



Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

June 1, 2023

Dear Mr. Cegielski:

¶ 1. You asked the Wisconsin Elections Commission (“the Commission”) to issue an advisory opinion on whether officials who were appointed to constitutional, elective offices can be recalled, and, if so, whether the officeholder in question would be subject to the one-year waiting period before the recall petition could be filed.

¶ 2. The Commission may issue a formal or informal written electronic advisory opinion in response to a request for an advisory opinion made under Wis. Stat. § 5.05(6a). Wis. Stat. § 5.05(6a)(a)1. The Commission welcomes this opportunity to provide its position on this question of first impression in Wisconsin. The interpretation provided herein reflects the formal advisory opinion of the Commission with respect to your specific questions. The Commission’s opinions on these matters may be subject to judicial or legislative review.

¶ 3. After a review of the constitutional and statutory provisions related to recall, election, and vacancy, and consultation with agency staff, it is the Commission’s opinion that individuals appointed to statewide elective office are subject to the recall provisions described in Article XIII, Section 12 of the Wisconsin Constitution, including the prohibition on being recalled during the first year of their term.

I. Relevant Constitutional and Statutory Provisions

¶ 4. The legal authority for recall in Wisconsin is enshrined both in the state Constitution and state statute. The constitutional authority for recall of incumbent elective officers is specifically enumerated in Article XIII, Section 12 of the Wisconsin Constitution. WIS. CONST. Art. XIII, Sec. 12. That article states:

“The qualified electors of the state, of any congressional, judicial or legislative district or of any county may petition for the recall of any incumbent elective officer after the first year of the term for which the incumbent was elected, by filing a petition with the filing officer with whom the nomination petition to the office in the primary is filed, demanding the recall of the incumbent.”

Article XIII, Section 12 is effectuated by section 9.10 of the Wisconsin statutes. The relevant statutory language closely mirrors the Constitution’s text, and states that the “qualified electors...may petition for the recall of any incumbent elective official.” Wis. Stat. §9.10(1)(a). The phrases “incumbent elective officer” or “incumbent elective official” are not further defined, either by the Constitution or by statute. Likewise, although the phrase “elective officer” is used elsewhere in statute, it is similarly undefined with respect to the recall provisions. *See* Wis. Stat. § 9.10(1)(a).

II. Analysis of Scope of Recall and Application to Individuals Appointed to Elective Office

¶ 5. It is the opinion of the Commission that an individual appointed to an elective office is an incumbent elective officer pursuant to Article XIII, Section 12 of the Wisconsin Constitution, and an elective incumbent official pursuant to section 9.10 of the statutes, and is thus subject to recall. This conclusion is supported by a plain language analysis

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of the constitutional and statutory recall language, by the plain language analysis of other relevant Wisconsin statutes, and by public policy regarding the use of recall to effectuate the electorate's will.

¶ 6. The Commission's legal analysis of the issues before it centers upon the distinction between certain classifications of statewide officeholders, specifically elective officeholders, appointive officeholders, and individuals appointed to an elective office. Elective officeholders, which are at times differently titled across statutes, generally refer to those offices that are elected by the qualified electorate. *See* Wis. Stat. §17.18 (U.S. senator and representative in congress); §17.19 (elective state offices); §17.10 (elective county officers); §17.13 (certain elective local officers). Appointive officeholders generally refer to those officers that are appointed by an individual or body with appointment authority. *See* Wis. Stat. §17.20(1) (vacancies in appointive state offices; how filled; terms). Individuals appointed to an elective office generally refer to individuals appointed to fill a vacancy mid-term after the death, resignation, or removal from office of an elective officeholder. *See* Wis. Stat. §17.03. The difference between an appointive officeholder and an individual appointed to an elective office is straightforward—the former is appointed to an appointive office, and the latter is appointed to an elective office.

¶ 7. The only difference between an elective officeholder and an individual appointed to an elective office is the method by which the individual assumes the office, and that method creates no differences in the powers and duties of the office. When an individual is appointed to an elective office, he or she “shall enter upon the duties of his or her office immediately upon qualification.” Wis. Stat. §17.28. Once he or she assumes the elective office in question, he or she retains that office either for the remainder of the term or until a successor is elected. Wis. Stat. §17.19. Nothing in the Wisconsin Constitution or state statute indicates that the duties or powers of a statewide officeholder differ based on whether that officeholder was elected or whether they were appointed to a vacant elective position under section 17.19.

¶ 8. Accordingly, it is the opinion of the Commission that individuals appointed to an elective office assume all the duties, rights, and powers of that office without further distinction or qualification. For example, an individual appointed to the constitutional office of Secretary of State, who assumes that position via the proper procedure required by law, possesses all of the duties, rights, and powers of the office as if she had been duly elected by the qualified electors of Wisconsin. This finding is central to the Commission's analysis because the recall provisions of both the Wisconsin Constitution and state statute apply to incumbent elective officeholders, as opposed to appointive officeholders.

¶ 9. Even though an individual appointed to an elective office becomes an elective official upon assuming that office, an individual subject to recall must meet a specific constitutional and statutory definition of elected officeholder to be recalled. The Wisconsin Constitution and state statutes inconsistently use various terms to refer to elective officeholders. WIS. CONST. Art. XIII, Sec. 12 (“incumbent elective officer”); Wis. Stat. §9.10 (“incumbent elective official”); *see also* Wis. Stat. §17.19 (“elective state officers”). Neither the state Constitution nor the state statutes effectuating recall in section 9.10 specifically address whether individuals who are appointed to an elective office meet the various definitions given for elective officeholder. WIS. CONST. Art. XIII, Sec. 12; Wis. Stat. §9.10.

¶ 10. The plain text of the recall provision in the Wisconsin Constitution makes it clear that elective officials can be recalled, but does not explicitly mention individuals appointed to an elective office. The plain text of Article XIII, Section 12 of the Wisconsin Constitution refers to “incumbent elective officer,” and does not contain any reference to appointive officeholders or individuals appointed to an elective office. The absence of reference to appointive officeholders is unsurprising—statute provides for the removal of most appointive officeholders by the authority that appointed them. Wis. Stat. §17.07. However, the state Constitution is silent with respect to individuals who are appointed to an elective office.

¶ 11. Likewise, the plain text of the statute that effectuates recall elections is clear that elective officials can be recalled, but also does not explicitly address whether that encompasses individuals appointed to an elective office. The plain text of section 9.10 refers to “incumbent elective official,” and does not contain any reference to appointive officeholders or individuals appointed to an elective office. Wis. Stat. §9.10(1)(a). Section 9.10 does describe different recall procedures for state, county, congressional, legislative and judicial offices versus city, village, town, town sanitary

district, and school district offices, but does not otherwise provide clarity on the scope of officeholders subject to recall. *Compare* Wis. Stat. §9.10(3) *with* §9.10(4).

¶ 12. To the Commission’s knowledge, no Wisconsin court has interpreted either “incumbent elective officer” as referenced in Article XIII, Section 12, or “incumbent elective official” as referenced by Section 9.10(1)(a) of the recall statutes. In 2011, the Attorney General interpreted “incumbent elective officer” in Article XIII, Section 12 to conclude that an effort to recall the governor does not automatically include an effort to recall the lieutenant governor, but did not further define or interpret the scope of the phrase. 2011 Wis. AG LEXIS 5, *3.¹ In addition, the Attorney General has also concluded that section 9.10 is “broad enough” to apply to members of Congress. 68 Op. Atty Gen. Wis. 140 (1979), 1979 Wis. AG LEXIS 61, *3. To the Commission’s knowledge, the Attorney General’s office has not interpreted either “incumbent elective officer” or “incumbent elective official” to explicitly include an individual appointed to an elective office.

¶ 13. Turning first to the plain text of the relevant recall provisions, it is the opinion of the Commission that the use of the adjective “elective” in both Article XIII, Section 12 of the Constitution as well as in section 9.10 describes the office, not the officeholder. Using its plain meaning, “elective” can mean “chosen or filled by popular election” or “of or relating to election.”² Accordingly, it is the opinion of the Commission that “elective” thus describes an office that is usually filled by election. If the drafters of the recall provisions intended to limit recall solely to individuals who have been elected, they could have used the transitive verb “elected,” instead of the adjective “elective,” which would have clearly conveyed that meaning.

¶ 14. Outside of the recall provision context, Wisconsin’s statute addressing vacancies in state offices explicitly places individuals appointed to an elective office within the recall context. Specifically, the statute addresses when officers may hold office and states in relevant part: “[a]n officer who is elected or appointed to fill a vacancy in an elective office shall enter upon the duties of his or her office immediately upon qualification and, if elected, upon certification of the election result, and shall hold the office for the residue of the unexpired term unless removed or recalled in accordance with law...” Wis. Stat. §17.28 (emphasis added). Accordingly, the plain text of §17.28 supports the conclusion that recall is permitted for individuals who have been appointed to an elective office.

¶ 15. Further statutory support for the conclusion that individuals appointed to an elective office are incumbent elective officers subject to recall is found within the statutes governing the regulation of political lobbying. Wis. Stat. §13.62(6). There, “elective state official” is defined as “any person who holds an elective state office as defined in s. 5.02(23) or has been elected to an elective state office but has not yet taken office. A person who is appointed to fill a vacant elective state office is an elective state official.” Wis. Stat. §13.62(6).

¶ 16. Accordingly, the phrase “incumbent elective official” used in section 9.10(1)(a) of the recall statute should be harmonized with section 17.28 and section 13.62(6) to further support the Commission’s conclusion that individuals appointed to an elective office are subject to recall. A court will harmonize multiple statutory provisions “through a reasonable construction that gives effect to all provisions.” *State v. Fuerte*, 2017 WI 104, P29, 378 Wis. 2d 504, 904 N.W.2d 773. Harmonizing these statewide officeholder provisions together gives effect to all of them by confirming that all are intended to apply to elective officeholders, including those individuals who are appointed to an elective office due to a vacancy pursuant to section 17.19.

¶ 17. The Wisconsin Constitution expressly prohibits any law enacted “to hamper, restrict or impair the right of recall.” WIS. CONST. Art. XIII, Sec. 12(7). In construing Wisconsin’s election laws, “the will of the electorate is to be furthered.” *Stabovic v. Rajchel*, 122 Wis. 2d 370, 376, 363 N.W.2d 243 (1984); Wis. Stat. §5.01(1) (“Chapters 5 to 12 shall give effect to the will of the electors [...]”). Furthermore, the statutes governing recall “are to be liberally interpreted in favor of the electorate.” *Carlson v. Jones*, 147 Wis. 2d 630, 636, 433 N.W.2d 635, 637 (Ct. App. 1988).

¶ 18. An interpretation in favor of the electorate further supports the Commission’s conclusion that individuals appointed to elective office are subject to recall. A statewide, constitutional, elective officeholder should not be placed

¹ No. OAG-4-11.

² Available at: <https://www.merriam-webster.com/dictionary/elective>.

beyond the reach of the electorate’s power of recall solely based on their status as an individual appointed to fill a vacancy under section 17.19. If the electorate is expressly granted the power to vote for proscribed statewide, constitutional offices, so too should they be able to recall any individual who assumes that elected office via appointment when a vacancy occurs. The Commission specifically notes that this interpretation does not grant power to recall in excess of that intended by the state Constitution and statute, nor is it intended to conflict with or negate any the petition requirements placed upon the electorate when exercising their recall power. See Wis. Stat. §9.10(2).

III. Analysis of Applicability of One-Year Waiting Period

¶ 19. Your request under section 5.05(6a) also asked for the Commission’s advisory opinion on whether the one-year waiting period described by Article VIII, Section 12 of the state Constitution would apply to the recall of an individual appointed to elective office.

¶ 20. As described above, the Commission interprets Article VIII, Section 12 and section 9.10 of state statute to apply to individuals appointed to an elective office, and specifically to the elective office itself. Accordingly, the Commission must interpret the language of those authorities harmoniously to avoid an inconsistent result. The Wisconsin Constitution authorizes qualified electors to petition for the recall of an incumbent elective officer “after the first year of the term for which the incumbent was elected.” WIS. CONST. Art. VIII, Sec. 12. The effectuating recall statute prohibits filing a recall petition “prior to the expiration of one year after the commencement of the term of office for which the officer is elected.” Wis. Stat. §9.10(2)(s).

¶ 21. Accordingly, the Commission interprets the one-year waiting period to also apply to individuals appointed to an elective office. If an individual appointed to an elective office is an incumbent elective official, then it is also the opinion of the Commission that the entirety of Article VIII, Section 12 and section 9.10 apply to the recall of that official, including the one-year waiting period. This broad reading of the one-year waiting period is consistent with a liberal interpretation of recall law in favor of the electorate. *Carlson v. Jones*, 147 Wis. 2d 630 at 636.

¶ 22. With respect to when the one-year waiting period begins, it is the opinion of the Commission that both Article VIII, Section 12 and section 9.10(2)(s) refer to the same moment in time when an incumbent elective official assumes their office. The word “term” is defined by Merriam-Webster as a “limited or definite extent of time.”³ Within the context of elections, the word “term” is understood to mean the period of time an official holds their elective office. See Wis. Const. Art. VI, Sec. 10 (“term for which he was elected”); Wis. Const. Art. IV, Sec. 26 (“term of office”). When given their plain meaning, the phrases “after the first year” and “one year after the commencement” both refer to a time after the first, full year after the start of a term of office. Accordingly, it is the opinion of the Commission that a recall petition cannot be filed against an incumbent elective official, whether elected or appointed to fill a vacancy, until after the official’s first year in office.

¶ 23. This interpretation is also consistent with the intent of the drafters of Article VIII, Section 12 in the years immediately preceding the 1926 amendment because the purpose of the one-year waiting period was so that voters could judge officials based on their performance in office. In 1921 and 1923, Governor John J. Blaine addressed the Wisconsin Assembly and Senate in support of an amendment to the state Constitution to allow recall elections. Speaking specifically of the amendment to add the recall power to Wisconsin’s Constitution, Governor Blaine argued that “the recall should not be available until there has been an opportunity for the people to judge of the official acts of an elected officer, so that the vote, when taken under the recall, will be on the merits of the incumbent’s administration rather than to enable a defeated group to force a new election on the basis of rival candidates at a time when the incumbent has no opportunity to justify his election in the first instance.”⁴

¶ 24. Your request specifically mentioned the Constitutional office of secretary of state, so the Commission shall use that office as an example to illustrate its one-year waiting period analysis. Former Secretary of State Douglas La Follette was elected most recently on November 8, 2022, and resigned on March 17, 2023. Also on March 17, 2023, Governor Tony Evers appointed Sarah Godlewski to the office of secretary of state pursuant to the vacancy

³ Available at: <https://www.merriam-webster.com/dictionary/term>.

⁴ WISCONSIN STATE SENATE, *Journal of Proceedings*, Vol. 56, Pg. 19 (January 11, 1923).

procedures described by section 17.19(4). Secretary of State Godlewski's appointment was effective as of March 18, 2023. Secretary Godlewski will hold office or the residue of the unexpired term, which would be until January of 2027. WIS. CONST. Art. VI, Sec. 1; Wis. Stat. §17.19(4). Accordingly, it is the opinion of the Commission that a recall petition pertaining to Secretary Godlewski is prohibited until at least March 19, 2024.

IV. Conclusion

¶ 25. The Commission will proceed to carry out its responsibilities pursuant to Wisconsin Constitution Article XIII, Section 12 and section 9.10 of the Wisconsin statutes if it is called upon to do so, unless and until directed otherwise by the legislature or a court of law. This approach is consistent with the guidance from the Attorney General to the Commission's predecessor, the Elections Board, when faced with similar questions of the scope of Wisconsin's recall laws. 68 Op. Atty Gen. Wis. 140, 1979 Wisc. AG LEXIS 61, *15.