

## **CHAPTER 44-11 REMOVAL BY GOVERNOR**

### **44-11-01. What officers removable by governor - Grounds.**

The governor may remove from office any county commissioner, sheriff, coroner, county auditor, recorder, state's attorney, county treasurer, superintendent of schools, surveyor, public administrator, city auditor, city commissioner, mayor, township officer, rural fire protection district board member, school board member, or any custodian of public moneys, except the state treasurer, whenever it appears to the governor by a preponderance of the evidence after a hearing as provided in this chapter, that the officer has been guilty of misconduct, malfeasance, crime in office, neglect of duty in office, or of habitual substance abuse or gross incompetency.

### **44-11-02. Charges - How made - By whom prosecuted.**

1. The petition against any official authorized to be removed by the governor must be entitled in the name of this state and must be filed with the attorney general.
2. The charges against any official, other than a school board member, may be made upon the petition of fifty qualified electors of the county in which the person charged is an officer, or upon the petition of ten percent of the qualified electors voting at the preceding general election for the office of governor in that political subdivision or district in which the person charged is an officer, whichever is least, or by the state's attorney of such county.
3. The charges against a school board member must be made upon a petition containing the signatures of qualified electors of the school district equal in number to twenty percent of the number of persons enumerated in the school census for that district for the most recent year such census was taken, unless such census is greater than four thousand in which case only fifteen percent of the number of persons enumerated in the school census are required. However, not fewer than twenty-five signatures are required unless the district has fewer than twenty-five qualified electors, in which case the petition must be signed by not less than twenty-five percent of the qualified electors of the district. In those districts with fewer than twenty-five qualified electors, the number of qualified electors in the district must be determined by the county superintendent for such county in which such school is located.
4. When the petition is filed, the attorney general shall conduct an investigation within thirty days. Upon completion of the investigation, the attorney general shall make a recommendation to the governor whether a removal proceeding should be conducted by a special commissioner, and if so, whether the accused officer should be suspended during the pendency of the proceeding.
5. Upon receipt of the recommendation of the attorney general, the governor shall determine whether to proceed with the appointment of a special commissioner. If the governor decides not to appoint a special commissioner, the governor shall notify the individuals who filed the petition and summarize the reasons for the decision. If the governor decides to appoint a special commissioner, the governor shall request that a prosecutor draft and serve the official complaint against the officer.
  - a. When the officer sought to be removed is other than the state's attorney, the state's attorney for the county involved or in which the political subdivision or office is located, upon request of the governor, shall appear and prosecute. Upon approval of the governor, the state's attorney may contract with a state's attorney from another county or other competent attorney, or request the attorney general to prosecute the proceedings.
  - b. When proceedings are brought to remove the state's attorney, the attorney general shall appear on behalf of the state and prosecute such proceedings. Upon approval of the governor, the attorney general may contract with a state's attorney or other competent attorney.

#### **44-11-03. Petition and complaint - Requisites.**

The petition and thereafter the complaint must state the charges against the accused, and, unless filed by the state's attorney or attorney general, must be verified and may be amended as in ordinary actions. If such amendment of the complaint or charges includes any new or additional charge, then the accused must be allowed a reasonable time to prepare a defense.

#### **44-11-04. Suspension of officer - Notice to governing body.**

If the governor judges that the best interests of the state require it to be done, the governor by written order to be delivered to such officer, may suspend the accused officer from the performance of duty during the pendency of the removal proceedings. If the governor suspends the accused, the governor immediately shall notify the board or persons authorized to fill a vacancy in that office, and that board or those persons, within five days after receipt of such notice, shall appoint a competent person to fill the office and perform the duties of the officer during the suspension.

#### **44-11-04.1. Appointment of special commissioner - Filing of complaint.**

The governor shall appoint as a special commissioner a retired or former judge, or other competent person learned in the law to preside over the removal proceedings. The prosecutor shall file with the special commissioner a complaint containing the allegations against the officer, which may consist of the charges alleged in the petition or any charge justified by the investigation conducted by the attorney general. The prosecutor shall also file proof that the complaint was served on the officer.

#### **44-11-05. Notice of charges - Taking testimony.**

Repealed by S.L. 2013, ch. 342, § 12.

#### **44-11-06. Hearing - Report to governor .**

Within thirty days of the appointment of the special commissioner, a hearing shall be held in open court on the allegations of the complaint. The proceedings shall be recorded by a court reporter or court recorder. The accused is entitled to be present and be heard in person or through the accused's attorney. The commissioner has the same powers as are conferred upon district judges to take testimony and may rule on, admit, or exclude testimony accordingly. Within ten days of the conclusion of the hearing, the commissioner shall forward to the governor a report of the proceedings, including a summary of testimony, findings as to whether any allegations were proven by a preponderance of the evidence, exhibits and evidence received, and a recommendation whether the accused should be removed from office. The governor may request a transcript be prepared if review of testimony is necessary for a final determination on removal.

#### **44-11-07. Removal from office upon hearing - Filling vacancy.**

If after reviewing the report and recommendation, the governor determines that removal is in the best interests of the state, the governor shall make an order in writing removing the accused from office, and shall cause a copy of the order to be delivered to the accused and one copy to be delivered to the board or persons having the authority to fill a vacancy in that office. Thereupon that board or person, within five days thereafter, shall appoint a competent person to fill the office and perform the duties thereof, unless the accused, prior to the final hearing, had been suspended as provided by this chapter, and an interim appointment made. In such case the person appointed to the office during the suspension shall continue until the expiration of the term for which the accused was elected or appointed. If the governor decides that removal is not in the best interests of the state, the governor shall notify the individuals who filed the petition and summarize the reasons for the decision.

#### **44-11-08. Appeal - Notice and bond filed with clerk of district court.**

When the accused person so removed is aggrieved by the removal, the accused person is entitled to appeal from the decision of removal made by the governor to the district court in any

other district of the state upon filing a notice in the office of the clerk of the district court, setting forth the grounds of appeal, together with a bond in the sum of two hundred fifty dollars, which must be for the payment of costs of such appeal in the event the action of the governor is affirmed. Such bond must be approved as to form by the state's attorney of the county and as to its sufficiency by the clerk of the district court. Such notice and bond must be filed within fifteen days after the date of the order by the governor.

**44-11-09. Appeal - Notification of governor - Proceedings.**

The clerk of the district court shall notify the governor of the filing of an appeal by registered or certified mail. The governor, within ten days after the receipt of such notice, shall mail to the clerk of said court the testimony in such removal proceedings, together with a copy of any order made by the governor in such proceedings. Said appeal must be heard by the judge of said court upon the record in such proceedings, without a jury, at the next regular term of court or prior to said term, in the discretion of the judge of said court. After such hearing by the district judge, the district judge shall make an order affirming the order of the governor or an order reinstating the defendant officer if the decision is clearly erroneous.

**44-11-10. Fees of special commissioner - Stenographer - Witnesses.**

The fees of the special commissioner provided for by this chapter must be two hundred dollars per day, and in addition thereto, the special commissioner shall receive mileage from the commissioner's residence to the place of trial the same as is allowed by law to sheriffs. The special commissioner may employ a stenographer and pay the expenses of the stenographer. Such expenses must be itemized by the commissioner and filed with the commissioner's report and findings and audited and allowed by the governor. Witnesses giving testimony before such commissioner, the number to be limited by the commissioner, must be allowed the same fees as witnesses in district court. In proceedings to remove a county officer, such fees must be paid by the county upon allowance by the board of county commissioners in the same manner as other claims against the county, and if a municipal or township officer, then by the city council, board of city commissioners, or board of township supervisors, in the same manner as other claims against the municipality are paid.

**44-11-11. Oath of commissioner - Contents - Filing.**

When a special commissioner has been appointed as provided in this chapter, the commissioner forthwith shall take an oath and shall file the same with the governor that:

1. The commissioner, impartially and to the best of the commissioner's knowledge and ability, without fear, favor, or prejudice, will hear and cause to be taken all the testimony and evidence offered and received at the hearing for and in behalf of the prosecution and accused, together with all papers and other exhibits offered by either party, and carefully will preserve the same.
2. The commissioner will cause all of the oral testimony offered and received at the hearing to be available to be transcribed at the request of the governor, and as speedily as may be after the hearing will prepare a report of the proceedings, summary of testimony, findings of fact, and complete record of all evidence and testimony, including all exhibits offered and received at said hearing by either party, and will cause the same to be filed with the governor.

**44-11-12. Powers of commissioner - Subpoenas - Service - Fees.**

After taking and filing the oath of office, the commissioner has authority to issue subpoenas for persons and subpoenas duces tecum and to administer oaths to witnesses the same as is conferred upon district judges. The subpoenas may be directed to any sheriff, or chief of police, who immediately shall serve the subpoenas. The officer is entitled to such fees as are allowed to sheriffs for serving subpoenas in district court. The fees must be paid in the same manner as is provided in this chapter for witness fees and commissioner's fees. The commissioner may punish for contempt in the same manner as the district court.

**44-11-13. Costs on dismissal of charges - Bond.**

Repealed by S.L. 2013, ch. 342, § 12.

**44-11-14. Collection of costs.**

Repealed by S.L. 2013, ch. 342, § 12.