



March 29, 2025

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# Removal From Office-Ouster

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Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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Table of Contents

<b>Removal From Office-Ouster .....</b>	<b>3</b>
<b>Ouster Cases .....</b>	<b>4</b>

# Removal From Office-Ouster

Reference Number: CTAS-657

Article 7, Section 1 of the Tennessee Constitution provides that county officers shall be removed from office for malfeasance or neglect of duty. "The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." *State ex rel. Complainant v. Ward*, 43 S.W.2d 217, 219 (Tenn. 1931).

Pursuant to T.C.A. § 8-47-101, county officials may be ousted from office for:

1. Knowing or willful misconduct in office;
2. Knowing or willful neglect of duties required by law;
3. Voluntary intoxication in a public place;
4. Engaging in illegal gambling; or
5. Committing any act violating any penal statute involving moral turpitude.

Participating in the Tennessee lottery or other activity which is conducted pursuant to law and authorized by the Constitution of Tennessee is not considered gambling. T.C.A. § 8-47-127.

"Proceedings under the Ouster Act should never be brought unless there is a clear case of official dereliction. This is a very drastic statute and should not be invoked except in plain cases that can be certainly proved." *State ex rel. Wilson v. Bush*, 208 S.W. 607, 609 (Tenn. 1919). See, e.g., *McDonald v. Brooks*, 387 S.W.2d 803, 806 (Tenn. 1965) (ouster suits should be brought only where the evidence of official dereliction is clear and convincing). As has been noted by the Tennessee Supreme Court:

The Ouster statute is a salutary one, but those administering it should guard against its overencroachment. Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.

*Vandergriff v. State ex rel. Davis*, 206 S.W.2d 395, 397 (Tenn. 1937) (emphasis added).

"Misconduct that would sustain an indictment under the common law would support a proceeding under the Ouster Law." *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 597 (Tenn.Ct.App. 2008). Nevertheless, a plaintiff in an ouster suit shoulders a heightened burden of proof. *Id.* The Tennessee Court of Appeals has noted:

As used in reference to the ouster statute, the terms "knowingly" and "willfully" have been defined as encompassing "a mental attitude of indifference to consequences or failure to take advantage of means of knowledge of the rights, duties or powers of a public office holder." *Tennessee ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn.1981) (citing *Jordan v. State*, 217 Tenn. 307, 397 S.W.2d 383, 398 (1965)). The *Jordan* court also noted that the terms "knowingly" and "willfully" as used in ouster proceedings are "not confined to a studied or deliberate intent to go beyond the bounds of the law." *Jordan*, 397 S.W.2d at 399. However, it requires more than "simple negligence" to constitute willful or knowing misconduct. *Id.* (holding "simple negligence in discharging the duties of an officer does not constitute or amount to an officer acting knowingly or willfully").

*Id.* at 598.

Ouster is purely a civil proceeding and the rights granted to defendants in criminal cases are not applicable under the ouster statutes. *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981). Ouster proceedings may be instituted by the attorney general, district attorney general, or county attorney, either on their own initiative or after a complaint has been made. T.C.A. § 8-47-102. County attorneys, within their respective jurisdictions, are required to investigate any complaint made in writing alleging that a county officer is guilty of any of the acts, omissions, or offenses set out in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. T.C.A. § 8-47-103. See Op. Tenn. Atty. Gen. 07-169 (December 21, 2007); Op. Tenn. Atty. Gen. 00-126 (August 7, 2000). Note that the county commission is not authorized by statute to bring ouster proceedings against county officials. "Nor, is the county executive authorized under the ouster statutes to bring such a suit." *Duncan v. Cherokee Ins. Co.*, 1987 WL 11329 (Tenn.Ct.App. 1987).

County attorneys have the power and are directed, whenever a complaint has been made, and the names of the witnesses have been furnished to them, or whenever they deem necessary, to issue subpoenas for witnesses and other persons they believe have knowledge of the complaint, to appear before them at a

time and place designated in the subpoena and testify concerning the subject matter set out in the complaint. T.C.A. § 8-47-104. Each witness must be sworn and the testimony of each witness must be reduced to writing and signed by the witness. County attorneys may administer the necessary oaths and affirmations to the witnesses. T.C.A. § 8-47-105. Disobedience of a subpoena, or refusal to answer proper questions propounded by the county attorney at the inquiry, is a Class C misdemeanor. T.C.A. § 8-47-106.

The privilege against self incrimination does not apply in ouster proceedings. No person will be excused from testifying under the ouster statutes on the ground that the person's testimony may incriminate him or her. However, no person may be prosecuted or punished on account of any transaction, matter, or thing concerning which the person was compelled to testify, and the testimony cannot be used against the person in prosecutions for any crime or misdemeanor under the laws of this state. T.C.A. § 8-47-107. Citizens may also file ouster proceedings. Ten citizens and freeholders are required to institute the proceedings and they must post security for the costs of the lawsuit. T.C.A. § 8-47-110. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). It is the duty of the county attorney, upon request of relator citizens and freeholders, to aid and assist in the prosecution of the proceedings against county officers. T.C.A. § 8-47-111.

When an ouster petition or complaint is filed the court may suspend the accused officer from performing any of the duties of their office, pending a final hearing and determination of the matter. The vacancy should be filled as the law provides for the filling of vacancies in that office. The person filling the vacancy carries on the duties of the office until the hearing is concluded or until a successor is elected. T.C.A. § 8-47-116. The officer temporarily filling the office receives the same salary and fees as paid to the suspended officer. T.C.A. § 8-47-121.

At least five days before an official is suspended, the official must receive a notice setting forth the time and place of the hearing on the suspension application. The officer has the right to appear and make any defense that the officer may have, and shall be entitled to a full hearing upon the application for the order of suspension. No order of suspension shall be made, except upon finding of good cause. T.C.A. § 8-47-117.

Ouster proceedings have precedence over civil and criminal actions, and must be tried at the first term after the filing of the complaint or petition, provided that the answer of the accused officer has been on file at least ten days before the day of trial. The accused officer is entitled to demand and have a trial by jury as to any issue of fact. T.C.A. § 8-47-119. Likewise, plaintiffs in an ouster suit are entitled to a trial by jury as to any issue of material fact. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). If the officer is found guilty, the officer shall be ousted from office and must pay the full costs adjudged in the case. T.C.A. §§ 8-47-120 and 8-47-122.

If, after the final hearing the officer is not removed from office, the officer shall, if the officer has been suspended, be immediately restored to office and be allowed the officer's full costs and the salary and fees of the officer's office during the time of the officer's suspension. After the final hearing, any officer not removed from office may be reimbursed reasonable attorney fees. However, if either party appeals no such reimbursement shall be made until a final judgment is rendered. T.C.A. § 8-47-121. *See State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 602 (Tenn.Ct.App. 2008) (denying attorney fees). *See also Marshall v. Sevier County*, 639 S.W.2d 440 (Tenn.Ct.App. 1982).

Either party to an ouster proceeding may appeal, but the appeal does not operate to suspend or to vacate the trial court's judgment or decree, which remains in full force until vacated, revised or modified. T.C.A. § 8-47-123. An ouster suit has priority on appeal and will be heard at the first term after such appeal is perfected and filed. T.C.A. § 8-47-125.

## Ouster Cases

Reference Number: CTAS-658

*State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010) (county commissioner ousted for committing perjury).

*State, ex rel. Estep v. Peters*, 815 S.W.2d 161 (Tenn. 1991) (school superintendent ousted for knowingly or willingly misapplying public funds and failing to make required financial reports to the county commission).

*Tennessee ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn.1981) (road superintendent ousted for knowingly and wilfully permitting county equipment to be used by private company, knowingly and wilfully permitting a county employee to work for a private company at the same time that he was being paid by

the county, and failing to comply with competitive bidding procedures).

*Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965) (county commissioner ousted for utilizing for his own benefit equipment and supplies of the Shelby County Penal Farm and labor of its inmates).

*Edwards v. State ex rel. Kimbrough*, 250 S.W.2d 19 (Tenn. 1952) (sheriff ousted for knowingly and willfully neglecting his duty to "suppress affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace").

*State ex rel. Ten Citizens of Campbell County v. Smith*, 11 S.W.2d 897 (Tenn. 1928) (chairman of the county board of education ousted upon finding that he failed to countersign thousands of warrants authorized by the board of education, as required by law, but instead provided his secretary a rubber stamp with which to sign the chairman's name to the warrants).

*State ex rel. Milligan v. Jones*, 224 S.W. 1041 (Tenn. 1920) (director of school district ousted where there had been no meeting of the board of directors after the director had been elected, and he had repeatedly signed the names of all the directors to school warrants, he had failed and neglected to take care of the school property, and he had hauled coal from the school grounds).

*State ex rel. Thompson v. Reichman*, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office).

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