

**El. Bd. Op. 89-2** (Reaffirmed 12/17/08)

**Summary:**

**A vacancy on a school board caused by a resignation after a recall petition has been filed with the school district clerk is filled by recall election and may not be filled by appointment by the school board.**

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on December 17, 2008.

**Opinion:**

You have requested a formal opinion of the State Elections Board pursuant to §5.05(6), Stats., with respect to the following fact situation. Petitions for the recall of five of the seven members of the Whitefish Bay School Board have been filed with the clerk of the school district. Those petitions have not been certified by either the school district clerk or by a circuit court for Milwaukee County. One of the board members who is named in a recall petition is considering resigning for reasons of health. The questions you have raised are:

1. Whether under §17.26, Stats., the school board has the authority to fill the vacancy on the board caused by a resignation of a board member after a recall petition has been filed with the board clerk but before the board clerk certifies the petition and files it with the Clerk of Circuit Court?
2. Whether under §17.26, Stats., the school board has the authority to fill a vacancy on the board caused by a resignation of a board member after a recall petition has been certified by the board clerk but before the circuit court issues a certificate directing that an election be held pursuant to §9.10, Stats.

The Elections Board prefaces its opinion with the advice that it believes it does have jurisdiction, under §5.05, Stats., to administer Chapter 17, Stats., or resolve questions arising thereunder, because of the interrelationship of §§17.26 and 9.10, Stats.

The Board believes that a vacancy in a school board office which is created by resignation after the filing of a petition for recall of the official holding that office is filled pursuant to §9.10, Stats., and not pursuant to §17.26, Stats. The language of §17.26, Stats., expressly excepts from its application the provisions of §9.10, Stats.

17.26 VACANCIES IN SCHOOL BOARDS; HOW FILLED. Except as provided in s.9.10, Stats., vacancies in a school board shall be filled as follows:

What the legislature has said in this preamble to §17.26, Stats., is that a vacancy on a school board is filled under that section unless the vacancy is the subject of a recall action under §9.10, Stats. If a school board vacancy is the subject of a recall action under §9.10, then that section takes precedence over §17.26. A school board office is the subject of a recall action if a valid petition for recall has been filed with the appropriate clerk.

Even if the language of the preamble to §17.26 were not a clear enough preemption, we believe that the effective date of a recall action, the date of filing of the petition, precedes the effective date of the resignation. The effective date of the recall action is the date of filing of the petition. Although a petition may be amended—to correct insufficiency—after filing, the petition as amended is not a new petition and new signatures may not be added after filing. The action of the petitioner in amending the petition and of the clerk and the circuit court in certifying the petition relate back to the petition as filed. The signatures on the petition determine the expression of the electorate that a new election should be held and those signatures are fixed, and speak, as of the date they are offered for filing. A resignation is not effective before the date on which it is submitted. A petition for the recall of an official who does not hold office because he has already resigned cannot be filed. The effective date of the recall petition, therefore, must be prior to the date of the resignation.

A recall petition is directed at both a specific officeholder and at a specific office. A valid recall petition reflects the will of a considerable portion of the electorate that a new election should be held. Section 9.10, Stats., codifies that will into a right to a new election (or re-election). That the incumbent chooses to resign does not mean the petitioners lose or ought to lose that right. The will of those seeking a new election should not be frustrated by the one person who has precipitated the collective effort to obtain that election.

The answer to your first two questions precludes the consideration of your third question. The school board does not have authority to appoint a new board member.