



Wisconsin Elections Commission

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October 3, 2022

Mitchell and Jillian Berman
3905 8 Mile Road W.
Caledonia, WI 53108

Linda Terry, Clerk, Village of Raymond
2255 76th Street
Franksville, WI 53126

Sent via email: mitchell_berman_rn@yahoo.com and clerk@raymondwi.com

Re: In the Matter of Mitchell Berman and Jillian Berman v. Linda Terry (EL 22-18)

Mr. Berman, Ms. Berman, and Clerk Terry,

This decision letter is in response to the verified complaint submitted by Mitchell Berman and Jillian Berman (Complainants) to the Wisconsin Elections Commission (Commission), which was filed in reply to actions taken by an election official during a registration challenge under Wis. Stat. § 6.48. The Complaint alleges that the Village of Raymond Clerk, Linda Terry (Respondent), erred by finding that the Complainants were not qualified and changing their registration statuses from eligible to ineligible.

Complaints "...shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur." Wis. Stat. § 5.06(1). Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

The Commission has reviewed the Complaint, the Response of the Village of Raymond Clerk, Complainants' Reply, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission has determined that the Complainants have shown probable cause to believe that a violation of law or abuse of discretion occurred with relation to Wis. Stats. §§ 6.02, 6.10, 6.325, and 6.48.

Summary of Complaint, Response, and Reply

The Complaint alleges that the Respondent, in deciding a Wis. Stat. § 6.48 challenge to the Complainants' residency qualifications, based her decision on an erroneous interpretation of Wisconsin's residency statutes, and that the evidence provided did not meet the beyond a reasonable doubt standard of proof required. Following this alleged erroneous interpretation, the Respondent changed the Complainants' registration statuses from eligible to ineligible, and the Complainants ask the Commission to order the Respondent to reverse that action.

Wisconsin Elections Commissioners

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The Complaint states that the Complainants' new home being built within the Village of Raymond was scheduled to be complete by November 2021. In expectation of this date, the Complainants explain that they sold their home, stored their belongings, set up utilities at the new home, registered their child to attend school, updated their vehicle information and driver licenses to the new address, began receiving mail at the new address, licensed their pets to that address, and overall allege that they "fixed their place of habitation in Raymond by December, 2021." One of the Complainants ran for the local school board, and the complaint states that her nomination papers were not challenged. Supply chain issues delayed the home's completion, and it had not received an occupancy permit as of March 2, 2022. The Complainants argue that "[a]s a result, [the Complainants] are more or less homeless, and have been forced to stay temporarily with family members," that "[the Complainants] are presently temporarily absent from the address," and that "[t]heir habitation is fixed there, and they intend to return once the dwelling unit is safe for occupation."

The Complaint alleges that that Respondent's focus on the lack of an occupancy permit is an erroneous interpretation of statute, and that the Commission's information on how homeless voters may register to vote is applicable to them. The Complaint states that if the Complainants are not able to register and vote in the Village of Raymond, they will be disenfranchised completely.

The Response details the Wis. Stat. § 6.48 challenge which included an evidentiary hearing held on February 18, 2022. The Respondent states that "[t]he most pertinent fact adduced at the hearing, in my judgment, was the admission by both Complainants that neither had ever spent an overnight in the Village of Raymond at any time" (footnote omitted). The Respondent stated that the Raymond "residency had not been fixed or established, and while there was a future intent to fix that home as Complainants' residence, Complainants would not be *returning* to the residence, they would in fact be establishing this home as their residence for the first time."

The Respondent stated that "[u]nder the facts established at the hearing, there was no question of the Complainants' intent to establish the 8 Mile home as their residence. However, there was never the physical presence that is a condition precedent to meet the residency requirements under Wis. Stat. § 6.10(1)." The Respondent notes that the Complainants have been staying with family and friends. The Respondent also states that her Wis. Stat. § 6.48 determination was not based on any finding concerning the homeless status of the Complainants.

In the Reply, the Complainants argue that "residence for voting purposes does not depend on the legality of the residence for zoning or occupancy purposes" and point to the Wisconsin Elections Commission's Memo called "Enabling Qualified Homeless Individuals to Vote" for support. The Reply states that the Complainants are "physically present at the residence frequently (daily or nearly so). Legally, statutes and administrative code are silent on the frequency or duration of physical presence required." The Reply specifically addresses the Respondent's finding that the Complainants had never spent an overnight in the Village of Raymond. The Reply states that the Complainants stated during the Wis. Stat. § 6.48 hearing that they "have not stayed *in the home* overnight" and alleges that "the Bermans have spent nights on their property, just not in the structure under construction." Finally, the Reply states that the "Raymond residence is the only logical place from which they could vote."

Supporting documents, including the Respondent's decision in the Wis. Stat. § 6.48 challenge, will be examined in Commission Findings, below.

Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

Under Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Commission is provided with the inherent, general, and specific authority to consider the submissions of the parties to a complaint and to issue findings. In instances where no material facts appear to be in dispute, the Commission may summarily issue a decision and provide that decision to the affected parties. This letter serves as the Commission's final decision regarding the issues raised by Mitchell and Jillian Berman's complaint.

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

Commission Findings

The Commission must consider the information that the Respondent had available to her when she issued her decision in the Wis. Stat. § 6.48 challenge. To the extent the supporting materials for this complaint elucidate what was presented at that challenge, they will be examined and considered. First, the Commission will examine the findings of the Wis. Stat. § 6.48 challenge.

The Respondent, in writing the determination stated that the following facts were established:

- The Challenged Electors have never resided in the Village of Raymond.
- The Challenged Electors are in the process of constructing their "dream home" at 3905 8 Mile Road (the address listed as their residence on their Voter Registration Application).
- This home was under contract to be completed in November, 2021, but has not been completed and no Occupancy permit has been issued.
- Pending completion of construction, Challenged Electors have been temporarily housed in homes of friends outside of the Village.
- Challenged electors consider themselves to be homeless with the intent to reside at their 8 Mile Road home upon its completion.
- Challenged Electors visit the home on a daily basis, have obtained Wisconsin Drivers licenses reflecting this address, have paid taxes for the property, and have obtained dog license(s) at the address and have a mailbox there.

In her conclusion, the Respondent stated that "I must find while there is no doubt that there is an intent to establish residency at the 8 Mile Road property, their admitted acts do not establish that they are residents of such place."

The Complainants and the Respondent agree on a number of points. The Complainants are building a home at 3905 8 Mile Road, construction has been delayed and the home has not been completed, the Complainants have never spent a night inside the uncompleted house, the Complainants have been staying temporarily with other individuals, the Complainants visit the home daily or nearly daily, they have obtained licenses, paid taxes, and changed applicable documents to reflect the Raymond address. Further, the Complainants and the Respondent agree that the Complainants have the intent to reside at the Raymond address. The Commission accepts these facts as established and not in dispute. The documents provided by the Complainants show that they are treating the Raymond property as a residence beyond the purposes of voter registration. However, this speaks more to intent than to physical presence at the property. The Commission will briefly address the discussion of homelessness within the filings before discussing the crucial areas of disagreement.

Wisconsin Statute § 6.10, concerning Elector Residence, does not mention homelessness. The same statutory provisions apply to those who are homeless and those who are not homeless. The memo quoted in the filings is titled Enabling Qualified Homeless Individuals to Vote, and it is intended to help individuals who are homeless and who meet the residency requirements of Wis. Stat. § 6.10 to properly register to vote. In particular, the memo provides a template that a social service agency may use to certify that an individual does not have a traditional residence, i.e., a home, but *does* reside in a particular place. The form serves as a proof of residency for that place, which will allow an individual to vote from the specific ward where that person resides, albeit not within a home. The facts of this complaint raise difficult issues concerning how one meets the physical presence requirement of Wis. Stat. § 6.10(1). However, the issue is not a lack of documents or the lack of a place that *could* serve as a residence, but rather whether a lack of residency was found beyond a reasonable doubt. A finding of homelessness itself could not address this issue.

The main statute at issue in this complaint is Wis. Stat. § 6.10(1):

The residence of a person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return.

The relevant question in this complaint is: Did the Respondent properly determine that the challenging elector demonstrated beyond a reasonable doubt that the Complainants did not qualify as residents of the Village of Raymond under Wis. Stat. § 6.10(1)? This question has two component parts. The Commission will first address whether the Respondent correctly applied the beyond a reasonable doubt standard to the Wis. Stat. § 6.48 challenge process, and then will address whether the Respondent correctly interpreted the statute.

It is uncontested that the Complainants are not sleeping in the under-construction home. It is also uncontested that the Complainants have been staying outside the village while the home is being built. Further it is uncontested that the Complainants have visited the property daily or nearly daily. There is a dispute about whether or not the Complainants have ever spent a night at their property. The Commission can assume for the sake of argument that the Complainants did spend "nights" on the property. However, the Complainants were generally sleeping at a home outside of the Village of Raymond owned by someone else. The Commission finds that it was not an abuse of discretion for the Respondent to find beyond a reasonable doubt that the Complainants

have been “temporarily housed in homes of friends outside of the Village,” “visit the home on a daily basis,” and have “an intent to establish residency at the 8 Mile Road property.”

Though the Commission has not found an abuse of discretion concerning the Respondent’s determination of the facts, it must still examine the statutes for any errors of law. Relevant to the Commission’s consideration is whether there are any other places where the Complainants have established residency. Wis. Stat. § 6.10(11) states that “[n]either an intent to acquire a new residence without removal, nor a removal without intent, shall affect residence.” In this case the Complainants had intent to acquire a new residence and removal from the old residence. Further, when read in conjunction with Wis. Stat. § 6.10(1), the Complainants do not intend to return to their former residence where their habitation had been fixed prior to their move, which means that location cannot be their residence.

Wis. Stat. § 6.10(8) states that “[n]o person gains a residence in any ward or election district of this state while there for temporary purposes only.” When read in conjunction with § 6.10(1)’s language that a person cannot have “any present intent to move” when establishing a residence and based on the Respondent’s finding that the Complainant’s were “temporarily housed” with other individuals, the homes of those individuals cannot be the Complainant’s residence for voting purposes. They are staying for temporary purposes and have a present intent to move into their home when it is completed. Altogether, the Reply correctly¹ states that “to accept Respondent’s interpretation of the law would disenfranchise them completely.”

In this context, the Commission must examine if the 3905 8 Mile Road property is where the Complainants’ “habitation is fixed.” The other elements are not at issue. If the Complainants’ habitation is fixed, then the other facts establish that they would have no intent to move and that they would intend to return to that habitation when absent. The question of where someone sleeps may be relevant, and it is reflected to a certain extent in the statutes. Wis. Stat. § 6.10(4) states that “[t]he residence of an unmarried person sleeping in one ward and boarding in another is the place where the person sleeps.” Wis. Stat. § 6.10(7) states:

A guest at a national or a state soldiers’ home in this state, a guest at a home for the aged supported by benevolence, or a patient of any county home or other charitable institution, resides in the municipality where the home is located and within the ward where the guest or patient sleeps, unless before becoming a guest or patient at the home the guest or patient elects to maintain his or her prior residence as his or her voting residence.

None of these situations involving where a person sleeps apply to the Complainants. They are married, and nothing suggests that they are guests or patients as described above. Since sleeping is only mentioned in these two provisions and no others, the Commission will not apply that qualification as a deciding factor in this Complaint. Under the facts as established at the Wis. Stat. § 6.48 challenge, the 8 Mile Road property appears to be the only property that could qualify as a residence for voting purposes for the Complainants. The Commission finds that, under the unusual circumstances of this complaint, the fact that the Complainants were found to

¹ Under Wis. Stat. § 6.15, individuals in a similar circumstance may be able to vote for president and vice president, but no other offices. Given that the next presidential election is over two years away, this consideration did not factor into the Commission’s consideration.

“visit the home on a daily basis” satisfies the physical requirement that a person’s “habitation is fixed” at the residence, and that the Respondent did not correctly apply the statute to the facts she determined at the Wis. Stat. § 6.48 hearing. The Commission thus orders the Respondent to change the Complainant’s registration status from ineligible to eligible.

Though the Commission is reversing the Respondent’s decision in the Wis. Stat. § 6.48 challenge underlying this complaint, the Commission intends to make clear that the result of this Complaint is fact specific and that daily visits to a particular property will in most cases not result in that property being a residence for voting purposes. The uncontested facts of this Complaint showed that the Complainants abandoned their former residence, that they were living with other individuals on a temporary basis, that they intended to reside at the 8 Mile Road property, and that they visited the property daily. A difference on any of these points could have changed the Commission’s decision.

Commission Decision

Based upon the above review and analysis, the Commission finds probable cause to believe that a violation of law or abuse of discretion has occurred with regards to Wis. Stats. §§ 6.02, 6.10, 6.325, and 6.48. The Commission orders the Respondent to change the registration status of Mitchell Berman and Jillian Berman from inactive to active.

Right to Appeal – Circuit Court

This letter constitutes the Commission’s resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties have questions about this letter or the Commission’s decision, please feel free to contact me.

Sincerely,



Meagan Wolfe
Wisconsin Elections Commission Administrator

cc: Commission Members
Attorney Stacie Rosenzweig (via email)