

# Chapter 11

## Advisory Elections, Recall and Removal

### ADVISORY ELECTIONS

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An advisory election is a non-binding election on a question that municipal officials submit to the electorate to gauge voter attitudes on a particular topic. An advisory election is not intended as a substitute for the election on a municipal ordinance, resolution, charter amendment or other measure. Rather, the advisory election only initially tests the appeal of the proposed legislation, with a second election on the legislation itself to follow, if municipal officials so choose.<sup>1</sup>

#### A. Authority

The Supreme Court of Ohio recognized the right of a municipality to hold an advisory election in *State ex rel. Bedford v. Cuyahoga Co. Board of Elections* (1991), 62 Ohio St.3d 17. The Court held that [Article XVIII, Section 3 of the Ohio Constitution](#) (commonly referred to as the “home rule” provision) grants a municipality the authority to hold an advisory election, absent a specific prohibition against holding such an election in the municipality’s charter, the Ohio Revised Code, or the Ohio Constitution.

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<sup>1</sup> *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 22, 577 N.E.2d 645.

Please note that only a municipality may conduct an advisory election; an advisory election may not be held by any other political subdivision (e.g., state, county, township, school district, etc.).

## B. Procedure

When municipal officials certify an advisory question to the board of elections, the board should review the municipality's charter, if it has one, to determine whether the charter prohibits an advisory election. If the charter does not specifically prohibit an advisory election, the board should proceed with the election. If the charter appears to prohibit the advisory election, the board should consult with its legal counsel at the county prosecutor's office.

The heading "Advisory Election" must be placed on the ballot for an advisory election.

## RECALL

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### A. Authority

Recall is the statutory procedure that allows voters to decide in an election whether to remove (recall) a municipal official holding elective office. The use of the recall is significantly limited. First, it is available only in a municipality whose voters have adopted both (1) a form of limited home rule – that is, a charter or one of the plans of government outlined in [Chapter 705 of the Revised Code](#) – and (2) the recall process as part of that home rule government.<sup>2</sup>

**Note:** Recall is not available in a statutory municipality or in a limited home rule municipality that has not adopted the recall process.<sup>3</sup> Additionally, recall is not available for state, township or district offices, or for county offices except in a county that has adopted a limited home rule charter that specifically provides for the recall.<sup>4</sup>

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<sup>2</sup> *Lockhart v. Boberek* (1976), 45 Ohio St.2d 292, 345 N.E.2d 71, 74 O.O.2d 461; [R.C. 705.91 - 705.92](#).

<sup>3</sup> *Lockhart v. Boberek* (1976), 45 Ohio St.2d 292, 345 N.E.2d 71, 74 O.O.2d 461.

<sup>4</sup> [R.C. 705.92](#).

Second, even if the voters of a limited home rule municipality have adopted the recall, a question of removing an officer shall not be placed on the ballot until such officer has served for at least one year of the term during which he or she is sought to be recalled.

Unless the municipality's charter provides otherwise, the recall procedure is as set forth in [R.C. 705.92](#). The statutory recall process is initiated by the filing of a valid and sufficient petition. The Secretary of State does not prescribe a petition form pertaining to recall. Rather, the petitioner is responsible for crafting a petition that complies with the provisions of [R.C. 705.92\(A\)](#). For example, the petition must:

1. be signed by qualified electors equal in number to at least 15 percent of the total votes cast at the most recent regular municipal election,
2. contain the required number of valid signatures upon submission to the board of elections,
3. demand the election of a successor to the person sought to be removed from office,
4. contain a general statement in not more than 200 words explaining why the removal of the person is sought, and

The petition is not valid after 90 days from the date of the first signature. It also must satisfy all other requirements of law and must be filed with the board of elections, which shall verify the sufficiency and validity of the petition.<sup>5</sup>

If the petition is determined to be sufficient, the person whose removal is sought has five days after the sufficiency of the petition has been determined to resign.<sup>6</sup> Unless the municipality's charter provides otherwise, the board of elections that determines the validity and sufficiency of the petition should, as a courtesy, notify the person whose removal is sought of the determination of sufficiency and of the five-day deadline.

<sup>5</sup> [R.C. 705.92\(A\)](#) ("The form, sufficiency, and regularity of any such petition shall be determined as provided in the general election laws.").

<sup>6</sup> [R.C. 705.92\(B\)](#).

If the person does not resign within the five days, an election on the question of the recall and for the selection of a successor must be held at the next primary or general election occurring more than 90 days from the date the board of elections determines that the petition is sufficient. The board of elections must make all arrangements for holding the election, which is conducted in the same manner as a regular municipal election.<sup>7</sup>

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### **B. Successors**

A petition is required to nominate a candidate to succeed each officer sought to be removed.

A nominating petition must be filed with the board of elections at least 20 days before the election and must be signed by voters equal to 10 percent of the total votes cast for the head of the ticket at the most recent regular municipal election. No primary election shall be held.<sup>8</sup>

### **C. Ballot**

The form of the ballot is prescribed in [R.C. 705.92\(D\)](#). The recall question appears on the Official Questions and Issues Ballot and consists of two parts. The first part asks if the municipal officer named in the petition shall be removed from office. The second part sets forth the names of the candidates to fill the vacancy that may be created by the recall. The name of the officer whose removal is sought shall not appear on the ballot as a candidate to succeed the officer's self.

### **D. Results**

If a majority of votes cast are in favor of removal, the person is removed from office upon the announcement of the official canvass. The candidate who receives a plurality of the votes cast for the successor for that office shall be declared elected. The successor shall serve out the remainder of the unexpired term of the person who was removed.<sup>9</sup>

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<sup>7</sup> [R.C. 705.92\(B\)](#).

<sup>8</sup> [R.C. 705.92\(C\)](#).

<sup>9</sup> [R.C. 705.92\(D\)](#).

If the person whose removal was sought is not recalled, he or she shall be repaid “actual and legitimate expenses” for the election from the treasury of the municipal corporation. This amount shall not exceed 50 percent of the sum which is by law permitted to be expended by a candidate at any regular municipal election.<sup>10</sup>

## REMOVAL

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### A. General Provisions

The General Provisions of the Revised Code provide that any person holding public office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II of the Ohio Constitution may be removed by judicial action for good cause shown.<sup>11</sup> In order to be removed from office, a public officer must be found guilty by a court of competent jurisdiction of misconduct in office for one or more of the following reasons:

- Willfully and flagrantly exercising authority or power not authorized by law.
- Refusing or willfully neglecting to enforce the law or to perform any official duty imposed upon the public officer by law.
- Gross neglect of duty.
- Gross immorality.
- Drunkenness.
- Misfeasance.
- Malfeasance.
- Nonfeasance.<sup>12</sup>

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<sup>10</sup> [R.C. 705.92\(D\)](#).

<sup>11</sup> [R.C. 3.07 - 3.10](#).

<sup>12</sup> [R.C. 3.07](#).

Proceedings for removal on any of these grounds are initiated by the filing of a written complaint that specifically sets forth the charge against the public officer. The complaint must be signed by not less than 15 percent of the total vote cast for the office of governor in the state or subdivision whose officer it is sought to remove. If the public officer sought to be removed is a county sheriff, a county prosecutor, or the mayor of a municipal corporation, the governor may file the written complaint without the signatures of the electors.<sup>13</sup>

**Note:** The Secretary of State does not prescribe any form pertaining to the removal process, which is a judicial proceeding, not an elections matter. A board of elections' responsibility in a removal action is limited to providing the number of signatures required for the complaint.

The complaint is filed with the court of common pleas in the county where the public officer resides. If a complaint is filed against a common pleas court judge, the complaint is filed in the court of appeals of the district where the judge resides. All complaints against state officers are filed in the court of appeals of the district where the officer resides.<sup>14</sup>

If a holder of a public elective office is removed by the court, and the law provides no means for filling the vacancy, the board of elections in the county where the removed officer resides shall order a special election to fill the vacancy in office.<sup>15</sup>

### **B. Additional Provision - Municipal Officer<sup>16</sup>**

Additionally, a judicial complaint can be filed against a municipal officer pursuant to [R.C. 733.72](#). This method for removal is available only when the municipal officer is receiving illegal compensation for services, has a private interest in a city contract, or is guilty of misfeasance or malfeasance in office.

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<sup>13</sup> [R.C. 3.08](#).

<sup>14</sup> [R.C. 3.08](#).

<sup>15</sup> [R.C. 3.09](#).

<sup>16</sup> [R.C. 733.72](#).

The complaint is filed with the probate judge of the county in which the municipality or the larger portion the municipality is located.

If the charges in the complaint are sustained at trial, the judge will make an order removing the officer from office, and forthwith transmit a certified copy of the order to the presiding officer of the legislative authority of the municipality, whereupon the vacancy shall be filled as provided by law.<sup>17</sup>

If the vacancy is filled by appointment, the municipal appointing authority shall immediately, but no later than seven days after making the appointment, certify it to the board of elections and to the Secretary of State. The board of elections shall issue a certificate of appointment to the appointee.<sup>18</sup>

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<sup>17</sup> [R.C. 733.76.](#)

<sup>18</sup> [R.C. 3.02\(B\).](#)