

Supreme Court No. 80219-0

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**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

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**RESPONDENT CHRISTOPHER CLIFFORD'S  
RESPONSE BRIEF**

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## WASHINGTON STATE STATUTES

RCW 29.82.010  
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RCW 29A.56.110  
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RCW 29A.56.130  
RCW 29A.56.140  
RCW 29A.56.270  
RCW 42.30.060  
RCW 42.30.110  
RCW 42.30.140  
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 Dinsmore 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 Commission 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 pubic 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.

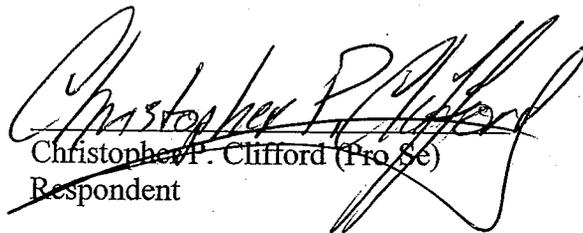
Commissioner Davis claims in her Opening Brief that nothing in the Petition for recall shows she did her duty in an improper manner. Port Bylaws do not allow the Commissioner to sign the type of agreement Pat Davis signed with Mic Dinsmore. Severance package, extended contract, whatever she wants to 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 20<sup>th</sup> day of December, 2007

Respectfully Submitted

  
Christopher F. Clifford (Pro Se)  
Respondent