

CHAPTER 9

POST ELECTION ACTIONS; DIRECT LEGISLATION

9.01 Recount.
9.10 Recall.

9.20 Direct legislation

9.01 Recount. (1) (a) Any candidate voted for at any election or any elector who voted upon any referendum question at any election may request a recount. The petitioner shall file a verified petition or petitions accompanied by the fee prescribed in par. (ag), if any, with the proper clerk or body under par. (ar) not earlier than the time of completion of the canvass and not later than 5 p.m. on the 3rd business day following the last meeting day of the municipal or county board of canvassers determining the election for that office or on that referendum question or, if more than one board of canvassers makes the determination not later than 5 p.m. on the 3rd business day following the last meeting day of the last board of canvassers which makes a determination. If the board of state canvassers makes the determination for the office or the referendum question, the petitioner shall file the petition not earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum and not later than 5 p.m. on the 3rd business day following the day on which the elections board receives the last statement from a county board of canvassers for the election or referendum. Each verified petition shall state that at the election the petitioner was a candidate for the office in question or that he or she voted on the referendum question in issue; that the petitioner is informed and believes that a mistake or fraud has been committed in a specified ward or municipality in the counting and return of the votes cast for the office or upon the question; or shall specify any other defect, irregularity or illegality in the conduct of the election. The petition shall specify each ward, or each municipality where no wards exist, in which a recount is desired. If a recount is requested for all wards within a jurisdiction, each ward need not be specified.

(ag) 1. Each petition for a recount shall be accompanied by the fee prescribed in this paragraph. If the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question is less than .5% of the total votes

cast for the office or on the question, the petitioner is not required to pay a fee.

2. If the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question is at least 5%, the petitioner shall pay a fee of \$2 for each ward for which the petition requests a ballot recount, or \$2 for each municipality where no wards exist.

3. All fees shall be prepaid in cash or another form of payment which is acceptable to the officer to whom they are paid. No petition for which a fee is required is valid unless the proper fee is paid at the time of filing.

4. The board shall deposit all moneys received by it into the account under s. 20.510 (1) (g), and shall pay the fees required for each recount to the county clerks of the counties in which the recount is to be held. The county clerk shall deposit fees received by him or her with the county treasurer. The municipal clerk shall deposit fees received by him or her with the municipal treasurer.

5. In this paragraph, the "leading candidate" includes every individual whose vote total at the time of the filing of the recount petition would entitle the individual to election or nomination to office.

(ar) 1. In the event of a recount for any office, the petition shall be filed with the clerk or body with whom nomination papers are filed for that office.

2. In the event of a recount for a referendum, the petition shall be filed with the clerk of the jurisdiction in which the referendum is called, and in the case of the state with the county clerk of each county any part of which is petitioned to be recounted, except in the case of a request for a statewide recount, the petition shall be filed only with the elections board.

3. Upon receipt of a valid petition, the clerk shall thereupon notify the proper board of canvassers. Upon receipt of a valid petition by the elections board, the board shall promptly by certified mail order the proper boards of canvassers to commence the recount. Returns from a recount ordered by the elections board shall be

transmitted to the office of the board as soon as possible, but in no case later than 14 days from the date of the order of the board directing the recount. The board of state canvassers may not make a determination in any election if a recount is pending before any county board of canvassers in that election. The board of state canvassers need not recount actual ballots, but shall verify the returns of the county boards of canvassers in making its determinations.

(b) The proper board of canvassers shall reconvene at 9 a.m. on the day following the last day for filing of a petition and proceed to recount the ballots in all wards specified and otherwise check the fact allegations of the petition or petitions. The recount shall proceed for each ward as follows:

1. The board of canvassers shall first compare the registration or poll lists and determine the number of voting electors.

2. The board of canvassers shall then examine the absentee ballot envelopes. Any defective absentee ballot envelopes shall be laid aside, properly marked and carefully preserved. The number of voters shall be reduced by the number of ballot envelopes set aside under this subdivision. An absentee ballot envelope is defective only if it is neither sworn nor witnessed, if it is not signed by the voter or if the affidavit supporting the absentee ballot envelope has such a number of technical errors that the board of canvassers is doubtful of the legal effect of the affidavit.

3. They shall then examine the container or bag containing the ballots to be certain it has not been tampered with, opened, or opened and resealed. Any irregularities or possible tampering with the container or bag shall be noted.

4. When the container or bag has been checked, it shall be opened and the contents removed. The board of canvassers shall, without examination other than is necessary to determine that each is a single ballot, count the number of ballots therein. If the number of ballots and the totals recorded under subd. 1 do not agree, the board of canvassers shall make a record of this fact. When the number of ballots exceeds the number of voters, the board of canvassers shall place all ballots face up to check for blank ballots. Any blank ballots shall be so marked, laid aside and carefully preserved. If the number of ballots still exceeds the number of voters, the board of canvassers shall place all ballots face down to check the initials. Any ballot not properly initialed by 2 ballot clerks or any absentee ballot not properly initialed by the municipal clerk shall be so marked, laid aside and carefully preserved. If the number of ballots still exceeds the number of voters, the remaining ballots shall be returned to the container or bag

and the board of canvassers shall draw a number of ballots equal to the excess number of ballots by chance and without inspection from the container or bag. These ballots shall be specially marked as having been removed by the canvassers on recount due to an excess number of ballots and carefully preserved.

5. When the number of ballots and voters agree, or after noting that there is a different number of ballots than voters, the recanvass shall begin.

6. In recanvassing a voting machine in which the record of the votes cast is contained in the machine, the board of canvassers shall make a record of the number of the seal, if any, the number of the protective counter or other device, if one is provided, and shall open the recording compartment of the machine, and without unlocking the machine against voting, shall recanvass the votes thereon. If the machine is an electronic voting machine utilizing a detachable record of votes cast, the record shall be retabulated under s. 5.90.

7. When a machine is recounted, the board of canvassers shall proceed to inspect and examine the machine showing the votes cast for each office or referendum specified in the petition, and shall make a record of the votes for that office or referendum as shown on that voting machine, which they shall certify as correct, in the presence of at least one witness.

8. If, upon the recanvass, it is found that the original canvass of the returns has been correctly made from a voting machine, and that the discrepancy still remains unaccounted for, the board of canvassers shall publicly unlock the voting and counting mechanism of the machine, and shall proceed to examine and test the machine to determine the cause of the discrepancy in returns from the machine. A similar test shall be performed for electronic voting machines to ascertain whether there is any malfunction in the machine. After the completion of the examination and test, the board of canvassers shall prepare a statement giving the results of the examination and test. The statement shall be witnessed by at least one witness.

9. If, upon the recanvass, it appears that the original canvass of the returns by the election officials was incorrect, the statements and determinations of the board of canvassers shall be corrected accordingly.

10. Recounts at polling places utilizing an electronic voting system in which ballots are distributed to electors shall be performed in accordance with the procedure for recounting paper ballots insofar as applicable, except as provided in s. 5.90. Recounts at polling places utilizing electronic voting machines shall be performed in accordance with the procedure for

9.01 POST ELECTION ACTIONS; DIRECT LEGISLATION

202

recounting votes cast on mechanical voting machines, insofar as applicable, except as provided in s. 5.90.

11. All steps of the recount shall be performed publicly and all materials and ballots may be viewed and identified by the candidates, the person demanding the recount and their authorized representatives and counsel, but only members of the official board of canvassers shall be allowed to touch any of the materials or ballots. Any errors shall be corrected.

(2) When the recount concerns a candidate, notification of the intent to file a petition shall first be sent by registered mail or served as a summons in circuit court on each opposing candidate addressed to the address given on the nomination papers. In recount proceedings for a partisan primary the notice to the candidates shall be served only on opposing candidates for the same party nomination. The petition and the sender's receipt for each registered letter or the affidavit of service upon each opposing candidate shall be filed with the proper clerk.

(3) (a) The petitioner, all opposing candidates and interested persons shall be entitled to be present in person and by counsel to observe the proceedings.

(b) When a recount proceeding affects a state or national office defined in s. 11.01 or other office which serves more than one county, the county clerk shall immediately notify the board.

(4) Whenever a recount petition for part of the wards within an election district is filed under the above provisions, the opposing candidate, or any elector or other interested party including a municipality if on a referendum question, may similarly file a petition for recount in any or all of the remaining wards. The petition shall be filed not later than 5 p.m. 2 days after the board of canvassers completes the first recount. The proper board of canvassers shall reconvene at 9 a.m. on the day following the filing of the petition and proceed to recount the ballots in all wards specified and otherwise check the fact allegations of the petition. Any errors shall be corrected.

(5) Any member of the board of canvassers may administer oaths, certify official acts and issue subpoenas for purposes of this section. Witness fees shall be paid by the county.

(6) Within 5 days after completion of the recount determination by the board of canvassers in all counties concerned, any candidate, or any elector when for a referendum, aggrieved by the recount may appeal to circuit court. The appeal shall commence by serving a written notice of appeal on the other candidates or persons who filed a written notice of appearance

before the board. The appellant shall file the notice with the clerk of circuit court together with an undertaking and surety in the amount approved by the clerk of court or the judge, conditioned upon the payment of all costs taxed against the appellant.

(7) The circuit judge shall forthwith issue an order directing the proper county or municipal clerk to transmit immediately all ballots, papers and records affecting the appeal to the clerk of court. The order shall fix a place and a time for the hearing within 5 days of the order either in open court, at chambers or before a referee. The order shall be served upon the proper county or municipal clerk and all other candidates or persons who filed a written notice of appearance before the board of canvassers. A reference may be ordered upon any and all questions. At the assigned time and place, the matter shall be summarily heard and determined and costs taxed as in other civil actions.

(8) Nothing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office.

History: 1971 c. 251; 1971 c. 304 s. 29 (2); 1971 c. 336; 1973 c. 313; 1973 c. 334 ss. 23 to 26, 57; 1975 c. 41, 422; 1977 c. 394 s. 53; 1977 c. 427; 1979 c. 200; 1979 c. 260 ss. 66 to 68, 93; 1979 c. 311, 355.

9.10 Recall. (1) The qualified electors of the state, of any county, city, village, town, or of any congressional, legislative, judicial or school district may petition for the recall of any elective official after the first year of the term for which the official is elected by filing a petition with the same official or agency with whom the petition for nomination to the office was filed demanding the recall of the officeholder. The petition shall be signed by electors equal to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. If at the last election any group of candidates were voted for in common to fill 2 or more offices of the same designation, the required number of petition signers shall be equal to 25% of the number computed by dividing the total vote for that office by the number of offices filled jointly.

(2) (a) The preparation and form of the recall petition shall be governed by s. 8.15. In addition, a recall petition for a city, village, town or school district office shall contain a specific statement of good and sufficient reason upon which removal is sought.

(b) In determining the number of signatures required on a petition to recall a school district officer, the method of calculation provided in s. 115.01 (13) shall be applied.

(c) After the recall petition has been offered for filing, no name shall be erased or removed.

No signature shall be valid or counted unless the date is less than 60 days before the date offered for filing.

(3) (a) The provisions of this subsection apply for the recall of all elective officials other than city, village, town and school district officials. City, village, town and school district officials are recalled under sub. (4).

(b) Within 3 days after the petition is offered for filing, the official with whom the petition is left shall determine by careful examination whether the petition is sufficient and so state in a certificate attached to the petition. If the petition is found to be insufficient, the certificate shall state the particulars creating the insufficiency. The petition may be amended to correct any insufficiency within 5 days following the affixing of the original certificate. Within 2 days after the offering of the amended petition for filing, it shall again be carefully examined to determine sufficiency and a certificate stating the findings shall be attached. Immediately upon finding an original or amended petition sufficient, the official shall file the petition and call a special election to be held not less than 40 nor more than 45 days from the filing date.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns within 10 days after the original filing of the petition. There shall be no primary. Candidates for the office may be nominated under the usual procedure of nomination for a primary election by filing nomination papers not later than 5 p.m. 4 weeks preceding the election and have their names placed on the ballot at the special election.

(4) (a) For the recall of any city, village, town or school district official, the municipal clerk shall verify the eligibility of the respective signers and circulators, shall certify thereto and shall transmit the petition to the clerk of circuit court within 10 days of the filing date. The circuit court within 10 days after receipt of the petition shall determine by hearing whether the petition states good and sufficient reason for the recall. The clerk of circuit court shall notify the incumbent of the hearing date. The person subject to recall and the petition circulators may appear by counsel and the court may take testimony with respect to the recall petition. If the circuit court judge determines the grounds stated in the petition and proof offered at the hearing show good and sufficient reasons for recall, the judge shall issue a certificate directing the governing body or school board to hold an election under this section. If the grounds stated in the petition and proof offered at the hearing do not show good and sufficient reason for recall, issuance of the certificate shall

be denied. Any party aggrieved by the circuit court determination may appeal to the court of appeals within 10 days following the circuit court determination by filing a notice of appeal with the clerk of the court of appeals. An appeal under this section shall have preference on the court of appeals calendar. The appeal shall stay enforcement of a certificate issued by the circuit court until the court of appeals determines the appeal. The governing body or school board upon receiving the certificate from the circuit court shall call a special election not less than 50 nor more than 60 days from the date of the certificate. The special election for recall of more than one official may be held on the same day.

(b) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns before the deadline for filing nomination papers. Other qualified persons may become candidates by filing their nomination papers not later than 5 p.m. of the day 6 weeks before the day of the election. If the number of candidates including the incumbent, when he is a candidate, is more than twice the number of offices of that designation to be filled, a special primary shall be held. The incumbent's name shall not appear on the primary ballot. When a primary is held, the name of the person receiving the highest number of votes shall be placed on the special election ballot with the incumbent. When the incumbent is not a candidate, the 2 persons receiving the highest number of votes shall be placed on the special election ballot. When an election to recall more than one official of the same designation is held at the same time, the names of all candidates nominated shall be grouped together on the ballot with instructions to vote for the number of offices to be filled.

(5) The official against whom a recall petition has been filed shall continue to perform the duties of his office until the result of the special election is officially declared. The person receiving the highest number of votes at the special election shall be declared elected for the remainder of the term. If the incumbent receives the highest number of votes he shall continue in office. If another receives the highest number of votes he shall succeed the incumbent if he qualifies within 10 days after receiving notification.

(6) After one recall petition and special election, no further recall petition shall be filed against the same official during the term for which he was elected.

(7) The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend the same rights to

9.10 POST ELECTION ACTIONS; DIRECT LEGISLATION

204

electors of cities, villages, towns and school districts.

History: 1977 c. 187 s. 134; 1977 c. 403, 447; 1979 c. 260. Reasons, to be good and sufficient, under (2) (a), must not only relate to the incumbent's official duties, involving actions which are proven to be politically unpopular with a significant percentage of the voters, but must be set forth in a petition with sufficient specificity to give notice to him so that he can respond to the electors. *Mueller v. Jensen*, 63 W (2d) 362, 217 NW (2d) 277.

Where the mayor at the hearing did not argue that the allegations were insufficient but sought to offer proof that they were untrue, the trial court properly refused to hear such testimony and correctly ruled that the matter was political and not judicial. *Beckstrom v. Kornsi*, 63 W (2d) 375, 217 NW (2d) 283.

This section applies to members of Congress. 68 Atty. Gen. 140.

9.20 Direct legislation. (1) A number of electors equal to at least 15% of the votes cast for governor at the last general election in their city may sign and file a petition with the city clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or referred to a vote of the electors. The person filing the petition shall designate in writing a person or organization to be notified of any insufficiency or improper form under sub. (3).

(2) The preparation and form of the direct legislation petition shall be governed by s. 8.15.

(2m) After the petition has been offered for filing, no name may be erased or removed. No signature may be considered valid or counted unless the date is less than 60 days before the date offered for filing.

(3) Within 15 days after the petition is filed, the city clerk shall determine by careful examination whether the petition is sufficient and whether the proposed ordinance or resolution is in proper form. He shall state his findings in a signed and dated certificate attached to the petition. If the petition is found to be insufficient or the proposed ordinance or resolution is not in proper form, the certificate shall give the particulars, stating the insufficiency or improper form. The petition may be amended to correct any insufficiency or the proposed ordinance or resolution may be put in proper form within 10 days following the affixing of the original certificate and notification of the person designated under sub. (1). When the original or amended petition is found to be sufficient and

the original or amended ordinance or resolution is in proper form, the city clerk shall so state on the attached certificate and forward it to the common council immediately.

(4) The common council shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next spring or general election, if the election is more than 6 weeks after the date the order is given. If 6 weeks or less before election the ordinance or resolution shall be voted on at the next election thereafter. The council by a three-fourths vote of the members-elect may order a special election for the purpose at any time prior to the next election, but not more than one special election for direct legislation shall be called in any 6-month period.

(5) Not more than 3 nor less than one week before the election, the city clerk shall cause the ordinance or resolution that is being submitted to a vote to be published once in a newspaper as are city ordinances.

(6) The ordinance or resolution need not be printed in its entirety on the ballot, but a concise statement of its nature shall be printed together with a question permitting the elector to indicate approval or disapproval of its adoption.

(7) If a majority vote in favor of adoption, the proposed ordinance or resolution shall take effect upon publication under sub. (5). Publication shall be made within 10 days after the election.

(8) City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council may submit a proposition to repeal or amend the ordinance or resolution at any election.

History: 1977 c. 102.

This section does not apply to villages. *State ex rel. Poole v. Menomonee Falls*, 55 W (2d) 555, 200 NW (2d) 580.

This section implements legislative powers reserved by the people. Subject to certain conditions, common council has no authority to make initial judgment of the constitutionality or validity of proposed direct legislation. *State ex rel. Althouse v. Madison*, 79 W (2d) 97, 255 NW (2d) 449.

City clerk may refuse to forward to city council an otherwise proper ordinance on grounds that it relates to administrative matter, it would modify statutory authority, or it would repeal action already taken by city. OAG 12-80.