
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST
PORT OF SEATTLE COMMISSIONER PAT DAVIS, Appellant

Appeal from the Superior Court of King County
The Honorable Charles Mertel

APPELLANT COMMISSIONER DAVIS'
CORRECTED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. *Assignments of Error*

1. The superior court erred in concluding Charges 1, 2 and 4-6 of the Petition for the Recall of Port of Seattle Commissioner Patricia Davis (hereinafter, "Commissioner Davis" or "the Commissioner") filed by Petitioner, and the related Charges contained in the Ballot Synopsis filed by the King County Prosecuting Attorney, based on the Petition, are factually sufficient.

2. The superior court erred in concluding Charges 1, 2 and 4-6 of the Petition for the Recall of Commissioner Davis filed by Petitioner, and the related Charges contained in the Ballot Synopsis filed by the King County Prosecuting Attorney, based on the Petition, are legally sufficient.

3. The superior court erred by certifying a Revised Ballot Synopsis, based on a legally and factually insufficient Petition.

B. *Issues Pertaining to Assignments of Error*

1. Is a recall charge that does not "give a detailed description including the approximate date, location, and nature" of the act complained of factually insufficient? (Assignment of Error 1).

2. Is a recall charge including a conclusion regarding the public officer's personal motives factually insufficient? (Assignment of Error 1).

3. Is a petitioner's knowledge of alleged facts insufficient when petitioner fails to state any sufficient basis of his knowledge of the alleged facts and there is nothing in the record setting forth alleged facts? (Assignment of Error 1).

4. Is a recall charge alleging misfeasance legally insufficient when the facts do not clearly establish conduct that "affects, interrupts, or interferes with the performance of official duty" or "the performance of a duty in an improper manner"? (Assignment of Error 1).

5. Is a recall charge alleging malfeasance factually and/or legally insufficient where the charge fails to identify a violation of law, despite Petitioner's intent to allege a statutory violation? (Assignment of Error 2).

6. Is a recall charge alleging malfeasance due to an alleged violation of law legally insufficient where there is no Charge that the elected official intended to violate the law? (Assignment of Error 2).

7. Is a recall charge alleging malfeasance due to an alleged violation of law legally insufficient where there is nothing more

than a conclusory charge that the elected official intended to violate the law? (Assignment of Error 2).

8. Is a recall charge factually and legally insufficient where the alleged acts of malfeasance are cured before the recall petition is filed? (Assignments of Error 1 and 2).

II. STATEMENT OF THE CASE

A. *Clifford Petition*

On April 21, 2007, Christopher P. Clifford (“Petitioner”), a registered voter in the Port of Seattle jurisdiction (CP 8), filed a document with the King County Records, Elections and Licensing Services Division entitled Petition to Recall Commissioner Patricia Davis alleging six charges. CP 1. This document was rejected by the Prosecuting Attorney because the oath supporting the petition did not meet the requirements of state law. *Id.* On April 25, 2007, the Petitioner filed a new two page Petition for Recall, with no attachments, against Commissioner Davis with a “corrected oath” (the “Petition”). CP 2; 5-6.

The Petition sets forth four alleged facts:

1. On or about January 10, 2006, the Port of Seattle Commission met in an executive session.
2. On or about June 8, 2006, the Port of Seattle Commission met in an executive session.

3. On or about October 10, 2006, the Port of Seattle Commission signed a memorandum granting Mic Dinsmore, an outgoing employee of the Port of Seattle, \$339,841.00 of extra compensation outside the original employee contract for that employee.¹

4. On or about March/April of 2007 Mic Dinsmore sought to collect the monies granted to him by Port of Seattle Commissioner Pat Davis. CP 5.

The Fact section of the Petition does not allege any facts to support a conclusion of a "vote" in executive session; instead, Petitioner merely recites that executive sessions took place on two different days. CP 5-6. As discussed, *infra*, the superior court rejected allegation 4 (CP 112, ¶ G), which necessarily then rejected the later similar claim (in Petitioner's section on alleged factual support) that, in 2007, Mr. Dinsmore had attempted to obtain the monies stated in the October 10, 2006, Memorandum. No alleged facts are set forth claiming any interference with Commissioner Davis' duties, or which affected the Port.

The Petition contains six Charges, largely redundant in substance, which claim six alleged acts of malfeasance (Charges 1, 2, 3, 4, 5 and 6) and one act of misfeasance (Charge 3). CP 5-6. The Petition does not

¹ The Petition did not contain the Memorandum; it was included in Petitioner's Supplemental Material. CP 75.

allege that Commissioner Davis engaged in a violation of the oath of office or a violation of the Constitution. *Id.*

In summary, Charges 1, 2 and 3 contend that Commissioner Davis made grants or gifts of public funds to Mic Dinsmore, the now former Port of Seattle CEO. Charges 4, 5 and 6 contend that "votes" were taken in one or two executive sessions regarding such alleged grant(s) or gift(s). Only Charge 6 alleges a "knowing" or intentional violation of law. Petitioner intended that Charges 1 and 2 allege malfeasance due to a statutory violation, yet he failed to include any statutory reference in that charge. CP 102-104.

Specifically, the Petition contains conclusory claims that:

1. The Commissioner committed an act of malfeasance by signing an agreement to provide to an unidentified "individual" a gift of public money outside of his employment contract,²
2. The Commissioner committed an act of malfeasance by "obligating" the Port of Seattle to pay monies not voted on or approved by Port of Seattle Commissioners at a regularly scheduled public hearing;
3. The Commissioner committed an act of misfeasance and malfeasance when she used her position as Port Commissioner to provide "her personal friend and political ally Mic Dinsmore" with a gift of public money;
4. and 5. The Commissioner committed an act of malfeasance by "voting on an issue" in executive session

² The alleged employment contract is not included in the record.

on or about January 10, 2006, and June 8, 2006, in violation of the Washington State Open Public Meetings Act ("OPMA"); and

6. The Commissioner committed an act of malfeasance by "knowingly violat[ing] the limited context of the executive session exclusions of the Open Meeting Act to improperly negotiate and vote on a gift of public money."

CP 5, 6.

The Petition alleges, again in conclusory fashion, that:

The acts of malfeasance and misfeasance regarding Port of Seattle funds are evidenced by the October 10, 2006, memo signed by Pat Davis to Mic Dinsmore. Further evidence of these acts are Mr. Dinsmore's attempts to obtain the monies stated in the October 10, 2006 memo, in 2007.

The acts of malfeasance and misfeasance regarding violations of the open meetings act and the executive session exemption are evidenced by the public statements of Commissioner Davis.

CP 6.

The Petition included no attachments or exhibits; the foregoing allegations are the only allegations or "knowledge" included. Although Petitioner swore, under oath, that he had "knowledge of the alleged facts upon which the stated grounds for recall are based" (CP 5), the record contains insufficient evidence to support that oath.

Petitioner's Memorandum and Supplemental Materials Supporting Recall Petition claimed that Charges 1 and 2 of the Ballot Synopsis were based on alleged violations of RCW 53.12.245 and the Port's Bylaws.

See, e.g. CP 56-92, esp. CP 61-63. Petitioner later confirmed that it was his intent that Charges 1 and 2 of the Ballot Synopsis claim violations of RCW 53.12.245 and the Port's Bylaws. After the Sufficiency Hearing, as the parties were preparing the Order, Petitioner sent an email to counsel for the Prosecutor and Commissioner Davis in which he conceded that regarding Counts 1 and 2, he was alleging a statutory violation pursuant to RCW 53.12.245 as well as a violation of the Port's Bylaws. CP 102-104. However, the Petition, Ballot Synopsis and Revised Ballot Synopsis (CP 5-6, CP 10-11, and CP 114) are silent as to any alleged violation of law other than the OPMA.

B. Prosecutor's Ballot Synopsis

Pursuant to RCW 29A.56.130,³ the King County Prosecuting Attorney filed a Petition for Approval of Ballot Synopsis and Determination of Sufficiency of Charges (hereinafter "Prosecutor's Petition") and a Ballot Synopsis of the Charges for the Recall of Seattle Port Commissioner Patricia Davis (hereinafter "Prosecutor's Ballot Synopsis") with the King County Superior Court on May 7, 2007. CP 1 - 11. The Prosecutor's Ballot Synopsis consolidated some of the six

³ The text of the relevant statutes, RCW 29A.56.110, .120, .130, and .140, is set forth in Appendix A.

Charges, setting forth five recall charges. CP 10-11. *Id.* The Prosecutor filed a “friend of the Court” brief regarding the Petition. CP 12-24.

C. Commissioner Davis

Commissioner Davis timely opposed the Petition and filed her Request For Dismissal Of Recall Petition With Prejudice. CP 39-53. She filed a Declaration in Support of her Opposition. CP 25-37.

Commissioner Davis is an elected official, serving as a Commissioner for the Port of Seattle. Commissioner Davis has a long and distinguished career as a public servant. *Id.*, esp. CP 25, ¶ 2; CP 37. She fully believes in the mission of the Port of Seattle, and in the accountability of public officials, including herself. CP 30, ¶ 22; CP 31-32, ¶ 27. At all times, she has acted in good faith. She did not ever act unilaterally or independently on behalf of the Commission. Commissioner Davis has always intended to comply with her legal obligations, and has never intended to act in any way contrary to such obligations. To her knowledge and belief, she has always complied with those obligations. CP 25 – 37, esp. CP 25– 26, ¶ 2, CP 29, ¶ 16.

There was no grant or gift of monies to Mr. Dinsmore. CP 25 – 37, esp. CP 26, ¶¶ 3, 4, 5, and 6, and Ex. The Commission voted unanimously on April 24, 2007 not to provide him with any additional form of compensation. CP 26, ¶ 3. He never received nor was provided

with any such funds. *Id.* Commissioner Davis never voted on providing any transition assistance to Mr. Dinsmore, and she had no intention to do so. CP 25-37, esp. CP 27, ¶¶ 10, 11, 12, and 14. The Commissioner legitimately was concerned about ensuring that there was no staff vacuum before the Port could find a replacement for Mr. Dinsmore (CP 28-29, ¶ 15, 16); her main motivation in signing the October 10 Memorandum (CP 75, "Memorandum") was to confirm Dinsmore's agreement to stay with the Port until a new CEO transitioned on. CP 29, ¶ 16.

Commissioner Davis did not ask for the Memorandum to be prepared, nor did she prepare it. It was presented to her in her role as Port Commission President. She did not act unilaterally or independently on this issue. She did not "obligate" the Port to pay monies to Mr. Dinsmore, nor did she have any intention of doing so. CP 29, ¶ 17. She understood that if the Port were to agree to provide any extended benefits or additional compensation to Mr. Dinsmore, such an action could only occur after public discussion and a public vote. She had no intention of circumventing these requirements, and did not do so. *E.g. id.* The Commissioner was performing a discretionary act, within her authority.

There is no mention of a salary extension in the Memorandum. Issues surrounding the topics discussed were deferred to the Port's Human Resources/personnel department. Commissioner Davis had no intention

of acting secretly or unilaterally, and she did not do so. CP 29, ¶ 17. She does not have the authority to bind the Port to the kind of agreement alleged by Petitioner, and she made no attempt to do so. Commissioner Davis does not know to what Petitioner refers when he recites in the Petition that her “public statements” support a recall effort. Her statement denies acting unilaterally, underhandedly, independently, unlawfully or illegally, which statement her Declaration reconfirmed under oath. CP 30 -31, ¶¶ 22 - 23; CP 25-37.

Commissioner Davis acted in good faith at the referenced January and June, 2006, executive sessions. She had no intent to violate the OPMA, and she does not believe that she or the other Commissioners did so. All of her actions were taken in good faith, to ensure a smooth and effective transition surrounding the departure of Mr. Dinsmore as CEO, and the challenge of finding a qualified replacement. CP 27-28, ¶¶ 12-14. These were discretionary acts. Mr. Dinsmore’s departure was not accompanied by any final Commission action authorizing an extended compensation package. CP 35 (“...no final action has been taken by the Commission and no extended compensation has been provided to Mr. Dinsmore.”).

Commissioner Davis exercised her discretionary acts in a manner that she believes to be consistent with the law. Commissioner Davis had

no intent to do anything other than address personnel discussions, as she understood that the Commissioners were allowed to do in executive session. The Commission's activities in the January and June, 2006, meetings were consistent with what she understood to be their legal right in executive session – that is, to contemplate and consider potential personnel actions before having public discussion and voting in a public meeting about them. CP 26 -27, ¶¶ 6 – 7. Commissioner Davis performed at all times with what she understood to be legal justification for all of her conduct. CP 31, ¶ 25. She has nothing to hide, and fully supports and believes in “sunshine” in government. CP 30, ¶ 22.

Public support, based on trust and accountability, underlies the Port's success in an increasingly competitive global marketplace. Commissioner Davis' goal and her intent have always been and still are to act as a faithful and accountable public steward, and to honestly and openly advance the Port of Seattle as an economic engine and environmental leader for our region, our economy and our citizens. She remains true to that goal. CP 30, ¶ 22; CP 31-32, ¶ 27.

D. Petitioner's Supplemental Filings

On May 16, Petitioner filed his “Memorandum and Supplemental Materials Support Recall Petition.” CP 56 - 92. He attached an October 10, 2006, Memorandum signed by Commissioner Davis to

Mr. Dinsmore, certain Bylaws of the Port, certain emails, and certain notes. CP 71- 92.

Minutes before the Sufficiency Hearing, Petitioner filed the “Declaration of Christopher Clifford in Support of Recall Petition” CP 93-95. In that Declaration, which contained no attachments or corroboration, he alleged, *inter alia*, that he:

Based the charges contained in the petition for recall based upon my personal knowledge of the facts surround [sic] the conduct of Port Commissioner Pat Davis.

I acquired the facts and information through a variety of sources and material.

I read over 12 articles in local newspapers; the Seattle Post Intelligencer, The Seattle Times, and The Stranger, regarding the facts surrounding the conduct charged in the recall petition.

In many of those articles Pat Davis is quoted or submitted material to be quoted.

CP 93 – 94.

The Court denied the Commissioner’s Motion to strike this Declaration. CP 97, ¶ B.

While Petitioner references other media information (CP 94, ¶ 8), he does not allege that he watched the referenced “video(s).” *Id.* He also claims to have “read and pulled down from the internet” certain documents allegedly “released” from the Port of Seattle “surrounding the

conduct of Port of Seattle Pat Davis," but did not identify the alleged documents. CP 94, ¶ 11. He alleged, with no corroboration, that:

In this current matter I have examined State law, Port Bylaws, State Supreme Court rulings, spoken with staff at the Port of Seattle, and read numerous news articles as the background for filing the recall petition.

My decision to file the recall charges was based on the documents produced by the Port of Seattle, the State law, and the Port of Seattle Bylaws.

CP 95, ¶¶ 18 - 19:

Petitioner intended to claim a statutory violation regarding Charges 1-3 of the Petition and Charges 1-2 of the Ballot Synopsis, as he indicated in communications to counsel for the other parties. See CP 61 (alleging a violation of RCW 53.12.245); CP 101-104, esp. 103 ("I would be willing to add language to Ballot Synopsis 1, and 2, that Commissioner Davis, 'violated RCW 53.12.245 and various provisions of Port of Seattle Bylaws' if that would placate Commissioner Davis."). Nevertheless, the Petition, the Ballot Synopsis and the Revised Ballot Synopsis do not allege violations of the statute or Bylaws.

E. Decision of the Superior Court on the Sufficiency Hearing and Hearing on Presentation of Order

Pursuant to RCW 29A.56.140, a hearing was noted in King County Superior Court before the Honorable Charles Mertel. The parties briefed the matter. The Sufficiency Hearing was held on May 18, 2007. The

Court granted the Commissioner's Motion to Strike unsubstantiated factual assertions in Petitioner's Brief but accepted additional materials attached to Petitioner's Brief. CP 97, ¶ C. The Court declined to strike the additional Declaration that Petitioner submitted minutes before the Sufficiency Hearing. CP 97, ¶ B. No *voir dire* was conducted regarding the factual sufficiency of the Petition. The Court found that some Charges were factually and legally sufficient to proceed but found that others were not sufficient to proceed. The superior court also orally revised the Ballot Synopsis.

A hearing for presentation of the Order and Ballot Synopsis was held on May 24, 2007. After further argument, the Court entered its Order re Sufficiency of Recall Charges and Adequacy of Ballot Synopsis. The court also made final revisions to the Ballot Synopsis ("the Revised Ballot Synopsis"). CP 110-114, esp. CP 114 (Revised Ballot Synopsis). The Order recites that the superior court found that the recall Charges set forth in paragraphs 1, 2 and 4-6 were legally and factually sufficient to proceed, but that Charge.3 was legally and factually insufficient. The court also found that certain allegations were factually insufficient. CP 112, ¶¶ D-H.

The superior court substantially revised the Ballot Synopsis. Charge 1 of the Revised Ballot Synopsis essentially consolidated Charges 1 and 2 of the Ballot Synopsis. Charge 1 of the Revised Ballot

Synopsis does not reference the statutory violation claimed by Petitioner, nor does it claim that the Commissioner intended to violate any law. Charge 1 does not recite any alleged wrongful conduct or facts that suggest that the issues stated “affected, interrupted, or interfered with the performance of official duty.” CP 114. The Revised Ballot Synopsis does not contend that Commissioner Davis committed any act of misfeasance.

The Court rejected Charge 3 of the Ballot Synopsis, and did not include it in the Revised Ballot Synopsis. Charge 2 of the Revised Ballot Synopsis alleges the Commissioner Davis “voted” in executive session in violation of the OPMA, but does not allege any intention to violate that Act. Charge 3 of the Revised Ballot Synopsis alleges that the Commissioner “knowingly exceeded the purposes for executive session” in the OPMA by “negotiating and voting on a gift of public money to Mr. Dinsmore in executive session.” CP 114. No legal basis for claiming a “gift of public money” is included in that charge.

F. Appeal

On June 7, 2007, Commissioner Davis timely filed her Notice of Appeal to Supreme Court pursuant to RCW 29A.56.140 and RCW 29A.56.270. CP 106-114.

III. ARGUMENT

A. Statutory Framework Surrounding Recall Petitions

1. The Recall Process

The Washington State Constitution provides that the citizens of this state may seek removal of a public official through a recall election. “Recall is the electoral process by which an elected officer is removed before the expiration of the term of office.” *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71 (1984). Pursuant to article 1, section 33 of the Washington Constitution, an “elective public officer of the state of Washington ... is subject to recall and discharge” if a petition demanding his or her recall alleges “that such officer has committed some act or acts of malfeasance or misfeasance while in office” or “has violated his oath of office.” This provision of the Constitution “requires a showing of cause before a recall will be allowed.” *In re Recall of Ackerson*, 143 Wn.2d 366, 370, 20 P.3d 930 (2001) (citation omitted); *see also* RCW 29A.56.110 *et seq.* (replacing the former recall statute, RCW 29.82.010 *et seq.*).

An elected official can only be recalled for cause. *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003); *Chandler*, 103 Wn.2d at 274; *In re Recall of Pearsall-Stipek*, 129 Wn.2d 399, 401-02, 918 P.2d 493 (1996) (“*Pearsall-Stipek I*”). One of the legitimate purposes of the recall statutes is to protect elected officials from being subjected to

harassment and/or the financial and personal burden of recall elections based on false or frivolous charges, or mere insinuations. *See, e.g., id.* at 402; *see also Ackerson*, 143 Wn.2d at 371. In a recall petition, courts serve as gatekeepers to ensure that public officials are not subject to “frivolous or unsubstantiated charges.” *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001).

RCW 29A.56.110 specifies information that must be included in a recall charge. First, the charge must recite that the public officer “has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office, or has been guilty of any two or more of the acts specified in the Constitution as grounds for recall.” RCW 29A.56.110. Second, “[t]he charge shall state the act or acts complained of in concise language [and] give a detailed description including the approximate date, location, and nature of each act complained of” *Id.* Third, the charge must “be signed by the person or persons making the charge ... 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.” *Id.*

The charges in the Petition and the Prosecutor’s Ballot Synopsis allege misfeasance and malfeasance. CP 5-6; CP 10-11. For recall purposes, these terms are defined as follows:

(1) "Misfeasance" or "malfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty;

(a) Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and

(b) Additionally, "malfeasance" in office means the commission of an unlawful act...

RCW 29A.56.110.

A recall charge is initially filed with the appropriate elections officer (in this case, the King County Records, Elections and Licensing Services Division). RCW 29A.56.120. The elections officer then certifies and transmits the charge "to the preparer of the ballot synopsis" (in this case, the King County Prosecuting Attorney). RCW 29A.56.120(2), 29A.56.130(1)(b). Within fifteen days of receipt of the voter's recall charge, the designated preparer "shall formulate a ballot synopsis of the charge" and "certify and transmit the charges and the ballot synopsis to the superior court." RCW 29A.56.130(1), (2).

Pursuant to RCW 29A.56.140, the superior court determines "(1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed, and (2) the adequacy of the ballot synopsis." "The court's central purpose in the recall process is to determine whether the charges are factually and legally sufficient." *In re Recall of Young*, 152 Wn.2d 848, 852, 100 P.3d 307 (2004). To satisfy the "cause"

requirement, a petition must be both factually and legally sufficient. *Id.* This inquiry is determined from the face of the petition. *In re Recall of Zufelt*, 112 Wn.2d 906, 914, 774 P.2d 1223 (1989).⁴ Generally, to be factually sufficient, the petition must state in detail the acts complained of, and the petitioner must have knowledge of identifiable facts which support the charges. To be legally sufficient, the petition must state with specificity conduct amounting to misfeasance, malfeasance or violation of the oath of office. *In re Recall of Carey*, 132 Wn.2d 525, 527, 939 P.2d 1221 (1997) (citations omitted).

“An appeal of a sufficiency decision” by the superior court “shall be filed in the Supreme Court as specified in RCW 29A.56.270.” RCW 29A.56.140. This Court reviews the sufficiency of recall charges *de novo*, using the same criteria as the superior court. *Young*, 152 Wn.2d at 852. “Any decision regarding the ballot synopsis by the superior court is final.” RCW 29A.56.140.

2. Personal Knowledge

RCW 29A.56.110 requires that “the person ... making the charge ... have knowledge of the alleged facts upon which the stated grounds for

⁴ Although the charges may contain some conclusions, they must “state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a *prima facie* showing of misfeasance, malfeasance, or a violation of the oath of office.” *Chandler*, 103 Wn.2d at 274.

recall are based.” “Although there is no requirement that the petitioner have firsthand knowledge of the facts, he or she must have some knowledge of the facts underlying the charges.” *Wasson*, 149 Wn.2d at 791; *Ackerson*, 143 Wn.2d at 372. Specifically, “the petitioner must have knowledge of identifiable facts which support the charges.” *Carey*, 132 Wn.2d at 527. A simple belief that the charges are true is insufficient. *In re Recall of Beasley*, 128 Wn.2d 419, 425, 908 P.2d 878 (1996). The recall petition itself must demonstrate that the petitioner has personal knowledge of wrongdoing that constitutes misfeasance or malfeasance. *See Pearsall-Stipek I*, 129 Wn.2d at 403.

Unverified information from an unnamed source contained in newspaper articles is not a sufficient factual basis to support a recall election. *See Beasley*, 128 Wn.2d at 429-430 (charge alleging school board members made certain improper comments found factually insufficient where the petitioner testified “that he obtained the comments from a newspaper article, and that their ultimate source was [the school superintendent], but he did not reveal the source of [the superintendent’s] knowledge”).

Nothing in this opinion should be taken to establish that media articles, categorically, may form a sufficient basis for the personal knowledge of facts required by law. However, here, the news articles included lengthy transcripts of electronic conversations that form the basis of the charge. Additionally, we note that after a

contested hearing, the trial court essentially concluded that Mayor West had admitted the conversations; a finding West has not challenged before us, though he does challenge the transcript's completeness and the implications to be drawn from those conversations....

In re Recall of West, 155 Wn.2d 659, 666, 121 P.3d 1190 (2005) (citations omitted).

This Court also has found the petitioner's knowledge inadequate when based solely on something told to them by a third party. *In re Recall of Morrisette*, 110 Wn.2d 933, 936, 756 P.2d 1318 (1988). Because Mr. Clifford failed to demonstrate the requisite personal knowledge, the Petition is factually and legally insufficient.

3. Factual Sufficiency

The Court must determine whether the charges in the petition are sufficient to justify the extraordinary remedy of a recall election. *See Pearsall-Stipek I*, 129 Wn.2d at 403; RCW 29A.56.140. Factual sufficiency means the facts must establish a *prima facie* case of misfeasance, malfeasance, or violation of the oath of office (quantitative prong). *See, e.g., Cole v. Webster*, 103 Wn.2d 280, 285, 692 P.2d 799 (1984). To be factually sufficient, alleged facts must establish a *prima facie* case of malfeasance, misfeasance, or a violation of the oath of office. *See In re Recall of Call*, 109 Wn.2d 954, 958, 749 P.2d 674 (1988) (quoting *Chandler*, 103 Wn.2d at 274).

“[T]he charge must *on its face* show the official acted wrongfully, improperly, unlawfully or negligently in the performance of his duties.” *Teaford-v. Howard*, 104 Wn.2d 580, 586, 707 P.2d 1327 (1985) (emphasis added). The petition must state in detail the identifiable acts complained of and must demonstrate that the petitioner has personal knowledge of the facts supporting the charge. *See, e.g., Pearsall-Stipek I*, 129 Wn.2d at 403; RCW 29A.56.140. The facts must also be stated in concise language and provide a detailed description that includes the date, location and nature of each Charge (qualitative prong). RCW 29.82.010; *Chandler*, 103 Wn.2d at 274. This precision and detail is required to enable the electorate and a challenged official to make informed decisions. *Chandler*, 103 Wn.2d at 274; *Zufelt*, 112 Wn.2d at 911 (citation omitted).

When an official is charged with violating the law, the burden regarding personal knowledge is even higher. The facts must show that the official intended to violate the law. *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990); *In re Recall of Anderson*, 131 Wn.2d 92, 95, 929 P.2d 410 (1997) (specifically, the OPMA); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 262, 961 P.2d 343 (1998) (“*Pearsall-Stipek II*”). This requires proof “not only that the official intended to commit the act, but also that the official intended to act unlawfully.” *Id.*;

see also In re Recall of Sandhaus, 134 Wn.2d 662, 668, 953 P.2d 82 (1998).

Although the court does not determine whether the charge is true, it may go outside the petition to determine whether there is a factual basis for the charge. *Beasley*, 128 Wn.2d at 427; *West*, 155 Wn.2d at 659; *see also, Pearsall-Stipek I*, 129 Wn.2d at 403 (court relied upon a declaration submitted by the elected official, in which she explained a mistake, to determine that the charges were insufficient).

This Court consistently has rejected charges that fail to include the requisite factual specificity. *See, e.g., Ackerson*, 143 Wn.2d at 374 (charge providing “no specifics as to when, where, or how the funds were converted” was factually insufficient); *Beasley*, 128 Wn.2d at 429-30 (charge that school board members made certain comments, without stating “to whom the comments were made, when they were made, [or] the context in which they were made” was factually insufficient); *Morrisette*, 110 Wn.2d at 935-37 (charge that an official mishandled an unknown item of unknown ownership in an unknown manner found factually insufficient).

4. Legal Sufficiency

Legal sufficiency means the charge must define substantial conduct clearly amounting to misfeasance, malfeasance or a violation of the oath of

office. *Id.* To be legally sufficient, the petition must describe “with specificity *substantial* conduct *clearly* amounting to” misfeasance or malfeasance, *i.e.* any wrongful conduct that affects, interrupts, or interferes with the performance of official duty because it causes the duty to be performed in an improper manner or because it causes the commission of an unlawful act. *Pearsall-Stipek I*, 129 Wn.2d at 403 (emphasis added); *see also* RCW 29A.56.110.

“Misfeasance” or “malfeasance” in office” is wrongful conduct that “affects, interrupts, or interferes with the performance of official duty” or “the performance of a duty in an improper manner.” RCW 29A.56.110(1). Petitioner sets forth *no* facts to attempt to prove such interference.

“A charge must also sufficiently specify *why* the challenged acts constitute misfeasance” *Beasley*, 128 Wn.2d at 425 (emphasis added). If the recall petition “does not identify a standard, law or rule which would make [the elected official’s] conduct wrongful, improper or unlawful,” then “the recall petition does not present a *prima facie* case of misfeasance” and is therefore legally insufficient. *Zufelt*, 112 Wn.2d at 914. The same standard applies to claims of “malfeasance.”

Finally, the legal sufficiency requirement “means that an elected official cannot be recalled for appropriately exercising the discretion

granted him or her by law.” *Chandler*, 103 Wn.2d at 274 (citations omitted). Legal sufficiency is not satisfied when there is a legal justification for the challenged official’s conduct. *Wade*, 115 Wn.2d at 549. As such, lawful, discretionary acts are not a sufficient legal basis for a recall. *Chandler*, 103 Wn.2d at 274. *See also Kast*, 144 Wn.2d at 815. “[W]here a discretionary act is the focus of the controversy, recall petitioners must show that the official exercised discretion in a manner which was manifestly unreasonable.” *Greco v. Parsons*, 105 Wn.2d 669, 672, 717 P.2d 1368 (1986) (citation omitted). The failure to identify a specific law, policy, or procedure that would make the challenged act unlawful “raises the possibility that the acts in question were discretionary acts” and renders the petition insufficient. *Teaford*, 104 Wn.2d at 587.

B. The Petition is Factually Insufficient

The Petition is factually insufficient because: (1) Petitioner has not demonstrated that the he has personal knowledge to support the Charges; (2) the Petition fails to set forth “facts” upon which the Charges can be based; (3) the uncontroverted evidence proves that the Charges are false; (4) no violations of law occurred; (5) with respect to Charges 1-3 of the Petition (CP 5-6) and Charge 1 of the Revised Ballot Synopsis (CP 114), Petitioner intended, but failed to, recite any statutory violation and none was included in the Ballot Synopsis or Revised Ballot Synopsis (CP 114);

and (6) with respect to Charges 1-5 of the Petition, even Petitioner does not contend that the Commissioner acted with an intent to violate the law, and with respect to Charge 6 of the Petition and Charge 3 of the Revised Ballot Synopsis, the claim of "knowing" conduct is completely without foundation.

Separately, the record is devoid of any evidence of "wrongful conduct" by Commissioner Davis. It is similarly devoid of any allegation that any act regarding the October 10, 2006, Memorandum affected, interrupted, or interfered with the performance of official duty. No "malfeasance" can be found on that basis, and the Charges are factually insufficient.

1. The Petition Fails to Set Forth "Facts" that Support the Charges.

The Petition makes general statements about the Charges without citing any specific factual foundation. The "Facts" set forth do not support the Charges. By way of a glaring omission, while many of the Charges in the Petition, and Charges 2 and 3 of the Revised Ballot Synopsis reference "voting in executive session," the "Facts" set forth in the Petition merely allege that the Port of Seattle Commission met in executive sessions on two dates. The Petition does *not* allege that Commissioner Davis was present in those sessions that she (or any other

Commissioner) “voted” in those meetings or even what the subject of the alleged “vote” was.

The Petition contains no factual support for the conjecture that Commissioner Davis allegedly improperly gifted or granted funds to Mr. Dinsmore, and in fact, she did not. CP 26, ¶ 3. This renders the Charge factually insufficient. *Wade*, 115 Wn.2d at 550. The Court rejected the claim in the Petition that Mr. Dinsmore “sought to collect the monies granted to him by Seattle Port Commissioner Pat Davis.” CP 112, ¶ 9.

The only “facts” remaining in the Petition are that the Commission met in executive session on two different dates, and that Commissioner Davis signed an October 10, 2006, Memorandum.

Charges 1, 2 and 3 erroneously claim that the Commissioner acted unlawfully by committing acts of misfeasance and/or malfeasance when she purportedly attempted to provide a “gift of public money” to Mr. Dinsmore because he was her “personal friend.” The claims about the Commissioner’s alleged motive were purely conjectural and were rejected by the superior court in its formulation of the Revised Ballot Synopsis. CP 112, ¶ F; CP 114.

2. Petitioner Fails to Demonstrate that the Few Alleged Facts that He Sets Forth Are Based on Personal Knowledge.

The Petition identified next to no “knowledge of identifiable facts which support” the Charges. *Carey*, 132 Wn.2d at 527. Although Petitioner’s late filed declaration (CP 93-95) suggested that he watches the news and is otherwise an activist, Mr. Clifford provided no sufficient identifiable information about the factual source of his Charges. No “facts” regarding the issues giving rise to the Petition were included in the Declaration. Unlike the petitioner in *West*, 155 Wn.2d at 666, Petitioner did not include media articles or other media information with the Petition or even his supplemental materials in an attempt to show that his purported knowledge was gleaned from the press. He introduced no facts to support any purported “knowledge” based on his alleged review of newspapers or other press coverage.

“If a petitioner chooses to refer to attached information, he or she must reasonably identify the information in such a manner to satisfy the specificity requirements of [RCW 29A.56.110].” *Wasson*, 149 Wn.2d at 792.

While it may be “proper in a recall case to consider documents” submitted by the petitioner “for the purpose of determining whether there is any factual *basis* for the charges” (*Beasley*, 128 Wn.2d at 427 (emphasis

added)), “the *sufficiency* of a recall petition must be determined *from its face*.” *Carey*, 132 Wn.2d at 527 (emphasis added, citation omitted).

Petitioner’s general reference to information not contained in the record does not remedy the factual and facial insufficiency of the Petition or Ballot Synopsis.

Moreover, an examination of the claimed knowledge reveals no factual support for the Charge that the Commissioner acted improperly. “The procedural safeguards of sufficiency, specificity and knowledge, established through case law and through legislation” are intended to protect public officials from “false or frivolous charges.” *Ackerson*, 143 Wn.2d at 372-73.

The specific factual basis of Petitioner’s alleged knowledge is not stated, other than to claim that he read certain media information.⁵ Further, Petitioner alleges that the Commissioner’s “public statements” support the Charges (CP 6), yet he does not claim to have read or observed any such statement. Moreover, he fails to provide or even describe any such purported statements. In marked contrast, the uncontroverted

⁵ Even if Plaintiff had claimed reliance on specific newspaper articles about this issue (and provided those), such articles alone are insufficient to form a basis for the personal knowledge requirement of RCW 29A.56.110 and RCW 29A.56.140. *See West*, 155 Wn.2d at 666 n.3. The *West* court warned that “[n]othing in [its] opinion should be taken to establish that media articles, categorically, may form a sufficient basis for the personal knowledge of facts required by law.” *Id.*

evidence demonstrates that the Commissioner has publicly denied any wrongdoing. *See* CP 30, ¶ 22 and CP 25-33.

The Petition is devoid of any purported source of the Charges or the requisite personal knowledge of the issues surrounding this matter. As a result, the Petition is factually insufficient under RCW 29A.56.010 to serve as the basis for a recall election.

3. Petitioner Fails to Allege a Knowing Violation of Law for Any Alleged Act of Malfeasance, Other Than Regarding the OPMA. The Alleged "Intent" to Violate that Act is Merely Speculative, and is thus Factually Insufficient.

To establish malfeasance by virtue of an alleged violation of law, the petitioner "must at least have knowledge of facts which indicated an 'intent' to commit an unlawful act." *Wade*, 115 Wn.2d at 549. Petitioner intended that his Charges 1, 2 and 3 of the Petition, and Charges 1 and 2 of the Ballot Synopsis (now Charge 1 of the Revised Ballot Synopsis), be based on violations of RCW 53.12.245 and the Port's Bylaws, although he fails on the face of the Petition to so allege. Nevertheless, because he is claiming malfeasance based on an alleged violation of law, he was obligated to set forth facts showing that the Commissioner intended to violate the law. He failed to do so. This failure renders Charges 1-3 of the Petition and Charge 1 of the Revised Ballot Synopsis factually insufficient.

Petitioner's only claim of a knowing violation of law, Charge 6 of the Petition, was to claim that Commissioner Davis "knowingly violating [sic] the limited context of the executive session exclusions of the Open Public Meetings Act..." CP 6. First, the Petition fails to set forth facts demonstrating a "vote" in an executive session. This renders any allegation of a violation of the OPMA factually (and legally) insufficient. Even if there were "facts" provided to support the claim of a "vote", the Petition provides no factual basis to demonstrate a knowing violation by the Commissioner of that Act, rendering that claim factually insufficient. Moreover, like in *Pearsall-Stipek-I*, 129 Wn.2d at 399, the Commissioner provided a Declaration that overcomes the conclusory allegations in the Petition. CP 25-33, esp. CP 28, ¶ 14 (denying any vote in executive session); CP 31, ¶ 24 (denying intent to violate the OPMA or any such violation). The allegation of a knowing violation is factually insufficient.

For these reasons, all allegations of a violation of law are insufficient. This renders the Petition and the Revised Ballot Synopsis fatally flawed on all charges.

C. The Petition is not Legally Sufficient

- 1. Charges 1 and 2 are factually and legally insufficient because Petitioner claims a statutory violation, but does not recite that claim in the Charge.**

Charges 1 and 2 of the Ballot Synopsis claim malfeasance, but do not claim an interference with official duties or otherwise meet the statutory definition of malfeasance separate from a statutory violation. In fact, Petitioner intended to claim a statutory violation, as he indicated in communications to counsel for the other parties. *See* CP 101-104, esp. 103 (“I would be willing to add language to Ballot Synopsis 1, and 2, that Commissioner Davis ‘violated RCW 53.12.245 and various provisions of Port of Seattle Bylaws’ if that would placate Commissioner Davis.”). Port Bylaws were included in Petitioner’s Supplemental Brief (CP 77-84), yet the Petition did not reference or incorporate them, or in any way attempt to demonstrate that any of the Charges were based on a purported violation of those Bylaws. CP 5-6.

Charges 1-3 of the Petition and Charge 3 of the Revised Ballot Synopsis, do not cite to any statute or other provision of law regarding “gifts” or “grants” of public funds. Those same charges fail to identify any alleged violation of law by virtue of signing the October 10, 2006, Memorandum.

Even if the Petition identified a legal citation underlying the charges, there is no law that was violated. Charge 1 of the Revised Ballot Synopsis (CP 114) describes that the October 10, 2006, Memorandum “had the potential effect of obligating the Port of Seattle to pay to Mr. Dinsmore” monies outside of his employment contract. This is legally incorrect. For example, a public agent cannot bind a governmental agency when he enters into a contract that is *ultra vires*, “even though the public body for which he acts may have clothed him with such indicia of authority that it would be estopped if it were a private person . . .” *State v. O’Connell*, 83 Wn.2d 797, 825, 523 P.2d 872 (1974) (cited by *Barendregt v. Walla Walla Sch. Dist. No. 140*, 26 Wn. App. 246, 250, 611 P.2d 1385 (1980));⁶ *see also* RCW 42.23.050 (making void any contract in violation of the Act). The Commissioner did not obligate the Port to any contract; thus the Charges are legally wrong.

2. A failure to allege a knowing violation of the law, based on a proper foundation, renders the Petition legally (as well as factually) insufficient.

Charges 2, 4, 5 and 6 of the Petition claim a violation of the OPMA, by (1) voting in executive sessions on January 10, 2006 and

⁶ *See also, State ex rel. Bain v. Clallam County Bd. of County Commr's*, 77 Wn.2d 542, 549, 463 P.2d 617 (1970) (“When dealing with an officer of [the State], one must be presumed to have knowledge of the official’s power and authority, and when one deals with them in a manner not in compliance with the law one does so at one’s peril.”).

June 8, 2006, (2) obligating the Port of Seattle to pay monies without a vote at a regularly scheduled public hearing, and (3) exceeding the purposes of executive session. A failure to allege and demonstrate an intentional violation of law, including the OPMA, is fatal to a recall charge. The Petition fails to establish that the Commissioner intended to commit an unlawful act.

First, there is no factual support in the Petition. The Petition wholly fails to show that the Petitioner has knowledge “indicating that the official intended to commit an unlawful act.” *Pearsall-Stipek II*, 136 Wn.2d at 263. Charges 1-5 of the Petition, and Charges 1 and 2 of the Revised Ballot Synopsis do not allege the Commissioner intended to violate any law, which is fatal to such baseless charges. *See In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990).

Similarly, in *Pearsall-Stipek I*, 129 Wn.2d at 403-04, a recall petition was brought against a county auditor on the grounds that she willfully and intentionally violated the law by altering and falsifying a document on file with the Public Disclosure Commission. By affidavit, the county auditor explained that she did not intend to violate the law, but that she made a mistake failing to make sure that the documents forwarded to the Public Disclosure Commission contained the same entries as those contained on file in the auditor’s office. *Id.* at 404. Based on this

affidavit, the court ruled that the petitioner's charge was "purely conjectural and therefore provides no basis for recall" because the petitioner had "no knowledge of any facts showing that [the county auditor] 'willfully and intentionally' violated the law...." *Id.* The recall petition also charged that the county auditor and directed a clerk to destroy ballots from a presidential election. *Id.* Again, the court ruled that the petitioner had no knowledge of any facts showing the county auditor intentionally violated the law. *Id.* As a result, the petition for recall was dismissed. *Id.*

As evidenced by her Declaration (CP 25-33, esp. CP 31, ¶¶ 24, 25), the Commissioner always acted with what she understood to be legal justification – that is, ensuring a stable transition to a new Port CEO in an era of increased Port competitiveness. Additionally, even as to Charge 6, which contends, in conclusory form, that there was a knowing violation of the OPMA, Petitioner has not presented any facts indicating such an intent. This, too, is fatal. *Wade*, 115 Wn.2d at 549 (Holding that although the petition alleges respondents intentionally discriminated against Drummond because of his sex and intentionally violated the law in doing so, this charge is merely a conjectural conclusion unsupported by any of the facts set forth in the petition). If a petitioner does not demonstrate personal knowledge of this intent, the recall petition is insufficient on its

face. *Id.* For example, in *Beasley*, recall charges were brought against school board members alleging they took certain actions “with the intent to intimidate” other board members. *Beasley*, 128 Wn.2d at 422. The court held “[t]he Charge of intent to intimidate is not an observed fact but is respondents’ conclusion.” *Id.* at 430.

Petitioner swore under the penalty of perjury that the Charges were “true” and that he has “knowledge of the alleged facts upon which the stated grounds for recall are based.” CP 6. This is not true; he cannot see into her motives. Petitioner’s charge of a knowing violation of the OPMA (Charge 6) is pure conjecture and speculation, with no foundation whatsoever. The Petition wholly lacks any information to show the requisite intent or an inference of intent.⁷ Commissioner Davis has sworn by declaration that she only had an intent to comply with the law. CP 28, ¶ 14; CP 31, ¶¶ 24, 25. Thus, even if the Commissioner committed improper acts as claimed by the Charges (which she fully denies), the lack

⁷ To the Commissioner’s knowledge, only one case has arisen in which this Court has expressly “inferred” a motive to break the law. *See, In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 779, 10 P.3d (2000) (relying on *In re Recall of Sandhaus*, 134 Wn. 2d at 670) (“*Pearsall-Stipek III*”), in which such an inference arose because, within seconds or minutes of being administered a witness oath of truthfulness, the witness on the stand lied about her educational or other background). No such facts are present here, and no such inference is implicated.

of intent is fatal. *Beasley*, 128 Wn.2d at 428. The Charges of a violation of the OPMA are thus insufficient.⁸

Because Petitioner does not allege and cannot show unlawful intent, Charges 1-5 of the Petition and Charges 1 and 2 of the Revised Ballot Synopsis are also legally insufficient under RCW 29A.56.010 to serve as the basis for a recall election.

3. Charges 1-3 of the Petition are legally insufficient because they do not allege conduct interfering with the performance of official duties or the performance of a duty in an improper manner.

There are no allegations, let alone facts, showing the Commissioners' alleged conduct affected, interrupted or interfered with her official duties. The October 10th Memorandum was an exercise of her discretionary duties in her role as Port President. CP 28-29, ¶¶ 15-17.

Likewise, there are no facts showing that the Commissioner performed a duty in an improper manner. With regard to Charges 1-3 of the Petition and 1 of the Revised Ballot Synopsis, Petitioner failed to identify a "standard, law or rule which would make his conduct wrongful, improper or unlawful" (*Zufelt*, 112 Wn.2d at 914), or otherwise explain

⁸ See also, *Pearsall-Stipek III*, 141 Wn.2d at 779 ("Even though we find that Washam's petition is legally sufficient to show Pearsall-Stipek committed false swearing in two instances, for the factually sufficient requirement to be satisfied Washam must additionally show that Pearsall-Stipek intended her actions, and that she specifically intended to violate the law.").

“why the acts alleged constitute misfeasance.” *Ackerson*, 143 Wn.2d at 375. Thus, Petitioner has failed to establish the existence of an applicable duty, rendering the Petition and related Charges legally insufficient.

4. Charges 1-3 of the Petition and Charge 1 of the Revised Ballot Synopsis are legally insufficient because there are no facts showing the Commissioner exercised her discretion in a manifestly unreasonable manner.

Petitioner must show the Commissioner exercised her discretion “in a manner which was manifestly unreasonable.” *Greco*, 105 Wn.2d at 671. Based on the record, he has not, and cannot do so. Signing personnel related documents is a discretionary act. There is nothing in the record to show that signing the October 10th Memorandum was manifestly unreasonable; the uncontroverted Davis Declaration (CP 25-32) demonstrates to the contrary.

5. A recall petition cannot be based on acts or events that are “cured” before the recall petition is filed.

Even if the October 10, 2006 (CP 75) Memorandum constituted an improper contract, which it did not, a recall petition cannot be based on alleged acts or events that are “cured” before the recall petition is filed. *See, e.g., Sandhaus*, 134 Wn.2d at 662. Even assuming purported legal consequence to the Memorandum or the unsubstantiated claims of “voting in executive sessions,” on April 24, 2007, the Commission publicly and

unanimously voted not to provide further compensation to Mr. Dinsmore, thereby effecting a "cure" that is fatal to the Petition. The Petition was filed on April 25, 2007. CP 2.

IV. CONCLUSION

Commissioner Davis respectfully requests this Court reverse the superior court's recall decision allowing certain Charges of the Petition to go forward, and its certification of the Ballot Synopsis, because the Charges are not based on personal knowledge and are otherwise factually and legally insufficient.

DATED this 6th day of August, 2007.

Respectfully submitted,

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP

By: 
Suzanne J. Thomas, WSBA #17338
Attorneys for Port of Seattle
Commissioner Pat Davis, Appellant

APPENDIX A

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 6th day of August, 2007, I caused true and correct copies of the attached Appellant Commissioner Davis' Opening Brief to be delivered to the following:

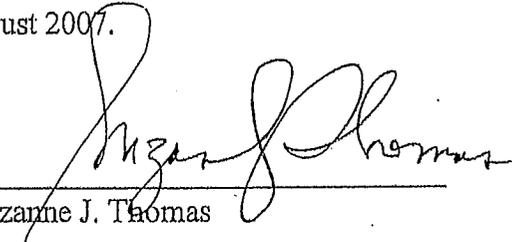
Thomas Kuffel
Deputy Prosecuting
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Attorneys Office
516 3rd Avenue
Seattle, WA 98104

Christopher Clifford
2721 Talbot Road
Renton, WA 98055

Via U.S. Mail

Via U.S. Mail

Dated this 6th day of August 2007.



Suzanne J. Thomas

DANIEL T. SATTERBERG
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December 5, 2007

Susan L. Carlson
Supreme Court Deputy Clerk
The Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504-0929

Re: Supreme Court No. 80219-0 -- In re Recall Charges Against Pat Davis

Dear Ms. Carlson:

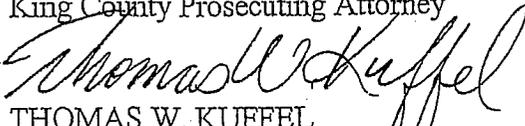
I received your letter dated November 27, 2007 in which you indicate that the briefs of Respondent King County Prosecuting Attorney and Respondent Clifford in the above referenced case are overdue and must be filed by December 28, 2007.

Please be advised that the King County Prosecuting Attorney will not be filing a brief in this matter. Consistent with the position taken before the King County Superior Court, the Prosecuting Attorney is not taking a position as to the sufficiency of the recall charges at issue. The Prosecuting Attorney's involvement in this case has been limited to fulfilling his statutory duty to prepare and file the ballot synopsis, providing the Superior Court with a neutral, friend of the court brief explaining the recall process, assisting the Superior Court in setting the initial hearing, and, at the Superior Court's request, drafting the order regarding the sufficiency of the charges and adequacy of the ballot synopsis. The statutory recall scheme does not contemplate a role for the Prosecuting Attorney on appeal, and the King County Prosecuting Attorney does not have a legal interest in the outcome of this case.

If the Washington Supreme Court needs any further information from the King County Prosecuting Attorney in this matter, or if you have any questions regarding this communication, please do not hesitate to contact me.

Very truly yours,

For DANIEL T. SATTERBERG
King County Prosecuting Attorney


THOMAS W. KUFFEL
Senior Deputy Prosecuting Attorney

cc: Christopher Clifford
Suzanne J. Thomas

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST
PORT OF SEATTLE COMMISSIONER PAT DAVIS, Appellant

Appeal from the Superior Court of King County
The Honorable Judge Charles Mertel

**RESPONDENT CHRISTOPHER CLIFFORD'S
RESPONSE BRIEF**

Christopher P. Clifford
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Pro Se

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RCW 53.12.245

I. ASSIGNMENT OF ERROR

Respondent finds no assignment of error by Superior Court Judge Charles Mertel and therefore finds Assignment of Error, 1-3, by Appellant Commissioner Davis, to be unsubstantiated and unsupported by the law or fact.

II. STATEMENT OF THE CASE

A. Clifford Petition

On April 21, 2007, Christopher P. Clifford ("Petitioner"), a registered voter in the Port of Seattle jurisdiction (CP 8), filed a petition for recall with the King County Records, Elections and Licensing Services Division of King County. The initial petition was rejected by the Prosecuting Attorney claiming the oath did not meet the requirements of state law. On April 25, 2007, Christopher P. Clifford, filed another petition for recall with a corrected oath (the "Petition"). CP 5-6. The Petition contains six charges. These charges contain six alleged acts of malfeasance, and an act of misfeasance.

The Petition stated that;

- 1) Port of Seattle Commissioner Pat Davis committed an act of malfeasance by signing an agreement to provide a "gift" of public money to an individual outside the employment contract approved by the Port of Seattle Commission.
- 2) Port of Seattle Commissioner Pat Davis committed an act of malfeasance by obligating the Port of Seattle to pay monies not voted on or approved by Port of Seattle Commissioners at a regularly scheduled public hearing.
- 3) Port of Seattle Commissioner Pat Davis committed an act of misfeasance and malfeasance when she used her position as Port Commissioner to provide a "gift" of public money to her personal friend and political ally Mic Dinsmore.

4) Port of Seattle Commissioner Pat Davis committed an act of malfeasance by voting on an issue in an executive session on or about January 10, 2006, in violation of the Washington State Open Meetings Act.

5) Port of Seattle Commissioner Pat Davis committed an act of malfeasance by voting on an issue in an executive session on or about June 8, 2006, in violation of the Washington State Open Meetings Act.

6) Port of Seattle Commissioner Pat Davis committed an act of malfeasance by knowingly violating the limited context of the executive session exclusions of the Open Meetings Act to improperly negotiate and vote on a "gift" of public money.

The Petition also contains a "FACTS" section that includes the dates and locations of the alleged acts, the amount of money petitioner alleged was being given, and actions by Mr. Mic Dinsmore. (CP 5) After this section Petitioner states that the Port of Seattle Memo dated October, 10, 2006, by Commission Pat Davis, and the acts of Mic Dinsmore in March 2007 supported the alleged acts of malfeasance and misfeasance (CP 6).

Petitioner prepared a detailed memorandum (CP 56-92) regarding the petition for the Sufficiency Hearing conducted on May 18, 2007, Before Judge Charles Mertel. Included in that detailed memorandum were a number of Port of Seattle documents, Port of Seattle Bylaws, and a number of emails exchanged between Mic Dinsomore and Port of Seattle staff. Commissioner Davis claims that the petition failed to have any of this additional information attached to the petition, but that is not the standard set out by state law.

"Whenever any legal voter of the state or of any political subdivision thereof, either individually or on behalf of an organization, desires to demand recall and discharge of any elective public officer of the state.... the voter shall prepare a typewritten charge, reciting in such officer, naming him or her and giving the title of the office, has committed and act or acts of malfeasance, or an act or acts of misfeasance while in office....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 grounds for recall are based. (RCW 29A.56.110)

Commissioner Davis filed a thirteen page brief (CP 12-24), and a ten page declaration (CP 25-38) in response to the petition. Clearly Commissioner Davis who has served on the Port of Seattle since 1988 is familiar with the Port Bylaws and RCW 53.12.245 which govern the acts and outline the powers of Port Officials. The bylaws provided in Chris Clifford's memorandum were voted on by Commissioner Davis in 1993. Commissioner Davis knew with specificity the amount of money she claims was to be given to the outgoing Port Director and stated that in her declaration (CP 30, lines 5-12). Commissioner Davis went on in her declaration to counter that the monies referred to in the Petition filed by Chris Clifford were not gifts but "to ensure that there would be no "power vacuum" left by Mr. Dinsmore's leaving the Port." (CP 31, lines 21-22) Even in the brief filed with this Court the Petitioner admits to granting additional money to Mr. Dinsmore, "her main motivation in signing the October 10 Memorandum (CP 75, "Memorandum") was to confirm Dinsmore's agreement to stay with the Port until a new CEO transitioned on. CP 29, paragraph 16."

Nothing in RCW 29A.56.110 states that a petitioner must attach documents or cite specific law. Based on the volume of Commissioner Davis's brief and declaration she clearly understood the allegations being raised by Mr. Clifford in his petition.

B. Prosecutor's Ballot Synopsis

Respondent, Christopher Clifford stipulates to section B of the Appellant's brief.

C. Commissioner Davis

Respondent, Christopher Clifford asks the Court to dismiss or strike this section of Appellants brief. This section is a regurgitation of the Petitioner's declaration and Brief filed with the Superior Court.

D. Petitioner's Supplemental Filings

Due to the shortened timeline in recall hearings both Christopher Clifford, and Commissioner Davis had to file their respective arguments with the Superior Court on May 16, 2007. There was no time for responses to be filed.

Mr. Clifford did submit an additional declaration with the Court just prior to the hearing on May 18, 2007 (CP 93-95). The Court offered Commissioner Davis an additional three days to respond to the declaration submitted by Mr. Clifford. Commissioner Davis declined the extension of time.

Mr. Clifford attempted to provide a video that is on the internet on the KING 5 News website. This video contains a brief interview with Commissioner Davis in which she defends granting the funds to Mr. Dinsmore and states "It is done all the time". The Court was not equipped to view this video during the hearing. Mr. Clifford has attached a copy of this clip and the website address for the Court.

The Court had the parties work out the language for the final order. Commissioner Davis's counsel kept complaining that the language in allegation number one was not "specific" enough. Mr. Clifford offered the specific language cited in Commissioners Opening brief to this Court in an email in an attempt to settle the language negotiations.

E. Decision of the Superior Court on the Sufficiency Hearing and Hearing on Presentation of Order

Pursuant to RCW 29A.56.140, a hearing was noted in King County Superior Court before the Honorable Charles Mertel. Both parties filed briefs with the Court. The Sufficiency Hearing was held on May 18, 2007.

As noted above, Mr. Clifford filed a declaration with the Court just before the beginning of the Hearing. Commissioner Davis was given the opportunity to take an additional three days to examine and respond to the three page declaration (CP 93-95). Commissioner Davis and her counsel chose not to take the additional time.

Commissioner Davis was allowed the opportunity to *voir dire* Mr. Clifford. *Voir dire* in a recall hearing is the opportunity for the Court or for the public official to question and test the knowledge of the individual who filed the recall charges. Commissioner Davis declined the opportunity to question Mr. Clifford under oath to test his personal knowledge regarding the facts of the charges put forth in his recall petition.

After two hours of oral argument Judge Mertel found that the petition was legally sufficient to move forward. Judge Mertel altered the ballot synopsis language put forward by the King County Prosecutor's Office. Judge Mertel ordered the three sides to propose the final synopsis language.

Judge Mertel adopted almost in entirety the language put forward by Commissioner Davis. At a presentation hearing on May 24, 2007, the final order of the Court was signed (CP 96-100).

F. Appeal

Respondent, Christopher Clifford stipulates to Section F in the Appellant's Brief.

III. ARGUMENT

1. The Recall Process

Respondent, Christopher Clifford concurs with the analysis contained in the Appellant's Opening Brief, pages 16-19.

2. Personal Knowledge

Respondent, Christopher Clifford concurs with the analysis contained in the Appellant's Opening Brief, pages 19-21.

3. Factual Sufficiency

"First, we note that the role of the courts in the recall process is highly limited, and it is not for us to decide whether the alleged facts are true or not. It is the voters, not the courts, who will ultimately act as the fact finders. RCW 29A.56.140; *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001)" *In re Recall of West*, 155 Wn.2d 659, 121 P.3d 1190 (2005)

"To be factually sufficient, the petition must 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, ...and be verified under oath that [the petitioners] believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based", *In re Recall of Beasley*, 128 Wn.2d 419, 908 P.2d 878 (1996).

Factual Sufficiency means the facts must establish a prima facie case of misfeasance, malfeasance, or violation of the oath of office. *Cole v. Webster*, 103 Wn.2d 280, 692 P.2d 799 (1984).

The purpose of the factual sufficiency requirement “is to ensure that charges, although adequate on their face, do not constitute grounds for recall unless supported by identifiable facts”. *In re Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990) (quoting *Teaford v. Howard*, 104 Wn.2d 580, 585, 707 P.2d 1327 (1985).

“The charges must be made with “sufficient precision and detail to enable the electorate and the challenged official to make informed decisions in the recall process”. *Jenkins v. Stables*, 110 Wn.2d 305, 307, 751 P.2d 1187 (1988). Although charges may contain some conclusions, they must state sufficient facts to “identify to the electors and the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office”. *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984)

Charges are factually sufficient to justify recall when, “taken as a whole they...state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance” *Id.*, 274.

A charge of “malfeasance” in office means the commission of an unlawful act RCW 29A.56.110 (1)(b). “Where the petition charges the official with violating the law, the petitioners must at least have knowledge of the facts which indicate intent to commit an unlawful act.” *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990). Although the recall statutes do not require firsthand knowledge of the facts underlying the charges, the petitioners must have some form of first hand knowledge of the facts upon which the charges are based rather than simply a belief that the charges are true. *In re Recall of Zufelt*, 112 Wn.2d 906, 912, 774 P.2d 123 (1989).

a. All three charges contained in the final Ballot Synopsis as modified by the trial Judge are factually sufficient.

Mr. Clifford followed the procedures for recall when he filed his petition with the King County Records and Elections Office on April 25, 2007. That petition was then presented to King County Superior Court with a ballot synopsis as required by state law. A Sufficiency Hearing was held and the trial judge altered the ballot synopsis at the presentation hearing.

Both parties filed briefs with the court on May 16, 2007. Commissioner Davis filed a thirteen page brief, and a ten page Declaration refuting the charges put forth in the recall petition. At no time has Commission Davis claimed to not understand the charges being raised by Mr. Clifford.

Commission Davis claims that the petition for recall did not have any documents attached, or contain specific citations to law. RCW 29A.56.110 requires that the charges be typewritten, name the officer being charged, provide the title of office, provide the address for the individual filing charges, recite the charges in concise language, provide a detailed description of the acts, date when the acts occurred, place, be signed by the individual making the charge, and be verified under oath. Nothing in the statute requires citation of specific laws or attachments of any kind.

The Washington State Supreme Court has stated that:

Technical violations of the governing statutes are not fatal, so long as the charges, read as a whole, give the elected official enough information to respond to the charges and the voters enough information to evaluate them. *Id.* Notwithstanding the petitioner's duty to plead with specificity, we will not strike recall efforts on merely technical grounds. *Id.* Accordingly, we may consider supporting documentation to determine whether the charges are factually sufficient. *In re Recall of West*, 155 Wn.2d 659, 121 P.3d 1190 (2005)

In this case Commissioner Davis has not only presented one defense against the charges, but multiple defenses that conflict with her plea of innocence. From

Commissioner Davis's Opening Brief:

Excuse #1 (page 8) "The was no grant of gift of monies to Mr. Dinsmore. CP 25-37, esp. CP 26, paragraph 3,4,5, and 6. The commission voted unanimously on April 24, 2007 not to provide him with any additional form of compensation. CP 26, Paragraph 3"

Excuse #2 (page 9) "The Commissioner legitimately was concerned about ensuring that there was no staff vacuum before the Port could find a replacement for Mr. Dinsmore. (CP 28-29, lines 15, 16); her main motivation in signing the October 10 Memorandum (CP 75, "Memorandum") was to confirm Dinsmore's agreement to stay with the Port until a new CEO transitioned on. CP 29, line 16.

Excuse #3 (Page 9) "She did not act act unilaterally or independently on this issue. She did not "obligate" the Port to pay monies to Mr. Dinsmore, nor did she have any intention of doing so. CP 29, line 17."

Commissioner Davis's Opening Brief has treated the October 10, 2006, Memorandum as though it were a way to secure Mr. Dinsmore staying with the Port. That is not how the memorandum reads. The memorandum reads as a severance package. In Commissioner Davis's Opening Brief she states "Commissioner Davis does not know what Petitioner refers to when he recites in the Petition that her "public statements" support a recall effort. In her declaration CP 30, lines 19-21 "I made a public statement via email when the news stories were starting to circulate with inaccurate information. Other than this statement, the only other public statement that I have made was at a recorded Port meeting on April 24, 2007." That is untrue. This is what Pat Davis said to King 5, prior to April 24, 2007, regarding the October 10, 2007, Memorandum;

Excuse #4*

“This is common in companies and other places...there are a lot of places where people are let go with a years salary and so on.”

* This video interview is located on the internet address:

<http://www.king5.com/video/upfront-index.html?nvid=147335>

Commissioner Davis claimed at trial and in her Opening Brief that she “was performing a discretionary act, within her authority.” Commissioner Davis has never provided a citation for showing what discretionary acts are “within her authority”. In Commissioner Davis Opening Brief on pages 9 and 10 she uses the term “discretionary Act(s)” at least three times and yet never provides an RCW or Port Bylaw granting her such discretion. However, in Mr. Clifford’s Memorandum (CP 56-92) the Port Bylaws are provided and show that Commissioner Davis has no authority under the Port Bylaws to exercise the type of discretionary authority that she claims to have under these charges.

Mr. Clifford’s memorandum (CP 56-92) contained RCW’s, Port Bylaws, the Memorandum, Port Emails, and Handwritten notes to support the charges within the final Ballot Synopsis. “However, we caution that petitioners have the duty to “reasonably identify” the relevant facts contained in the supplemental materials and risk dismissal if the courts cannot readily ascertain the factual basis of the charge.” *In re Recall of West*, 155 Wn.2d 659, 121 P.3d 1190 (2005) In this case the official and the court both clearly understand the factual basis for all three charges in the final Ballot Synopsis.

“We now hold that an alleged factual insufficiency in a recall petition may be, in the judge’s sound discretion, cured by consideration of supplemental documentation, so long as the elected official has sufficient actual notice to meaningfully respond to the factual allegations supported by the proffered supplementation.” *In re Recall of West* In

this case Commissioner Davis was provided with ample time to examine the memorandum (supplemental material), and argue her case before the trial court.

Charges 2 and 3 of the Final Ballot Synopsis are factually sufficient. Conflicting facts and statements within Commissioner Davis's declaration support the factual sufficiency of these charges.

1. Only Commissioner Davis signed the October 10, 2007, Memorandum. CP 76
2. "I did not act unilaterally or independently on this issue". (CP 26, line 17)
3. "The port commission shall organize by the election of its own members of a President and secretary, shall by resolution adopt rules governing the transaction of its business and shall adopt an official seal. All proceedings of the port commission shall be by motion or resolution recorded in a book or books and kept for such purpose, which shall be public records. CP 62 (Port Bylaws)
4. The President shall preside at all public meetings of the commission and at executive sessions of the Commission, and shall sign all resolutions, contracts, and other instruments on behalf of the Commissioners as authorized by the Commission, and shall perform all other such duties as are incident to the office or are properly required by the Commission. CP 62 (Port Bylaws)
5. Individual Commissioners serve as members of the Commission, a body which acts by majority vote. CP 63 (Port Bylaws)
6. Even more important, at least some of the other Port Commissioners denied that the issue of potential transition benefits to Mr. Dinsmore had been raised in any meeting (executive or otherwise). This is simply not true....The suggestion that I had acted unilaterally was simply untrue. CP 30

Commissioner Davis under the Port Bylaws has no right to sign into the type of agreement she signed with Mic Dinsmore. She has always maintained she only worked with the approval of her fellow commissioners. The only way for them to have approved was through a vote or resolution, or agreement in an executive session. Port Commissioner Davis claims the memo and agreement with Mr. Dinsmore was discussed during the executive session identified in the recall petition and charges 2 and 3 of the

Final Ballot Synopsis. The only way for this to occur would have necessitated a violation of the State Open Meetings Act.

The supplemental material and the declaration of Pat Davis support the factual sufficiency of charges 2 and 3 in the Final Ballot Synopsis.

b. Knowledge

Chris Clifford demonstrated sufficient knowledge of the facts for this matter at the trial court. The Memorandum (CP 56-92) contains state law, Port Bylaws, Memorandum, emails, and handwritten notes. The Court Record is evidence that Mr. Clifford had more than just a mere "belief" regarding these charges and in fact dedicated personal time to research beyond what was contained in the news coverage.

Commissioner Davis claims in her Opening Brief that the recall charges are factually insufficient because: "1) Petitioner has not demonstrated that he has personal knowledge to support the charges", page 25. This is an outrageous argument since Commissioner Davis was given the opportunity at the trial court to *voir dire* Mr. Clifford regarding his knowledge.

Commissioner Davis admits that this opportunity was provided and that she did not engage in *voir dire* of Mr. Clifford. That was the Commissioner's opportunity to test the knowledge of the Petitioner and to show the court any lack or insufficiency of knowledge. The Commissioner chose to sleep on her rights and now is trying to benefit from the failure at the lower court level to create a record supporting her argument that Petitioner lacks the knowledge necessary to put the petition forward.

Commissioner Davis claims "(2) the petition fails to set forth "facts" upon which the charges can be based". Again, the record contains a declaration from Mr. Clifford,

state law, Port Bylaws, Memorandum, emails, and hand written notes from the Port of Seattle. This statement is without merit.

Commissioner Davis claims that “(3) the uncontroverted evidence proves that the charges are false; 4) no violation of law occurred; 5) with respect to charges 1-3 of the Petition (CP 5-6) and Charges 1 of the Revised Ballot Synopsis (CP 114), Petitioner intended but failed to, recite any statutory violation and none was included in the Ballot Synopsis or Revised Ballot Synopsis (CP 114); and 6) with respect to charges 1-5 of the Petition, even Petitioner does not contend that the Commissioner acted with intent to violate the law, and with respect to charge 6 of the Petition and Charge 3 of the Revised Ballot Synopsis, the claim of “knowing” conduct is completely without foundation.

To all of these arguments there is a simple rebuttal. The courts do not determine whether the charges are true or false. “It is the voters, not the courts, who will ultimately act as the fact finders.” RCW 29A.56.140

4. Legal Sufficiency

The petition filed with the King County Records and Elections Division, and the Final Ballot Synopsis are legally sufficient. The petition when read as a whole does give fair notice of the actual charges to the voters, the court, and the elected official. “In order to be legally sufficient, “the petition must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office. Chandler, 103 Wn.2d at 274”. (cited in *In re Recall of West*)

The petition stated specifically the unauthorized and illegal acts Commissioner Davis is accused of having done. The Facts section of the petition puts forward the dates, places of the alleged acts. The next section titled “Acts of Malfeasance and Misfeasance”

allege specific violations of state law, and specific acts of Malfeasance. This section specifically cites violations of state law. This section speaks directly to actions committed by Commissioner Davis that did not have the consent of the majority of the Port of Seattle Commissioners, or were actions not authorized by a motion or resolution of the Port Commission. These acts were outlined in great detail and specificity in the petition.

Commissioner Davis claims that the petition fails since it does not cite or attach state law to the petition. This is not required under RCW 29A.56.110. The Memorandum submitted at the Sufficiency Hearing in this matter clearly identified state statutes, and Port Bylaws that were violated by the acts of Commissioner Davis. This petition meets the high standard Justice Sanders was looking for in the West Recall action.

Commissioner Davis claims that she did not "intend" to violate state law or the Port Bylaws. The voters will weigh the facts and hear the arguments from both sides, and then decide the issue of "intent". Intent can only be shown through the facts and not through self serving declarations.

Commissioner Davis claims that acts complained of did not interfere with the performance of official duties or the performance of a duty in an improper manner. Due to the acts of Commissioner Davis the Port of Seattle Commission had to schedule a special meeting to deny the additional benefits granted by the memorandum signed by Commissioner Davis. Commissioner Davis has maintained that signing the memorandum was meaningless. If that premise were true then why would the

Commission have to hold a special meeting to pass a resolution denying Mic Dinsmore the benefits granted in the October 10, 2007, memorandum.

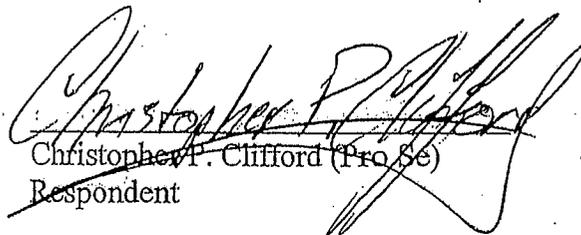
Commissioner Davis claims in her Opening Brief that nothing in the Petition for recall shows she did her duty in an improper manner. Port Bylaws do not allow the Commissioner to sign the type of agreement Pat Davis signed with Mic Dinsmore. Severance package, extended contract, whatever she wants to call it, the Commissioner violated State law, and Port Bylaws by signing that memorandum. Violating the Open Meetings Act is violating the law. A public official that violates the law in the performance of their duty is doing their duty in an improper manner. It is sad that at this late date Commissioner Davis denies this simple concept.

IV. CONCLUSION

Mr. Clifford respectfully requests this Court to uphold the decision made by Judge Mertel because the charge is both factually and legally sufficient.

DATED this 20th day of December, 2007

Respectfully Submitted


Christopher F. Clifford (Pro Se)
Respondent