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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

IN RE THE RECALL OF DALE WASHAM
PIERCE COUNTY ASSESSOR-TREASURER

Appeal from the Superior Court of Pierce County

The Honorable Thomas J. Felnagle

APPELLANT PIERCE COUNTY ASSESSOR-TREASURER
DALE WASHAM'S REPLY BRIEF

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FILED
FEB -4 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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I. SUMMARY REPLY

Respondent (Farris) argues she had the right to amend the petition to correct her failure to verify the charges and other matters. However, RCW 29A.56.130(2) vests the task of petitioning the superior court exclusively with the prosecutor who already declined to act on her letter requesting the petition be amended. In any case, the court lost jurisdiction once the 15 day statute of limitations ran for the sufficiency determination.

Assuming Farris could ignore the law and file her letters as the "Recall Petition" directly with the court, her charges are legally and factually insufficient. Farris relies on unverified hearsay reports and references inapplicable or non-existent laws. The genesis of those reports are grievances from a few disgruntled employees who felt threatened by Washam's legitimate concern that physical inspections had not been done every 6 years as required by law and were falsely entered into the taxpayers' assessment records as having been done. Those false entries were used as a basis for yearly reports to the State Department of Revenue and to the Pierce County Budget and Finance Department during the years 2001-2008.

II. ARGUMENT

A. Farris has no right to amend the recall petition filed by the prosecutor.

There is no private right to directly file a recall petition in court or, for that matter, for any voter to amend such a petition after it has been filed by the prosecutor. Here, the prosecutor declined to amend his petition and expressly “took no position on the validity or effect, if any, of the Amended Request.”¹ Farris blames the prosecutor for failing to realize that her “original Petition contained a defective verification”² and argues that “free amendment of pleadings” enables her to bypass the prosecutor and file her letter directly in court as an “amended petition.” This “legal doubletalk”³ ignores the facts and the law.⁴ Farris had no right to pursue her unverified recall *charges* in court after the prosecutor declined to amend his *petition* with the court.⁵

¹ CP 191:9-10.

² Respondent’s Br. At 26 [“In this case, if the Special Deputy Prosecutor had realized that the original Petition contained a defective verification and had communicated that to Respondent, she would have been entitled under *Wasson* to file an amended Petition remedying the defect, which is precisely what she did.”]

³ “Deliberately ambiguous or evasive language. Also called *doublespeak*.” American Heritage Dictionary; See, e.g. *Miller v. Fenton*, 474 U.S. 104 (fn. 4) (1985) [questioning the voluntariness of a confession after a 58-minute interrogation.]

⁴ RCW 29A.56.130(2) vests the task of petitioning the court exclusively with the prosecutor who declined to act.

⁵ See, cf. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 894-895, 969 P.2d 64 (1998). In that case, this Court stated: “The legislature has looked out

It is undisputed that the legislature did not create a “private right of action” allowing voters to directly petition superior court for the recall of elected officials.⁶ While the voter initiates the recall process by filing verified charges with the auditor,⁷ it is the prosecutor – *not the voter* – who petitions the superior court to “determine the sufficiency of the charges.”⁸ This safeguards all elected officials from being subjected to the financial and personal burden of a recall election based on unverified, false or frivolous charges.⁹ It also insulates voters from countersuits by elected officials.¹⁰

for the interests of the public by providing that the information shall be filed by the prosecuting attorney, either on his own relation, or when directed by the court or other competent authority; and private interests are provided for in the latter part of the section by the words, "or by any other person on his own relation. . . . [The *quo warranto* statutes] all convey the idea that where the relator is other than the prosecuting attorney he must show his interest, and will be entitled to damage if he prevail, showing conclusively that his interest must be a special interest, and that his damage would be equally distinct."

⁶ See App. A to Opening Brief [RCW 29A.56.110 et seq.]; see, cf. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976) (the private right of action is designed to "enlist the aid of private individuals . . . to assist in the enforcement" of the CPA).

⁷ RCW 29A.56.110 -.120

⁸ RCW 29A.56.130(2); see, cf. *State v. Gentry*, 125 Wn.2d 570, 680, 888 P.2d 1105 (1995) ["A criminal proceeding is not a private right of action for the victim's benefit; it is a proceeding in which a prosecutor, representing all the people of the State, seeks to deter, punish, restrain, and/or rehabilitate those whose actions are so dangerous or offensive that they are an affront to a civilized society."]

⁹ See, *In re Recall of Telford*, 166 Wn.2d 148, 160, 206 P.3d 1248 (2009)

¹⁰ See, *Pederson v. Moser*, 99 Wn.2d 456, 458, 662 P.2d 866 (1983) involving a suit by the elected official against the prosecutor to enjoin the recall election. See also RCW 4.24.510 (Washington's anti-SLAPP law).

Here, it is undisputed that the original statement of charges and additional information were not verified under oath as required by law.¹¹ Furthermore, it is undisputed that the prosecutor “took no position on the validity or effect, if any, of the Amended Request.”¹² Yet, Farris proceeded as if she had a “private right of action” and filed her revised letter to the County Auditor¹³ as an “amended *petition*” directly with the court.¹⁴ Farris failed to include any verified additional information she relied upon to provide the necessary details¹⁵ to support her charges.

Farris argues that “Nothing in RCW 29A.56.110 prevents amendment of a *petition*.”¹⁶ However, that particular statute does not refer to the petition but to the initial *charges* filed by the voter with the auditor, not the court. Here, Farris filed her original letter and charges with the auditor on October 29, 2010.¹⁷ She revised

¹¹ CP 8-160; RCW 29A.56.110

¹² CP 191:9-10

¹³ Compare her original letter to the Auditor and her “amended request”. CP 9-160 and CP 193-202

¹⁴ CP 206 [Memorandum in Support of Sufficiency of Charges and Adequacy of Ballot Synopsis]

¹⁵ RCW 29A.56.110 [“The charge shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or persons making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.” (Emphasis added)]

¹⁶ CP 24 [emphasis added]

¹⁷ CP 9-160

her letter and amended her charges on November 17, 2010.¹⁸ The problem was that the prosecutor declined to amend his petition and took “no position on the validity or effect, if any, of the Amended Request.”¹⁹

To support her argument that voters have the private right to amend recall petitions filed by prosecutors, Farris relies upon *Pederson v. Moser*.²⁰ That case involved a suit by the elected official against the prosecutor to enjoin the recall election. Farris selectively quotes from that case at page 20 of her brief.

Pederson rightly points out that RCW 29.82 nowhere provides for multiple or amended recall demands and argues that they are therefore not permitted. On the other hand, nothing in RCW 29.82 prohibits filing multiple or successive recall demands, either. Moreover, the recall statute is to be construed in favor of the voter, not the elected official. See *McCormick v. Okanogan Cy.*, supra, 90 Wash.2d at 78, 578 P.2d 1303. While we are inclined to imply into the statute a requirement that a voter choose between or consolidate multiple recall demands, Reitsma did so here. We must therefore reject Pederson's claim.

Farris left out this sentence at the ellipses:

Indeed, RCW 29.82.010 permits "any legal voter" to demand recall "[w]hensoever [he or she] shall desire", the only express limitation being that no

¹⁸ CP 193-202

¹⁹ CP 191

²⁰ 99 Wn.2d 456, 458, 662 P.2d 866 (1983)

such demand may be filed within 10 months of regular election (RCW 29.82.025). (Italics ours.)

RCW 29.82.010 was recodified as RCW 29A.56.110²¹ and does not refer to the *petition* but to the initial *charges* filed by the voter. Consequently, while voters are free to file revised, amended, multiple or successive letters and charges with the county auditor, they relinquish control over the charges once the prosecutor has petitioned the superior court.²²

Farris then argues that “The Washington Rules of Civil Procedure allow for free amendment of pleadings.”²³ However, that presumes she had a “private right of action” to amend a petition filed by the prosecutor in court with a letter filed by the voter with the auditor. Even if she had such a right, Farris did not and could not follow the rules for amending pleadings *she did not file*. There is only her revised letter to the auditor.²⁴ No verified attachments. No notice of issue. No motion. No proposed “amended petition.”²⁵ No order. The court erred in treating

²¹ Laws of 2003, ch. 111, sec 2401 (effective July 1, 2004)

²² RCW 29A.56.130; Farris’s “legal doubletalk” is the misrepresentation that her revised letter to the auditor is that same as an “amended petition” filed by the prosecutor.

²³ Respondent’s Brief at 28

²⁴ CP 193-202

²⁵ Compare the form and content of the prosecutor’s “Petition to Determine Sufficiency of Recall Charges and for Approval of Ballot Synopsis” [CP 4-162] with what Farris’s letter to Julie Anderson, Pierce County Prosecutor “Subj:

Farris's letter as if it was an "amended petition" filed by the prosecutor who had already announced he would not act on Farris's request.²⁶

B. The 15 day statute of limitations ran on any sufficiency determination, thereby depriving the court of jurisdiction.

Farris does not dispute the fact that the 15 day statute of limitations ran for the sufficiency determination.²⁷ Therefore, the court lost jurisdiction. Farris argues this was due to Washam's claim that he was not properly served by the Auditor with the "amended petition." Farris states that:

Judge Felnagle continued the November 22, 2010 hearing in order to give deference to Appellant's due process rights by ensuring that proof of service of the *Amended Petition* was on file.²⁸

Washam requested "the Court to look in the file to see if there was any serving...."²⁹ Washam was never served with any "*Amended Petition*" for the simple fact that there never was such a pleading.

The prosecutor refused to amend his petition. Farris could have

Amended Request Adjudication to Petition to the Citizens of Pierce County for Recall of the Pierce County Assessor-Treasurer, Mr. Dale Washam (To Correct Citation in Page 2, These are the Allegations, Line 19, Charge 6, Line 2, and to Correct Verification)." [CP 193-202; 558]

²⁶ VRP 12/16/10 at 11:14 [Judge Felnagle granted Farris request to amend at the final hearing.]

²⁷ See Opening Brief App. B.

²⁸ Respondent's Brief at 31 [Emphasis added]

²⁹ VRP 11/22/10 at 6:7-8

formally intervened with a pleading pursuant to CR 24(c) but failed to do so.³⁰

Although Washam ultimately received Farris's revised letter, it did not include any supporting documentation. Moreover, proof of service of Farris's revised letter was not perfected and filed until January 24, 2011 - *after this case was appealed and after Washam's opening brief was filed.*³¹ It is well established that "If the evidence is not in the record it will not be considered."³²

Next, Farris argues that her revisions should relate back to the date she filed her original letter and unverified charges with the county auditor.³³ If that were true, the 15 day statute of limitations on adjudicating sufficiency of the charges ran on or before November 15, 2010 – *before she filed her revised letter and amended charges with the county auditor.*³⁴

³⁰ CR 24(c) ["Procedure. A person desiring to intervene shall serve a motion to intervene upon all the parties as provide in rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."] See also, *In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wn.2d 501, 506-507, 173 P.3d 265 (2007) [cited at Respondent's Brief at page 28].

³¹ CP 558

³² *State v. Wilson*, 75 Wn.2d 339,332,450 P.2d 971 (1969); *State v. Leach*, 113 Wn.2d 679, 693, 782 P.2d 552 (1989).

³³ Respondent's Brief at 35 [October 29, 2010]

³⁴ Farris filed her "amended request" on November 17, 2010. CP 190; See Opening Br. App. B

C. The charges are factually insufficient because they rely on unverified hearsay reports.

The amended charges are not factually sufficient because they are based on three unverified investigative reports based on hearsay and attached to the original unverified statement of charges.³⁵ Judge Felnagle erred in relying on these “multiple sources” in finding the charges were factually and legally sufficient.³⁶ Such unverified additional information was expressly rejected by this court in *In re Recall of Wasson*.³⁷

Moreover, if the civil rules of procedure apply as Farris claims,³⁸ basic rules of evidence would exclude hearsay and unauthenticated documents.³⁹ Farris did not and could not authenticate these reports. She does not have any personal “knowledge of the alleged facts upon which the stated grounds for

³⁵ CP 10

³⁶ See, e.g. VRP 12/16/10 at 35:13-17 [Regarding Charge #2, Judge Felnagle stated: “It has the same kind of supporting investigatory report.” (referring to Charge #1)]; VRP 12/16/10 at 37:7-9 [Regarding Charge #3, Judge Felnagle stated: “This, in my opinion, is almost the same analysis as Charge 1. It’s also got an investigation to support it.”]; VRP 12/16/10 at 37:17-18 [Regarding Charge #4, Judge Felnagle stated: “Factually, this is established by multiple sources.”]; VRP 12/16/10 at 38:14-15 [Regarding Charge #5, Judge Felnagle stated: “Factually, again, it’s documented from numerous sources, firsthand sources.”]; VRP 12/16/10 at 40:1-3 [Regarding Charge #6, Judge Felnagle stated: “there are plenty of facts to support the charge, and they come from multiple sources with firsthand knowledge.”]

³⁷ 149 Wn.2d 787, 72 P.3d 170 (2003); See Opening Brief at 17-20.

³⁸ CP 28

³⁹ ER 801; PCC 3.14.030(B) cites RCW 5.60.060. RCW Title 5 concerns “Evidence”

recall are based”⁴⁰ as required by law. Her charges are based on unverified hearsay complaints by a few disgruntled unionized employees that were affected by county budget cuts.⁴¹ Farris is not and has never been an employee of the Assessor-Treasurer’s Office.

D. The charges are legally insufficient because they concern discretionary acts.

The essence of the charges concern Washam’s complaints that his predecessor⁴² and employees falsely reported statutorily mandated physical inspections.⁴³ When Washam came into office, he not only learned the these statutorily mandated physical inspections had not been done but that they were falsely reported as having been done with the initials/code being “KMP” – Ken Madson.⁴⁴ Based on a published investigative report by his department,⁴⁵ Washam believed these false entries and failure to complete the revaluaiion requirements violated state law and the

⁴⁰ RCW 29A.56.110

⁴¹ CP 216:17-20 [“Six union members filed EEO complaints, but not one was found to merit a finding of discrimination.”]; CP 217:6-7

⁴² Ken Madsen

⁴³ RCW 84.41.041 Physical inspection and valuation of taxable property required — Adjustments during intervals based on statistical data. Each county assessor shall cause taxable real property to be physically inspected and valued at least once every six years in accordance with RCW 84.41.030, and in accordance with a plan filed with and approved by the department of revenue.

⁴⁴ Mr. Madsen was the preceding Assessor-Treasurer

⁴⁵ CP 441-524

state constitutional mandate regarding uniformity in taxes.⁴⁶ His efforts in this regard were supported by both the Governor⁴⁷ and State Department of Revenue.⁴⁸

It is well established that “an elected official cannot be recalled for appropriately exercising the discretion granted him or her by law.”⁴⁹ Mere disagreement with a discretionary decision is not sufficient.⁵⁰ The charges focus on Washam’s on-going complaints⁵¹ about these false entries and his discretionary, albeit

⁴⁶ Const. art. VII, sec. 1; See *Belas v. Kiga*, 135 Wn.2d 913, 916-917, 959 P.2d 1037 (1998) [“This is an original action brought by 10 elected county assessors challenging the constitutionality of a portion of a 1997 referendum which changed the method of assessing real property for the purpose of levying property taxes. The county assessors argue the new scheme violates the uniformity requirement of the Washington Constitution and unfairly shifts the tax burden from owners of rapidly appreciating property to owners of property which is staying more stable in value or which is depreciating in value. We agree with the assessors that the challenged provisions violate article VII of our state constitution. The apparent intent of value averaging was to accommodate taxpayers experiencing large increases in real property market values. To accomplish this, however, value averaging shifts the tax obligation to other taxpayers not experiencing large value increases. While the goal of alleviating rapid increases in taxes is laudable, the method used is unfair and unconstitutional.”]

⁴⁷ CP 524 [“The Governor’s Office concurs that the information uncovered by your thorough investigation should be reviewed by the county prosecution (sic) to determine if crimes were committed and if charges should be brought against the individuals involved. Since the allegations of misconduct are on the local government level, it is the locally-elected prosecutor’s responsibility to take the lead in instigating further action.”]

⁴⁸ CP 437-439 [“We commend your effort in completing the revaluation requirements as mandated by Washington State Law.”]

⁴⁹ *In re Recall of Reed*, 156 W.2d 53, 59, 124 P.3d 279 (2005).

⁵⁰ *In re Recall of McNeil*, 113 Wn.2d 302, 308, 778 P.2d 524 (1989).

⁵¹ Washam’s complaints are protected from retaliation by the state’s “anti-SLAPP” law. RCW 4.24.510

unpopular,⁵² administrative personnel decisions to address this significant problem with the accuracy of the taxpayers assessment records.⁵³

Here, Washam is being retaliated against for rightfully⁵⁴ complaining that his predecessor and employees failed to protect the public interest and follow state law that requires appraisals every six (6) years.⁵⁵ In addition to assurances under that Pierce County Code against retaliatory action,⁵⁶ Washam's complaints are protected by the anti-SLAPP law⁵⁷ and public policy.⁵⁸

⁵² The framers intended to "prevent recall elections from reflecting on the popularity of the political decisions made by elected officials." *In re Recall of Telford*, 166 Wn.2d 148, 159-160, 206 P.3d 1248 (2009)

⁵³ CP 13 [Charge 2 (Gross Waste of Public Funds) including the following: "According to employees, as stated in more than one investigation, Mr. Washam's pursuit to criminally prosecute Mr. Madsen takes nearly 100% of Mr. Washam's, Mr. Ugas's and Ms. Borck's (the A-T 's Assistant) time and energy."]

⁵⁴ The whistleblower complaint investigation by Deborah Diamond concluded:

Mr. Madsen broadly interpreted the statute regarding physical inspections *without the required approval from the Department of Revenue.*

CP 394; RCW 9A.72.040 [False reporting/false swearing is a crime]; RCW 42.20.050 [Public officer making false certificate "shall be guilty of a gross misdemeanor."]

⁵⁵ RCW 84.41.041

⁵⁶ Pierce County Code (PCC) [sec 3.14.020]:

County employees are encouraged to report improper governmental action in good faith in accordance with the procedures set forth in this Chapter to the Pierce County Human Resources Director, the Prosecuting Attorney, the County Council, the Pierce County Executive, the Pierce County Ethics Commission, or the Pierce County Sheriff. These entities shall forward the complaint to the Pierce

Moreover, Washam's efforts to investigate wrongdoing were in fulfillment of his oath to uphold the laws of the State of Washington.⁵⁹ Washam was entrusted by the voters with the reins of the Pierce County Assessor-Treasurer office at a time of considerable fiscal challenges. Public budgets throughout this state have been experiencing similar pressures. His term of office also happened to succeed an administration that had grossly mismanaged its assessment responsibilities and caused great harm to the taxpayers of Pierce County.⁶⁰ Washam had no choice, indeed he had a fiduciary responsibility, to act upon these inherited, albeit inconvenient, truths, and fulfill the responsibilities

County Human Resources Director for evaluation and action as appropriate. Reports of improper action may also be made to the Tacoma Police Department, or the State Auditor for allegations of violations of City of Tacoma laws or State statute as appropriate. To assist such reporting, Section 3.14.030 provides County employees protection from interference and retaliatory action, for reporting and cooperating in the investigation, and/or prosecution of improper governmental action in accordance with this Chapter.

Section 3.14.030 (D) prohibits retaliatory actions by employees.

⁵⁷ RCW 4.24.510; CP 11 [Charge #1 included removing overseeing "the Appraisal side of the office" from a complaining employee (it also includes an incorrect citation to the Pierce County Code: 3.14.030(c)); CP 12 [Charge #2 alleges that it was a "gross waste of public funds" for Washam to petition the prosecutor and others to pursue his predecessor for not doing the statutorily mandated physical inspections every 6 years]; CP 14 [Example 2: Angry gestures to an employee questioning where she was regarding the statutorily mandated physical inspections]

⁵⁸ RCW 84.41.041

⁵⁹ See Respondent's Brief at 5

⁶⁰ CP 441-524

and duties of his mandate. Despite these daunting challenges, Washam was able to achieve considerable success in performing his duties as Assessor-Treasurer.⁶¹

Fulfilling those duties and protecting the public interest amidst such a background inevitably aroused labor tensions and emotions. His inquires to staff about the lack of statutorily mandated physical appraisals⁶² generated a union organized campaign to solicit EEO, EEOC and whistleblower complaints from disgruntled employees. This is evidenced by the string of union e-mail sent to all unionized assessor-treasurer's office employees.⁶³ That string begins with a discussion about Mr. Washam's "announcement that we [i.e. appraisers] would begin working a fixed work schedule starting September 8."⁶⁴ It goes on to state that: "Mr. Washam is required by law to negotiate changes

⁶¹ CP 430 – 439 [Report of Pierce County Assessor-Treasurer's Office Achievements for 2009-2010].

⁶² CP 236 [Email from Teamsters 117 "Questions were also asked about an email sent by Albert Ugas to the appraisers requiring their answers to a question regarding physical inspections."]

⁶³ See CP 237 ["At the meeting Mary Ann strongly encouraged members who had complaints regarding their treatment by Mr. Washam to file complaints with HR. She indicated that it was the sheer number of these complaints that would have most effect in prompting HR to action. We should be filing these complaints with the EEOC office in Seattle. That will actually give us even more bang for the buck."]

⁶⁴ CP 236

in working conditions with the Union.”⁶⁵ That was followed by further discussion that included these comments:

At the meeting Mary Ann⁶⁶ strongly encouraged members who had complaints regarding their treatment by Mr. Washam to file complaints with HR. She indicated that it was the sheer number of these complaints that would have most effect in prompting HR to action.

....

We should be filing these complaints with the EEOC office in Seattle. That will actually give us even more bang for our buck.⁶⁷

Now it can be seen that these complaints were being solicited offensively to leverage support for the unions' Unfair Labor Practice (ULP) complaint that was filed against Washam on September 3, 2009.⁶⁸ The charges incorporate various employee grievances⁶⁹ which are being resolved according to the collective bargaining agreement and Pierce County Code.⁷⁰ Elevating every

⁶⁵ Id.

⁶⁶ Maryann Brennan, Teamsters 117

⁶⁷ CP 237 [Emphasis added].

⁶⁸ See CP 214; CP 236-240

⁶⁹ CP 21 [complaint includes: “exclusion from communication”; “change in vacation policy”; “removal of complainant’s job duties” and “assignment of complainant to a special project...”]; CP 102 [“Mr. Washam fails to bargain ... where he made changes relating to shifts, breaks, and discussion areas.”] Some personnel grievances were recently settled via the Public Employment Relations Commission. See: *Settlement a setback for Washam after long dispute with employees*. Tacoma News Tribune (1/29/11) <http://www.thenewstribune.com/2011/01/28/1521891/settlement-a-setback-for-washam.html>

⁷⁰ PCC 3.40 and 3.48

employee grievance over “working conditions”⁷¹ into grounds for recall would not only by-pass established labor-management mechanisms,⁷² but enable employees to abuse the recall power to harass unpopular elected officials over their management decisions.

E. The charges rely on inapplicable, inconsistent or non-existent laws.

Farris attached an “Index of Referenced Statutes and Codes” to her charges.⁷³ However, her excerpts are misleading. For example:

Charges 1 and 3 allege that Mr. Washam violated the Pierce County Code 3.14.030(c).⁷⁴ In her “Index,” Farris states that:

This section does not authorize a County officer To report information that is subject to applicable privilege against disclosure by law unless waived, or to make disclosure where prohibited by law.⁷⁵

However, if you read the entire section,⁷⁶ it appears to have no applicability to any of the charges since it references RCW

⁷¹ CP 236; CP 150 [“All of this caused the work environment at the AT’s office to become fractured, galvanized, and dysfunctional.”]

⁷² E.g. collective bargaining agreements and labor law.

⁷³ CP 17 and 201

⁷⁴ CP 11.

⁷⁵ CP 17 and 201

⁷⁶ 3.14.030 (C) Limitations. This Section does not authorize a County officer or employee to report information that is subject to an applicable privilege against

5.60.060 concerning spousal privilege, attorney-client privilege, clergy, doctor, etc. There's no allegation that Washam violated any of these privileges.

Charge 2 alleges "Gross Waste of Public Funds as defined in RCW 42.40.020(5)." In her "Index," Farris states that:

"Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating for (sic) the standard of care or competence that a reasonable person would observe in the same situation.

However, that statute [RCW 42.40.020(5)] applies to *state* employees⁷⁷ – not *local government* employees. Moreover, RCW 42.40.020(6)(b) states, similarly, that: "Improper governmental action" does not include personnel actions...."

Charge 4 involves hearsay information that Washam's references to religion (e.g. "Mr. Washam referring to God, prayer and requesting moments of silence at work"⁷⁸) somehow constituted "Acts of Violence" under PCC 3.15.020(b)(2). That section defines "Acts of Violence" to include

disclosure by law (e.g., RCW 5.60.060 Privileged Communications), unless waived, or to make disclosure where prohibited by law. An employee's reporting of his or her own improper action does not grant an employee immunity from discipline or termination insofar as his or her improper action would be cause for discipline.

⁷⁷ RCW 42.40.020(2) ["Employee" means any individual employed or holding office in any department or agency of *state* government.]

⁷⁸ CP 20

[A]ny deliberate act or behavior which ...
constitutes a directly or indirectly communicated or
reasonably perceived threat to cause harm, injure,
intimidate or frighten another individual.

Although Judge Feltnagle dismissed this charge,⁷⁹ this allegation is
resurrected in Charge 6.

Charge 5 references PCC 3.16.080(a) "Duty to Participate"
in the investigation of complaints. Washam offered to participate
in the Heyrich investigation but requested he submit written
questions he could answer.⁸⁰ That request was denied by Heyrich
although granted by another investigator (Nakamura).⁸¹

Charge 6 originally referenced RCW 42.02.080 and RCW
42.40.010(5) which does not exist. Although Farris corrected the
first citation to RCW 42.20.080, her amended request did not
correct the second citation.⁸² It also cites PCC 3.14.030(c) which,
as noted above, does not apply. Moreover, this charge
incorporates Charge 4's reference to PCC 3.15.020(b)(2) - which

⁷⁹ VRP 12/16/10 at 48:6-7; CP 548

⁸⁰ CP 15 [Referring to the Heyrich investigation.]

⁸¹ Nakamura report [CP 91-144] See CP 100 ["Mr. Washam, subsequently,
conditionally provided written information. See Enclosure E."] There were not
enclosures attached to Nakamura's report, including Washam's information.
Farris states "Attachments not available."

⁸² Her Index claims that "RCW 42.40.020(5) is referred to in some enclosures as
RCW 42.40.010. The statute was revised and the code is worded exactly the
same in both revisions." CP 17 and 201. However, that does not appear to be
the case. See Notes following RCW 42.40.010 and RCW Dispositions for Title
42 at <http://apps.leg.wa.gov/rcw/dispo.aspx?cite=42>

was dismissed by Judge Felnagle. Consequently, Charge 6 was, after all is said and done, “just a catchall.”⁸³

F. The charges ignore applicable state law that excludes personnel actions.

In his Investigation Report, Kent Nakamura noted the following,⁸⁴

Pierce County Code 3.14.010(A) differs from the state’s enabling statute that provides for local government’s enactment of whistle-blowing provisions. RCW 42.41.020(1)(b) states that:

(b) "Improper governmental action" does not include personnel actions including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the local government collective bargaining and civil service laws, alleged labor agreement violations, reprimands, or any action that may be taken under chapter 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 RCW or RCW 54.04.170 and 54.04.180.

That state’s whistle-blowing protection statute, RCW 42.40.020(6)(b) states, similarly, that:

(6)(b) "Improper governmental action" does not include personnel actions, for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement

⁸³ VRP 12/16/10 at 39:19 [Quoting Judge Felnagle]; Respondent’s Brief at 45.

⁸⁴ CP 96-97

violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

It seems that Pierce County Code 3.14.010(A) is incongruent with its enabling statute and the similar statute for state employee's whistle-blowing protections.

Farris attached Nakamura's report to her statement of charges, yet does not include RCW 42.41.020(1)(b) either in her letter or "Index of Referenced Statutes and Codes."⁸⁵

III. CONCLUSION

At the hearing on November 22, 2010, Judge Felnagle stated:

The problem is twofold. One is that there is no real procedure set out in the statute or in the constitution as to what one does if there's a need to amend. On the one hand, you could say, well, an amendment would be like with any other legal proceeding. You simply propose the amendment and give notice to the other side, and you keep the process moving. The other way to look at it would be that it's a defect and you need to start over.⁸⁶

Judge Felnagle went on to state:

I guess I'm really reluctant to go either way, because on the one hand, I don't want to set us back time wise. We've got this thing briefed and the material in front of me, and I have set aside the time to handle this. On the other hand, I'm reluctant to

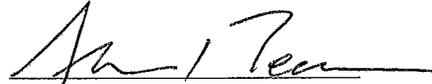
⁸⁵ CP 17; CP 201

⁸⁶ VRP 11/22/10 at 9:11-19

have a question of law with a big red flag on it sitting right at the start of this a case when that could be rectified by a new filing of a petition and the service of it and the rescheduling of the hearing.⁸⁷

Judge Felnagle chose the “wrong way” by allowing Farris to refile and serve her revised letter to the county auditor as an “amended petition.” In his premature rush to judgment,⁸⁸ Judge Felnagle failed to realize that only the prosecutor could petition the court to determine the sufficiency of recall charges.⁸⁹ Given the prosecutor had already declared he would not act of Farris’s request to amend,⁹⁰ Judge Felnagle erred in granting Farris what amounts to a private right of action to file or amend a recall petition in lieu of the prosecutor.

Dated: 2/3/11


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⁸⁷ VRP 11/22/10 at 10:7-15 [Emphasis added].

⁸⁸ Contrary to Farris’ claims, time is apparently not of the essence since she recently filed a separate federal suit challenging a state law that bans the use of paid signature-gatherers in recall campaigns. *Committee to Recall Dale Washam v. Rob McKenna*, No. 11-CV-05049-BHS (W.D.Wash. Jan. 18, 2011); See, *Proponents of Washam recall want state law overturned*, Tacoma News Tribune (1/20/11)
<http://www.thenewstribune.com/2011/01/19/1508952/washam-recall-backers-see-to.html>

⁸⁹ RCW 29A.56.130; CP 4

⁹⁰ CP 190-191