. Stat. § 59.23(2)(i). Municipal and County Board of Canvassers also play a significant role in the election process. Wis. Stat. §§ 7.53, 7.60, and 9.01 for recounts. This is not intended to be an exhaustive list of officials who play a statutory role in elections and that are not identified as election officials in Wis. Stat. § 7.30(2)(a).

The definition of “election official” in Wis. Stat. § 5.02(4e) should be used to define an “election official designated by law” in Wisconsin Constitution Art. III, Sec. 7(2). This would include all individuals who are charged with any duties relating to the conduct of elections. This would encompass all of the officials with statutory duties regarding elections set forth above. County clerks and municipal clerks have statutory authority to appoint one or more deputies who are authorized to perform the duties of the clerk. These deputies should also be considered election officials authorized to perform tasks in the conduct of primaries, elections and referendums.

Indeed each municipal clerk “has charge and supervision of elections and registration within the municipality.” Wis. Stat. § 7.15(1). This provision should be construed to give clerks authority and discretion to appoint as many “election officials” as are necessary to successfully hold an election, so long as they comply with the requirement that they are elector of the county. Wis. Stat. § 7.30(2)(a). That was the practice at the time of adoption of the amendment. It is also consistent with the stated intent of one of the authors of the amendment. Senator Eric Wimberger was primarily concerned with outsiders or “private employees” involvement in election administration. Senator Wimberger has stated if clerks are worried about whether a person is eligible to do an election related task they can just tell them that they’re “hereby designated” to do that task. He was further quoted as stating:

“You just don’t want people collecting ballots that are not even monitored or are completely disconnected from the clerk who’s supposed to be managing all this, he said. But, he added, “if you’re working at the clerk’s direction, that certainly means you’ve been designated to do the thing that you’re doing.”¹

Another issue that should be clarified is what is a “task” in the conduct of primaries, elections and referendums. The constitutional amendment adds verbiage not included in any of the election statutes in Wis. Stat. Chapters 5-12. There are many “tasks” that are collaterally related to elections. Most counties contract with commercial printers to produce ballots. Municipal and county IT departments assist in maintaining the security of the software and hardware protecting the election technology such as the voter registration system and results tabulated by electronic voting equipment. The vendor of the election systems provides technical guidance regarding operation and maintenance. Municipal clerks often rely upon local law enforcement to transport sealed ballots and election materials to the county clerk and upon other municipal employees to temporarily assist with absentee ballot mailings or other election preparation activities. There are undoubtedly other examples. The question is whether these “tasks” which are vital to the conduct of elections must be performed by an “election official” that is formally appointed by a local clerk and executed an oath.

The phrase “in the conduct of” is a propositional phrase that indicates “a limitation, qualification or circumstance.”² The best answer to this question is that “tasks” in the conduct of elections as used in the amendment is limited to those duties of an election official prescribed by statute. As an example, Wis. Stat. § 60.33(4)(a) states town clerks “perform the duties required by chs. 5 to 12 relating to elections,” and village clerks “perform any duties prescribed by law relative to elections. “Tasks” as used in the amendment should be limited to those duties specified by statute, generally in Wis. Stat. Chapters 5 through 12. Therefore, a commercial printer who contracts with the county clerk need not be an “election official.” A county IT employee who maintains the security functions of the county’s election systems need not be an “election official.” This interpretation is also consistent with the intent of the co-author of the amendment. Senator Wimberger was quoted as stating, “it was unrealistic to interpret the provision as banning outside help for all election-related activities.” The Senator further stated “there’s going to be a distinction

¹ <https://www.votebeat.org/wisconsin/2024/03/29/proposed-constitutional-amendment-ballot-question-election-administration-clerks/> (March 29, 2024).

² <https://www.merriam-webster.com/dictionary/in>

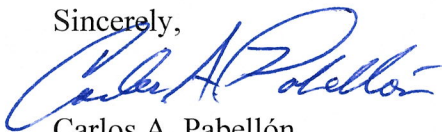
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between election preparation and the conducting of the election.” “And I would say that the conducting of the election happens when the polls open or handling ballots.”³

In conclusion, the term “election official” as used in Wisconsin Constitution Art. III, Sec.7(2) should be defined by Wis. Stat. § 5.02(4e), “an individual who is charged with any duties related to the conduct of an election,” or an individual appointed by one who is charged by statute with election duties. The phrase “task in the conduct of primaries, elections, or referendums” should be construed to apply to only to those duties prescribed by statute regarding the conduct of elections.

Finally, of course, there will be no legislative action this year following adoption of the constitutional amendment and prior to election officials being required to interpret and apply the language. Local clerks are currently arranging for assistance in preparing for the fall elections and signing contracts with vendors. The Legislature will have an opportunity to clarify its intent in the next legislative session. In the meantime, county and municipal clerks need guidance in how to apply the language of the amendment.

Sincerely,



Carlos A. Pabellón
Dane County Corporation Counsel

cc: Scott McDonell, Dane County Clerk (via email)

³ <https://www.votebeat.org/wisconsin/2024/03/29/proposed-constitutional-amendment-ballot-question-election-administration-clerks/>