

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

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## MEMORANDUM

**DATE:** For the Meeting of June 27, 2011

**TO:** Members, Wisconsin Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Prepared and Presented by:  
Shane Falk and Michael Haas, Staff Counsels

**SUBJECT:** Recall Nomination Paper Challenge Procedure

June 21, 2011 was the deadline for filing nomination papers for offices to be elected in the July 19, 2011 Recall Elections for Senate Districts 12, 22, and 30. Invariably, after nomination papers are filed, challenges to those nomination papers are filed. The Board's members will be asked to rule on those challenges at the June 27, 2011 meeting. The challenge complaints received by the Friday, June 24, 2011 deadline were made available to the Board in advance of the Board meeting. To refresh Board members' familiarity with the challenge procedure, the following review is provided.

### **I. PROCEDURE**

1. June 21, 2011 - Nomination papers must be filed not later than 5:00 p.m., (s.9.10, Stats.), for all nominations for the recall elections ordered for July 19, 2011.
2. June 24, 2011 - Challenges to nomination papers must be filed not later than 4:30 p.m. (Rule GAB 2.07). A copy of the complaint will be delivered by the Board's staff to the candidate whose papers are being challenged.
  - a. Challenges must be made by verified complaint and must establish probable cause to believe that the paper or signature challenged does not comply with Wisconsin Statutes or the rules of the Government Accountability Board. (See annotation below.)
  - b. The challenge should be accompanied by affidavits or other relevant documentation. Any challenge which is not established by the materials submitted as of the deadline for challenge is denied.

3. June 27, 2011 (Monday) - If received not later than 8:00 a.m., a written response to the challenge, (that will be photocopied or emailed for Board members for the June 27, 2011 meeting), may be filed by the candidate. A written response should also be verified and should also be accompanied by affidavits or other documentation. Just as the burden of establishing a challenge is upon the challenger, the burden of rebutting an established challenge is upon the candidate whose papers are challenged.
4. June 24 – 27, 2011 - The Board's staff will try to prepare a written report on the challenges and any available responses. To whatever extent possible, the Board's staff will contact circulators, affiants, and other persons with personal knowledge of the circumstances under which the signatures were obtained. Given the time frame involved, staff verification will probably be limited to close cases.
5. June 27, 2011 - The Board will meet to consider the challenges and responses, and hear any oral presentation. Attached is a copy of the relevant provisions of ch.8 of the Statutes governing nomination papers and nominations. Also attached are the Board's rules, GAB 2.05 and 2.07, governing treatment and sufficiency of nomination papers and challenges thereto.

**Please note:** Because challenge proceedings are an administrative proceeding subject to statutory administrative procedures and potential court review, Board staff recommends that any challenge proceedings be handled on a case-by-case basis. In other words, rather than having the Board entertain public comments on all cases before considering staff recommendations, staff recommends that the Board Chair announce each file, request any public comments regarding that matter, consider the staff recommendation, and then vote on each case prior to calling the next file. This procedure would help the Board to recall the facts of each case and the public comments at the time of the Board's decision, and to create a concise record for any potential court review of a particular decision.

## II. ANNOTATION

As a general rule, the policy of the former Elections Board and of the Government Accountability Board with respect to the nomination process has been to help or facilitate candidate ballot access, not to find a justification for impeding that access, and the challenge procedure was applied in that spirit. As much as possible, the selection and elimination of candidates should be left to the electorate.

To be considered by the Board, a challenge complaint must establish probable cause to believe that a violation of election law has occurred. A complaint must allege facts which, if true, would constitute a failure to comply with Wisconsin's election (not campaign finance) statutes. The complaint must allege a violation of ch.8, Stats., the statutory chapter governing nominations to the general election ballot. The statutory standard for compliance is "substantial compliance" as set forth in §.5.01(1), Stats., as follows:

*5.01 Scope. (1) CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs.5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of their provisions.*

The Board's administrative rule, GAB 2.05, sets forth the standards for determining whether nomination papers comply with ch.8, Stats. And its rule, GAB 2.07, sets forth the bases and procedure for challenges to those papers. Note that GAB 2.05(4) provides that "Any information on a nomination paper is entitled to a presumption of validity." Consequently, any challenge to that information must rebut that presumption, (under §.903.01, Stats.), by clear and convincing evidence that "the nonexistence of the presumed fact is more probable than its existence."

Challenges must be based on the personal knowledge of the complainant or of a person whose affidavit or sworn statement accompanies the challenge. As an example: a challenge to the eligibility to sign of various signers of a nomination paper, based on non-residency of those signers, must be accompanied by reference to Voter Public Access or "Who is My Legislator?" web searches, a map of the district showing their address to be outside the district, or by a signed statement from the election official, (municipal clerk or deputy clerk), whose responsibility it is to determine the residency of electors of the district. The complainant challenger's allegation of the signers' non-residency, without these references, is not sufficient to sustain the challenger's burden of proof.

Challengers will be informed that new grounds for a challenge which are not raised in an initial complaint and which are raised after 4:30 p.m., Friday, June 24, 2011, will not be considered by the Board.

Challenge complaints are filed by delivering an original and a copy to the Government Accountability Board at its offices, pursuant to GAB 2.07, and by the Board's staff delivering a copy to the respondent whose nomination papers are being challenged.

### **III. CORRECTIONS TO NOMINATION PAPERS**

Historically, the former Elections Board and this Board have recognized that some deficiencies in nomination papers, (or other petitions, for that matter), may be corrected by way of an affidavit from the circulator of the nomination paper (or petition). This is true whether the deficiencies were identified by staff review of the nomination paper or were identified by a challenge complaint. Consequently, signatures, which have been disallowed by the staff in its initial review of a nomination paper, have been "rehabilitated" by a correcting affidavit submitted after the deadline for filing nomination papers. Because of the potential for correction of nomination paper deficiencies, challengers have been advised to **not** assume that nomination papers, or some of the signatures on them, that have been disallowed as a result of staff review are forever barred, (i.e., do not need to be challenged). Any challenges to signatures disallowed (tentatively) by staff review also must be raised not later than 4:30 p.m., Friday, June 24, 2011, whether or not those papers or signatures have been corrected as of that time.

The basis for this application of the law is the distinction drawn by the courts between statutory requirements that are "mandatory" – the standard for compliance with which is strict, and those that are "directory" – the standard for compliance with which is substantial.

Errors that may be corrected:

a.) Elector errors:

- i. The elector wrote in a date other than the one on which he/she signed or left line undated
- ii. The elector used an address, which does not reflect his actual residence
- iii. The elector wrote in a municipality which does not reflect his actual residence

b.) Certificate of Circulator errors:

The circulator failed to sign or otherwise complete the certificate, or entered inadvertently erroneous data (for instance: the circulator dated the certificate before circulation, not after).

Errors that may not be corrected:

a.) Signatures may not be added or replaced after the filing deadline nor after the certificate of circulator has been executed. (However, the date of certification may be corrected.)

b.) None of the information in the heading of the nomination paper, (i.e., candidate's name, candidate's address, political party represented, date of election, office sought, name of jurisdiction or district in which candidate seeks office), may be altered, amended, or added after circulation of the nomination paper. This is the nomination information that each signatory saw and relied upon in deciding to sign the paper.

c.) The date of signing may not be changed to a date other than the one on which the signatory actually signed; nor may any other signatory information be changed from that which was correct at the time the signatory signed.

Attachments: GAB 2.05, 2.07 Wis. Adm. Code  
Sections. 8.15, 8.21, 8.30 Wis. Stats.