

WISCONSIN ELECTIONS COMMISSION

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INTERIM ADMINISTRATOR MEAGAN WOLFE

MEMORANDUM

DATE: For the August 22, 2018 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe
Interim Administrator, Wisconsin Elections Commission

Prepared and Presented by:
Michael Haas, Staff Counsel
Nathan Judnic, Senior Elections Specialist

SUBJECT: Certification of and Timeline for Trempealeau County District Attorney Recall Election

The Elections Commission received a campaign registration statement (CF-1) and a statement of intent to circulate a recall petition (EL-170i) from the Recall Taavi McMahan recall committee on May 25, 2018. The Elections Commission received a recall petition on Monday, July 23, 2018 against Trempealeau County District Attorney Taavi McMahan. The petition was filed by the Recall Taavi McMahan Committee. WEC staff has completed its first and second reviews of the petition and determined that it contains 3,149 valid signatures, which is 466 more signatures than the required minimum number of 2,683 valid signatures. District Attorney McMahan did not file any challenges to the petition by the deadline of August 2, 2018. Based upon its review, staff recommends that the Commission certify the recall petition as sufficient and order the election to be scheduled. Pursuant to Wis. Stat. § 9.10(3)(b), the Commission must make a determination as to the sufficiency of the petition and order an election, if the petition is sufficient, within 14 days of the petition being submitted, or by August 23, 2018.

Wis. Stat. § 9.10(3) governs the timing of the recall election and, if necessary, the recall primary. If the petition is sufficient, the Commission must order the recall election to be held “on the Tuesday of the 6th week commencing after the date of filing of the petition.” The petition is “filed” when the WEC Administrator certifies to the Commission that it is sufficient in form and contains the required number of valid signatures. If more than one candidate qualifies for the ballot in any ballot party, the date ordered by the Commission becomes the recall primary and the recall election is held four weeks after the primary. A copy of Wis. Stat. § 9.10 is attached.

The Administrator will “file” the petition on the same day of the Commission meeting. The Tuesday of the 6th week after the filing of the petition will be October 2, 2018. Pursuant to Wis. Stat. § 9.10(3)(c), nomination papers would be due on September 4, 2018, allowing 14 days for circulation of nomination

papers by any candidate other than the incumbent. The incumbent is automatically a candidate unless he resigns within 10 days after the petition is filed. Wis. Stat. § 9.10(3)(c). The recall election still occurs even if the incumbent resigns within that time period.

It is relatively rare that District Attorney elections involve a primary but that may be less predictable in a recall situation. If there is no need for a primary, the recall election on October 2, 2018 would create limited complications combined with the administration of the General Election on November 6, 2018. Ballots for the recall election in Trempealeau County would be available by September 11, 2018, and ballots for the General Election would be available by September 20, 2018.

If a recall primary is required because more than one candidate qualifies for the ballot in any political party which has ballot access, the election date ordered by the Commission becomes the date for the recall primary. In that case, Wis. Stat. § 9.10(3)(f) provides that the recall election “shall be held on the Tuesday of the 4th week commencing after the recall primary” unless that day is a holiday. The fourth Tuesday after October 2, 2018 is October 30, 2018, which is one week prior to the General Election.

Conducting a recall election so close to the General Election risks generating significant voter confusion and administrative complications when voters and election officials will be focusing on the high profile General Election. There would be deadlines that are close but different for activities such as issuing and tracking absentee ballots and administering in-person absentee voting. Municipal clerks may also have a challenge in securing election inspectors to serve during two consecutive Tuesdays. Clerks may also have to incur unexpected costs to procure additional memory devices to conduct two elections according to this timeline. Wisconsin law requires that memory devices used in an election may not be cleared and reprogrammed for 21 days after that election meaning devices used for the recall election will not be able to be used for the General Election. In addition, municipal and county canvass boards would be meeting in the week following the recall election which is also the week of the General Election.

In the past and at the request of local clerks, the State Elections Board and the Government Accountability Board occasionally authorized a local recall election to take place on the same day as a regularly-scheduled election in situations where the recall election schedule would result in two elections within one or two weeks. In doing so, the state elections agency attempted to balance the constitutional right of the recall petitioners to a timely recall election with the reality of the significant administrative challenges and potential voter confusion which would likely occur. For example, the Elections Board authorized the City of Milwaukee Elections Commission to schedule a recall election on the date of the Spring Primary when the statutory recall schedule would have otherwise required the recall election to be held two weeks prior to the Primary. In that case, the Elections Board advised:

The standard for compliance with the recall statute has been held to be substantial compliance, not strict compliance.¹ Although the context in which that standard has been applied is in regard to the recall petitioners’ compliance, the same standard has to apply to the governing body calling the election. In providing the schedule for the holding of the recall election, the legislature intended that recall elections be held in close proximity to the petition process while the subject of recall is still fresh in the minds of the persons who signed the recall petitions; and to avoid delays that could have the effect of frustrating the right of recall by

¹ See *In re Jensen* (App. 1984) 121 Wis.2d 467; *Matter of Haase* (App.1984) 120 Wis.2d 40

perpetuating the term of office of an incumbent whom the electorate had determined to remove from office.

Even in the scheme of a two-year term of office, however, a postponement of two weeks is not an undue delay or an undue extension of the term of office. Furthermore, the scheduling of the recall election to coincide with the spring primary serves an equivalent public policy: economy of elections. By coinciding two distinct elections, the expense and inconvenience of a separate election is avoided and the participation of the public in the recall election is maximized or enhanced.² Consequently, scheduling of the recall election to coincide with the spring primary substantially complies with s.9.10, Stats. A delay for any longer period, however, may not be substantial compliance and would have to be evaluated on its own merits.

For similar reasons, Commission staff recommends that the Commission order that if a recall primary is required, the recall election would take place on November 6, 2018, concurrent with the General Election and five weeks following the recall primary. Under these circumstances a postponement of one week is not an undue delay or undue extension of the incumbent's term of office, and it serves the same administrative interests for both local election officials and voters. Staff has contacted the recall petitioner to discuss this recommendation and he is agreeable to this approach.

Recommended Motion:

The Commission finds that the recall petition filed against Trempealeau County District Attorney Taavi McMahon contains 3,149 valid signatures and certifies the petition as sufficient. The Commission orders that a recall election be held in the municipalities of Trempealeau County on October 2, 2018 and that nomination papers for all candidates other than the incumbent must be filed in the office of the Wisconsin Elections Commission no later than 5 p.m. on September 4, 2018. The Commission further orders that if a recall primary is required for any ballot access party, the recall election shall be held on November 6, 2018, concurrent with the 2018 General Election. The Commission directs the Administrator to file and attach to the petition the Certificate of Sufficiency and Order attached to this Memorandum in accordance with Wis. Stat. § 9.10(3).

² For the same reasons § 8.50, Stats., provides that no special election may be held after February 1 preceding the spring election unless it is held on the same day as the spring election. However, delaying the recall election in this matter until the spring election would be an undue delay and not substantial compliance.