

State of Wisconsin \ Elections Board

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DATE: August 23, 2007

TO: Government Accountability Board Members

FROM: Kevin J. Kennedy, Executive Director, State Elections Board *KJ*

SUBJECT: Review of Rules, Orders, Formal Opinions and Internal Operating Procedures

Pursuant to his role under 2007 Wisconsin Act 1, Section 209 (6)(a), Terry Anderson has asked me to provide Government Accountability Board (GAB) members with information concerning the required review of State Elections Board (SEB) rules, orders, formal opinions and certain internal operating procedures by the GAB. This memorandum provides a brief description of the rules, orders, formal opinions and internal operating procedures that I believe would be subject to review by the GAB. I have also described a few transitional items I believe will be of interest to GAB members.

The GAB is required to hold one or more public hearings on the question of reaffirmation of each administrative rule promulgated by the SEB and each order issued by the SEB that is in effect. 2007 Wisconsin Act 1, Section 209 (2)(e). The GAB is also required to hold one or more public hearings on the question of reaffirmation of each formal opinion issued by the SEB. 2007 Wisconsin Act 1, Section 209 (2)(f).

The rules, orders and formal opinions of the SEB expire one year from the initiation date of 2007 Wisconsin Act 1, subject to a limited extension by the GAB. The GAB may amend or repeal a rule following the procedures established in subchapter II of Chapter 227, Wis. Stats. The GAB may reaffirm an order or formal opinion of the SEB.

The GAB is also required to review all internal operating procedures of the SEB that affect the manner in which the GAB interrelates with persons who are not employees of the GAB. 2007 Wisconsin Act 1, Section 209 (2)(g). The review shall specifically address the degree to which GAB employees are authorized to perform their functions without direct supervision or approval of the GAB. No change may be made to an internal operating procedure subject to this review unless the GAB holds a public hearing and specifically approves the change.

Administrative Rules

The SEB has extensive rule making authority that carries over to the GAB. In addition to the general grant of rulemaking authority applicable to all state agencies set out in s. 227.11 (2)(a), Stats., the SEB is specifically authorized to promulgate administrative rules under the following statutory provisions: Ss. 5.05 (1)(f); 5.905 (3); 5.93; 6.26 (3); 6.36 (6); 6.92 (1); 6.925; 7.08 (1)(d); 7.31 (1); 7.315 (1), (2); 7.41 (5); 8.07; 8.40 (3); and 11.21 (16), (17) Wis. Stats. A copy of the applicable statutory provisions accompanies this memorandum.

Pursuant to that authority, the State Elections Board has promulgated or directed promulgation of the following administrative code chapters:

EIBd Chapter 1 Campaign Financing

This chapter contains thirty-eight rules developed since the inception of the Elections Board in 1974. The rules interpret provisions of Chapter 11, Wis. Stats. These rules reflect policies developed by the SEB for the administration of statutory campaign finance requirements.

EIBd Chapter 2 Nominations

This chapter contains four rules developed to provide guidance on the preparation and sufficiency of election-related petitions including nomination papers. The rules also set out the procedure to be followed to challenge the validity of election-related petitions including nomination papers.

EIBd Chapter 3 Mail Registration

This chapter currently contains one rule on the distribution of voter registration forms by municipal clerks. The chapter has been re-written to reflect the implementation of the Statewide Voter Registration System (SVRS) and requirements for special voter registration deputies. The revised chapter has been sent to the appropriate Legislative committees for review before promulgation is complete. Legislative Clearinghouse Rule (CR) 07-59

A rule establishing the procedure for issuing provisional ballots to voters registering at the polling place on Election Day who are unable to provide the required driver's license information was promulgated as an emergency rule. The permanent rule is currently pending in the Legislative review process. Legislative Clearinghouse Rule (CR) 06-137

A separate rule establishing the costs for voter registration data was promulgated as an emergency rule. The appropriate Legislative committees recently completed their review of the permanent rule with no action. The SEB is scheduled to review the rule at its September 12, 2007 meeting in Waukesha. Legislative Clearinghouse Rule (CR) 07-43

Additional provisions will be added as the business processes for utilizing specific functions of SVRS are developed and to implement recommendations of a report from the Legislative Audit Bureau.

EIBd Chapter 4 Election Observers

This chapter currently contains one rule. The rule reflects a since repealed statutory provision on the appointment of election observers. The Board is authorized to promulgate rules regarding the proper conduct of observers, including the interaction of those individuals with election inspectors (poll workers) and other election officials. S. 7.41 (5), Wis. Stats. The SEB adopted a staff recommendation to repeal and recreate this chapter to reflect Board policies on the conduct of observers including a recently issued formal opinion on circulating petitions near a polling place. E.I. Bd. Op. 2007-01.

EIBd Chapter 5 Ballot Security

This chapter currently contains one rule describing the physical security provisions for paper ballots. The SEB recently adopted a staff recommendation to incorporate the electronic voting equipment security procedures into the agency's administrative code. Staff is currently drafting that rule for consideration by the Board at its next meeting.

EIBd Chapter 6 Procedure

This chapter contains six rules developed to clarify various administrative policies for staff assistance, filing documents and electronic filing of campaign finance reports. These rules will need to be revised to harmonize with Ethics Board rules on practice and procedure under the auspices of the GAB.

EIBd Chapter 7 Approval of Electronic Voting Equipment

This chapter contains three rules developed to specify the procedure for the approval of electronic voting equipment. The SEB recently adopted a staff recommendation to modify the rules to specify the means of access to the escrowed source code and enable the agency to conduct independent testing on minor software and hardware upgrades. The SEB also adopted a staff recommendation to incorporate the electronic voting system post election audit procedures into the agency's administrative code.

EIBd Chapter 8 Forms

This chapter currently contains one rule describing the campaign finance forms used by the SEB. Generally forms that require the collection of information from the public should be listed in the administrative code. None of the agency's election administration forms are currently in the rule. These rules will need to be revised to harmonize with Ethics Board forms and the numbering system developed for forms under the GAB.

EIBd Chapter 9 Challenges at a Polling Place

This chapter contains six rules developed to specify the procedure for challenging the qualifications of voters pursuant to Ss. 6.92 et seq., Wis. Stats. The content of these rules are incorporated into the challenge forms and training materials used at the polling place by election officials.

EIBd Chapter 10 Procedures for Complaints

This chapter contains ten rules developed to specify the procedure for filing and adjudicating campaign finance and election-related complaints. These rules will need to be revised to harmonize with the procedures in 2007 Wisconsin Act 1 and Ethics Board rules on practice and procedure under the auspices of the GAB.

EIBd Chapter 11 Training and Certification of Election Inspectors

This chapter contains five rules developed to specify the training and certification requirements for chief election inspectors. These individuals are in charge of the polling place on Election Day. The SEB is required to administer a training and certification program for chief inspectors.

EIBd Chapter 12 Training and Certification of municipal clerks

The State Elections Board recently adopted a staff recommendation to specify the training requirements for municipal clerks. The Board will consider a revised version of the draft rules at its September 12, 2007 meeting in Waukesha. The SEB is required to administer a training program for municipal clerks and other election officials.

A copy of the current SEB administrative code provisions accompanies this memorandum.

In addition to reviewing the substance of existing administrative rules, the agency staff will have to revise rules approved by the GAB to change references to the "Elections Board" to the "Government Accountability Board." This provides an opportunity to reorganize the approved rules into groupings that reflect the substantive areas of the GAB: campaign finance, disclosure, elections, ethics and lobbying. The procedural policies adopted by the GAB will also be reflected in the revised code

Orders

The SEB disposes of complaints filed with the agency by issuing an order. The SEB through its Executive Director also issues orders directing the recount of elections for state and national office. These orders are issued after the SEB staff has determined the sufficiency of a recount petition.

Complaints may be filed with the agency pursuant to Section 5.05 (3), Wis. Stats. (2005); Sections 5.06, 5.061, 11.61 (5), 11.66 (2007); and EIBd 2.07, 2.11 Wis. Admin. Code. The disposition of these complaints is based on the application of law to a specific fact situation. The disposition of the complaint may be reviewed in court. If the Board extends a settlement offer for violation of the campaign finance law, the Board has the onus to enforce its position through an enforcement action pursuant to Section 11.60 (4), Wis. Stats.

If the Board issues an order directing a local election official to conform their conduct to law pursuant to Sections 5.06, Wis. Stats., the Board's order may be reviewed in circuit court. Similarly, the Board's disposition of a complaint filed under the Help America Vote Act of 2002 (HAVA) pursuant to Section 5.061, Wis. Stats., is subject to judicial review under Chapter 227, Wis. Stats.

Since 1996, the State Elections Board staff has opened 394 files based on complaints filed with the agency. These include challenges to the qualifications for candidates to access to the ballot, which are now moot and allegations of failure to comply with campaign finance requirements which may be ultimately resolved through court action. For example the complaint against the Green for Wisconsin Committee would not be subject to review because the parties entered into a settlement and the Supreme Court dismissed the legal proceeding. The underlying policy that drove the SEB's order in that case has since been incorporated into the administrative code, EIBd 1.39 and would be reviewed by the GAB.

I do not believe that there are any SEB orders subject to review by the Government Accountability Board. Since the orders disposed of complaints on a specific set of facts, the issues have been resolved. The order disposing of the complaint does not have any ongoing effect. To the extent the disposition of the complaint establishes a precedent for future action, the GAB is not bound by a decision of the SEB. The guiding policies for both Boards are set out in the statutes along with the administrative rules and formal opinions adopted by the SEB and reauthorized by the GAB.

Formal Opinions

Since its inception, the State Elections Board has issued 106 formal opinions pursuant to Section 5.06, Wis. Stats. (2005). A formal opinion provides a person requesting the opinion who acts in good faith on the opinion with protection from civil or criminal prosecution if the material facts are as stated in the opinion request. A summary of each of the SEB formal opinions accompanies this memorandum.

The bulk of the formal opinions of the SEB were issued before 1980, when persons subject to the provisions of Chapters 5 through 12 needed direction, particularly with respect to the provisions of the campaign finance law which became effective in July 1974. Several of the opinions have been rendered moot by subsequent legislation or the adoption of administrative rules.

Review of the formal opinions by the GAB should be expeditious. The staff can prepare an analysis of the basic policy set out in the opinion. The analysis would reflect whether action by the Legislature, the courts or the adoption of an administrative rule has changed the policy set out in the opinion. GAB members can determine whether to reaffirm, modify or withdraw the opinion.

Internal Operating Procedures

The SEB has developed a number of internal operating procedures that affect the manner in which the agency interrelates with persons who are not SEB employees. The internal operating procedures provide guidance for staff on the degree to which SEB employees are authorized to perform their functions without direct supervision or approval of the SEB.

These procedures are reflected in detailed instructions for staff to process and audit campaign finance reports; resolve campaign finance discrepancies and violations; process and review nomination papers and other election-related petitions; canvass election results; review recount petitions and order election recounts; conduct post-election voting system audits; and evaluate requests for approval of electronic voting equipment. These procedures are routinely reviewed before key deadlines and modified to reflect changes in the law, technology or available agency resources.

It will be virtually impossible to freeze these procedures following the GAB initiation date without significantly compromising the staff's ability to carry out its daily responsibilities for interacting with the public, auditing campaign finance reports, reviewing ballot access documents, canvassing election results and conducting voting equipment audits.

One of the primary responsibilities of the election staff is to provide comprehensive training for local election officials. The staff is in the midst of developing an on-line training component for the Statewide Voter Registration System (SVRS) in cooperation with the University of Wisconsin as well as statutorily required programs for training election officials.

The SEB staff has developed detailed training materials for local election officials and campaign finance registrants. These materials are also routinely reviewed and modified to incorporate recommendations from agency clientele or changes in the law. The staff has also developed a series of manuals to provide information to agency clientele and supplement agency training materials. A list of informational manuals available on the agency website accompanies this memorandum.

In order to effectively continue the agency training endeavors, the GAB will have to reauthorize the various training initiatives as soon as practicable after the initiation date.

The SEB staff uses a detailed set of procedures and schedule for resolving campaign finance violations identified by staff audit. The schedule of settlement amounts is designed to meet the statutory directive to treat comparable situations in a comparable manner and ensure the settlement bears a reasonable relationship to the severity of the alleged offense. Section 5.05 (1)(c), Wis. Stats. (2005) Changes to these procedures have always been implemented after review by the SEB at a public meeting that permits public input

Currently the SEB staff responds to citizen, registrant and media inquiries under the direction of agency management. The SEB itself exerts very little direction or supervision over these communications. The GAB will have to determine what constraints it wishes to place on agency staff consistent with the provisions of 2007 Wisconsin Act 1 and GAB members' confidence in agency management.

Transitional Items

The Government Accountability Board is poised to provide the citizens of Wisconsin with a means to engender public confidence in the most essential elements of state government: the administration and conduct of elections and the public accountability of candidates and government officials. The new agency will be able to draw on more than 30 years of action by the independent agencies it replaces. The Government Accountability Board will benefit from the dedicated work provided by the employees and Board members of those agencies during that time.

The Government Accountability Board will also be faced with the challenge of addressing continuing responsibilities of the agencies and implementing new practices mandated by 2007 Wisconsin Act 1. Among the continuing responsibilities of the State Elections Board that the Government Accountability Board will assume are the following:

1. Implementation of the Statewide Voter Registration System (SVRS)

The State Elections Board staff has worked diligently along with employees from the Department of Administration to ensure that local election officials could conduct elections using a software application that was delayed in its delivery by the contractor and still does not meet the contract specifications. The State Elections Board has requested the Department of Justice to assist the agency to resolve the contract performance issues

2. Implementation of a Campaign Finance Information Software Application

The State Elections Board is poised to issue an "Intent to Award" a contract to a vendor for the development of a campaign finance information software application to replace the existing application developed in the mid 1980's. Members of the State Ethics Board staff have been involved in evaluating the proposals.

The State Elections Board along with the Legislative Joint Committee on Finance (JCF) must approve the proposal. Funding is in the state budget, but cannot be released until the budget becomes law and

the JCF approves release of the money. Given the transition of campaign finance responsibilities under 2007 Wisconsin Act 1, I believe the GAB and the current Ethics Board management need to be involved in the decision to move forward on this proposal.

3 Budget Implications

In addition to the release of funding for the campaign finance software application, the current status of the state budget will likely delay the hiring of the Government Accountability Board Legal Counsel. The authorization for the position is in the budget bill. Candidate recruitment can commence, but an offer of employment cannot be extended until the budget bill becomes law, with position authorization intact.

4 Administrative Issues

The merging of two existing independent agencies will require careful attention to the administrative details of running a state agency. Currently the two agencies are housed in three separate buildings, use different information technology (IT) resources, and have disparate staffing levels and funding sources.

Roth Judd and I have been discussing the challenges presented by the agency merger. We both want to ensure a smooth transition that provides Board members and the public with a high level of service on the substantive areas administered by the Board. We both have ideas on how the new agency can operate effectively.

I recommend the Board consider establishing subcommittees of two members each to work with the current agency directors and staff to incorporate implement the vision of the Board into the administrative structure of the new agency.