

**STATE OF WISCONSIN  
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD**

The Complaint of  
Melissa Mulliken,  
Complainant

**COMPLAINT**

against

Kathy Nickolaus, Waukesha County Clerk  
Respondent

This complaint is made pursuant to Wis. Stat. §§ 5.05(2m)(c)2.a and 5.06(1).

I, Melissa Mulliken, allege that the respondent has violated state election laws, as found in Wis. Stat. Chapters 5-12, as follows:

1. I am an adult resident of the State of Wisconsin.
2. I served as the campaign manager for JoAnne Kloppenburg in her candidacy for Wisconsin Supreme Court Justice, for which the election was held on April 5, 2011.
3. I make this complaint on my own personal knowledge and belief.

*Facts Relating to Nickolaus' Performance of Election Duties  
for the Spring Election Held on April 5, 2011*

4. In the evening of the spring election held on April 5, 2011, Waukesha County Clerk Kathy Nickolaus (hereafter "Nickolaus") released to the public and the media the election results from Waukesha County, including results for the Wisconsin Supreme Court race. The candidates in the race for the Wisconsin Supreme Court were incumbent Justice David Prosser (hereafter "Prosser") and attorney JoAnne Kloppenburg (hereafter "Kloppenburg").
5. The results released by Nickolaus on April 5, 2011, for Waukesha County showed that 81,255 votes were cast for Prosser and 29,332 votes for Kloppenburg, with 100% of precincts reporting.
6. Nickolaus released only county-wide election results on election night, without disclosing the results by precinct or even by municipality.
7. On Wednesday, April 6, 2011, the statewide election results, with all precincts reporting, showed that Kloppenburg had received 211 more votes than Prosser.

8. Throughout April 6 and 7, 2011, vote totals for the Supreme Court election were the topic of high public and media interest as county canvassing was conducted and reported. Given the very narrow vote margin in the Supreme Court race, the election hung in the balance as counties began submitting their official canvass reports on April 7, 2011.
9. On Thursday, April 7, 2011, at 5:30 p.m., Nickolaus held a press conference at which she stated that the vote totals released on election night failed to include any votes for the City of Brookfield, which totaled 10,859 for Prosser and 3,456 for Kloppenburg. Nickolaus announced new vote totals for Waukesha County of 92,263 votes for Prosser and 32,758 for Kloppenburg.
10. The new vote totals reported by Nickolaus for Waukesha County on April 7, 2011 resulted in Prosser taking the lead by approximately 7,500 votes in the Wisconsin Supreme Court election.
11. Nickolaus stated at the press conference that the City of Brookfield votes were omitted from the release on election night due to "human error." She subsequently stated that she made the error in transferring data from a spreadsheet submitted by the City of Brookfield to her own data system and failing to "save" the new data.
12. Nickolaus did not publicly release any evidence, such as a print-out from her data system, substantiating her explanation of the alleged "human error" in reporting the election results.
13. The City Clerk's Office for the City of Brookfield provided the election results for the City of Brookfield to Nickolaus twice on election night via email, first at 9:56 p.m. and a second time at 10:05 p.m.
14. Nickolaus stated that, on the morning of Wednesday, April 6, 2011, she determined that the results she released on election night omitted votes for the City of Brookfield.
15. The Waukesha County Board of Canvassers convened in an open meeting at approximately noon on Wednesday, April 6, 2011 to review the election results. Issues regarding minor vote corrections in New Berlin and Lisbon were discussed. Nickolaus did not mention the election-night omission of the Brookfield votes from the County's vote totals during the Board of Canvassers' public meeting. The Board certified the election results on the afternoon of Thursday, April 7, 2011, before the 5:30 p.m. press conference.
16. Nickolaus did not disclose the error in her report of Waukesha County's election results to the GAB, the City of Brookfield clerk, or the County Canvass Board members on Wednesday, April 6 or Thursday, April 7, 2011, prior to the 5:30 p.m. press conference.

17. On Wednesday, April 6, 2011, Justice Prosser was observed entering the Governor's Office late in the evening and attending a private, on-on-one meeting with Governor Scott Walker.
18. Governor Scott Walker made public statements on Wednesday, April 6, 2011, commenting that there might be "ballots somewhere, somehow found out of the blue that weren't counted before."
19. Conservative media outlets, including the National Review online, reported the change in Waukesha County's election results before Nickolaus held the press conference on Thursday, April 7, 2011.

*Facts Showing that Ms. Nickolaus Has a History of  
Neglect, Incompetence, and/or Malfeasance  
in Carrying out her Public Duties*

20. In 2001, Ms. Nickolaus was granted immunity from criminal prosecution when she was employed by the Assembly Republican Caucus. The criminal investigation into the partisan caucuses eventually led to the resignations, criminal charges, and criminal convictions of Senate and Assembly leaders for directing caucus and staff employees to engage in illegal political activity during their state employment. A criminal complaint issued in 2002 against then-Assembly Speaker Scott Jensen alleged that Nickolaus, as part of her assigned duties, developed a computer software program for legislators to use to track campaign donations.
21. In early 2002, shortly after she left the caucus and was mounting her campaign for Waukesha County clerk, Nickolaus was investigated by the state Ethics Board for buying Waukesha County voter lists with state money that she allegedly intended to use in her campaign for county clerk. She was subsequently cleared of that charge.
22. In 2004, as Waukesha County Clerk, Nickolaus reported election results in Waukesha County for the general election showing that 97.63% of registered voters cast ballots, which is a level of turnout so extraordinarily high as to raise questions as to its validity.
23. In 2005, as Waukesha County clerk, Nickolaus released "sample" ballots to the media that already had been marked for a candidate for county executive.
24. Also in 2005, all of Waukesha county's votes for the 2005 primary were counted twice in the race for Assembly District 33. Nickolaus stated that one of her staff "hit the wrong button." The error was discovered after one of the town clerks called and pointed out that the numbers listed on the county web site appeared to be greater than actual turnout.
25. In 2006, the primary election in Waukesha County was marred by computer glitches, inoperable equipment and other problems, resulting in one candidate mistakenly being posted as winner of an election. The problems prevented the county from posting final

results of races until the early morning hours of Wednesday, and kept the county from posting results online.

26. In 2010, an audit of Waukesha County's election procedures was requested by the Waukesha County Executive Committee, due to their concerns about elections data security and backup procedures. The county's director of administration, Norm Cummings, said Nickolaus had been uncooperative with attempts by county officials to have experts review her systems and confirm that backups were in place. Nickolaus resisted the recommendations of the audit and the County Board's entreaties that she improve her office's procedures.
27. As shown by the foregoing facts, Ms. Nickolaus has a significant history of committing negligent, incompetent, and/or wrongful acts in carrying out the duties of her public employment or public office;
28. As shown by the foregoing facts, Ms. Nickolaus has a significant history of carrying out her public duties relating to elections in a manner and by methods that lack transparency, accuracy, accountability, and security.
29. As shown by the foregoing facts, Ms. Nickolaus has a significant history of ignoring or rejecting public demands to improve the transparency, accuracy, accountability, and security of her manner and methods of carrying out her public duties.

*Nickolaus' Actions Were Contrary to Law or  
She Abused the Discretion Vested in Her by Law  
with Respect to Conducting Elections*

30. Wis. Stat. §7.60(1) provides that "on election night the county clerk shall keep the clerk's office open to receive reports from the ward inspectors and shall post all returns."
31. Wis. Stat. §12.13(2)(b)4 provides that no election official may "intentionally assist or cause to be made a false statement, canvass, certificate or return of the votes cast at any election."
32. Wis. Stat. §12.13(2)(b)7 provides that no election official may "in the course of the person's official duties or on account of the person's official position, intentionally violate or intentionally cause any other person to violate any provision of chs. 5 to 12 for which no other penalty is expressly prescribed."
33. Wis. Stat. §12.13(3)(z) provides that it is a prohibited act for a person to "tamper with automatic tabulating equipment or any record of votes cast or computer program which is to be used in connection with such equipment to count or recount votes at any election so as to prevent or attempt to prevent an accurate count of the votes from being obtained."

34. A violation of any of the election law provisions cited above in paragraphs 29 through 31 is a Class I felony. Wis. Stat. §12.60(1).
35. In addition, “[a]ny election official who is convicted of any violation of chapter 12 shall...be disqualified to act as an election official for a term of 5 years from the time of conviction.” Wis. Stat. §12.60(3).
36. Wis. Stat. §946.72 forbids tampering with public records and notices, stating that “whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony.”
37. Wis. Stat. §946.12 defines misconduct in public office, It provides that any public officer or public employee who does any of the following is guilty of a Class I felony:

- (1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or

- (2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or

- (3) Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or

- (4) In the officer's or employee's capacity as such officer or employee, makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or

- (5) Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

Wis. Stat. §§946.12(1) – (5).

38. Wis. Stat. §§946.12(1) – (4) could potentially apply to Ms. Nickolaus’s conduct if an investigation uncovers evidence that her actions in misreporting the election results in Waukesha County on election night were intentional or knowing.
39. Ms. Nickolaus’s actions as Waukesha County Clerk in the conduct of the spring 2011 election were contrary to law or an abuse of the discretion vested in her by law with respect to those duties.

