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No. 98683-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

IN RE RECALL OF ADAM FORTNEY,
Snohomish County Sheriff.

**AMICUS BRIEF OF SNOHOMISH COUNTY
DEPUTY SHERIFF'S ASSOCIATION**

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I. INTRODUCTION

The legislature enacted the Public Employees' Collective Bargaining Act (PECBA) to "promote the continued improvement between public employers and their employees" by providing a uniform basis for public employees to join a labor organization of their choosing and be represented by that labor organization. RCW 41.56.010. The Superior Court's order hinders the functioning of the PECBA by discouraging elected officials from satisfying legal obligations created in collective bargaining agreements (CBAs) and by discouraging the settlement of labor disputes short of binding arbitration. Therefore, this Court must reverse the Superior Court's order as it relates to Sheriff Fortney's decision to resolve labor grievances by reinstating three employees. The Court must clarify that elected officials are not subject to recall when acting pursuant to obligations created in collective bargaining agreements and when reasonably resolving labor disputes with labor unions. These actions are vital to the preservation of bargaining rights for all public employees in Washington.

II. IDENTITY AND INTEREST

Amicus curiae is the Snohomish County Deputy Sheriff's Association (Deputy Sheriff's Association or DSA). The Deputy Sheriff's Association is the exclusive bargaining representative for deputies and sergeants employed in the Snohomish County Sheriff's Office. In this role,

the Deputy Sheriff's Association bargains on behalf of bargaining unit employees on matters related to wages, hours, and working conditions and represents employees in various matters. The DSA has a significant interest in protecting the bargaining rights of public employees and ensuring the Superior Court's order does not discourage elected officials from respecting legal obligations created in CBAs and from reasonably resolving labor disputes short of arbitration.

III. ISSUES TO BE ADDRESSED

A. Whether a collective bargaining agreement's "just cause" requirement creates a legally cognizable justification for settling grievances that renders a recall charge legally insufficient.

B. Whether a recall charge is legally insufficient, where an elected official settles labor grievances short of binding arbitration and provides reasonable and tenable grounds for the decision.

IV. ANALYSIS

A. An elected official acts with a legally cognizable justification that renders a recall charge legally insufficient when a collective bargaining agreement requires "just cause" for discipline and the elected official reduces or overturns discipline, believing the imposed discipline violates the CBA

An elected official acts with a legally cognizable justification when he or she reduces or overturns discipline, believing that previously imposed discipline violates a collective bargaining agreement's "just cause"

requirement. This legally cognizable justification for reducing or overturning discipline renders a recall charge legally insufficient.

As background, “[a] charge is *legally* sufficient if the charge defines ‘substantial conduct clearly amounting to misfeasance, malfeasance or a violation of the oath of office,’ and there is no legal justification for the challenged conduct.” *In re Recall of Telford*, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009) (quoting *In re Recall of Wasson*, 149 Wn. 2d 787, 791, 72 P.3d 170 (2003)) (emphasis in original). A legally cognizable justification for the conduct or actions renders a recall charge legally insufficient. *In re Recall of Lindquist*, 172 Wn.2d 120, 132, 258 P.3d 9 (2011); *In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wn.2d 501, 509, 173 P.3d 265 (2007); *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 765-66, 10 P.3d 1034 (2000); *In re Recall of Ackerson*, 143 Wn.2d 366, 371, 20 P.3d 930 (2001); *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990); *In re Recall of Greco*, 105 Wn.2d 669, 671-72, 717 P.2d 1368 (1986). Therefore, “[e]ven if [a] charge is legally sufficient as plead, if an elected official can show ‘a legally cognizable justification[,] that justification renders a recall petition legally insufficient.” *In re Recall Washam*, 171 Wn.2d 503, 515, 257 P.3d 513 (2011) (quoting *Greco*, 105 Wn.2d at 671).

The Court has found legally cognizable justifications under a broad array of circumstances. These include (1) when a school board failed to stop the sale of a school property, where a lessee exercised an option to purchase the property, so the board was “simply fulfill[ing] the obligations created by [a] contract,” *In re Recall Charges Against Seattle School Dist. No. 1 Directors*, 162 Wn.2d at 511; (2) when a drainage improvement district commissioner unsuccessfully sought an anti-harassment order against his neighbors, which would have excluded them from district meetings, where he feared they would attack him, *In re Recall of Carkeek*, 156 Wn.2d 469, 475, 128 P.3d 1231 (2006); (3) “when an elected official fail[ed] to implement an ordinance or statute” due to impossibility, where he was not given sufficient time and funds, *Greco*, 105 Wn.2d at 672-73; and (4) when a port commissioner approved a lease without a SEPA review, because he relied on an incorrect determination by the port that the lease was exempt from that requirement, *Telford*, 166 Wn.2d at 157-58. In all the circumstances above, the public official could point to some reason or justification for his or her decision that rendered the recall charge legally insufficient.

Similarly, collective bargaining agreements create obligations on employers that can justify their actions. As background, public employees in the State of Washington are guaranteed the right to organize and

designate their bargaining representatives, without interference from their public employer. *See* RCW 41.56.040. When public employees organize and designate an exclusive bargaining representative, their public employer is legally required to bargain with the bargaining representative over “grievance procedures” and “personnel matters, including wages, hours, and working conditions” RCW 41.56.030(4). The result of these negotiations is usually a written contract, known as a collective bargaining agreement (CBA), which governs the wages, hours, and other working conditions for bargaining unit employees.

Employers must adhere to the terms of a CBA or face legal consequences for violating the contract. Therefore, when an elected official acts pursuant to obligations created in a CBA, he or she is acting with a legally cognizable justification, rendering a recall charge challenging those actions legally insufficient.

To allow a recall petition to proceed when an elected official is acting pursuant to obligations created in a CBA would greatly harm labor in Washington. Public employers would be hesitant to fulfill their legal obligations for fear of recall. This result would harm Washington employees, hinder labor-management relationships, and result in increased legal liability for public employers whose elected officials fail to follow the terms of CBAs for fear of recall.

In short, the Superior Court's order would hinder the operation of the Public Employees' Collective Bargaining Act, which solidified collective bargaining rights for public employees to "improve . . . the relationship between public employers and their employees." *See* RCW 41.56.010. These collective bargaining rights for public employees are of such paramount importance that the legislature directed: "[I]f any provision of [PECBA] conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of [PECBA] shall control." RCW 41.56.905. To protect Washington employees, labor rights and the intent of the legislature, this Court must recognize the legal obligations created when a public employer enters a CBA. Elected officials cannot face recall when acting pursuant to these legal obligations.

Here, Sheriff Fortney was acting pursuant to the "just cause" requirement in County's CBA with the Deputy Sheriff's Association, when he settled grievances filed on behalf of Deputies Wallin, Boice, and Twedt.¹ *See* CP 240 (granting Boice and Twedt's grievance in part because facts did not support two of the alleged policy violations); CP 250-53 (granting

¹ The Collective Bargaining Agreement between the Deputy Sheriff's Association and the County is found on the County's website at <https://www.snohomishcountywa.gov/DocumentCenter/View/66276/Deputy-Sheriffs-Association-CBA?bidId=>. The "just cause" requirement is found in Article 16.1.

Wallin's after finding he did not violate policy). As background, nearly all collective bargaining agreements require that discipline be for "just cause."

"Just cause" is a term of art in labor law, and its precise meaning has been established over [50] years² of case law. Whether there is just cause for discipline entails much more than a valid reason; it involves elements such as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty.

Civil Service Commission of the City of Kelso v. City of Kelso, 137 Wn.2d 166, 173, 969 P.2d 474 (1999). Employers who impose discipline without just cause face liability for violating the CBA, which often involves reinstatement of employment and backpay in termination cases.

Court precedent establishes that it is the elected official's perception that is the relevant factor when determining whether he or she acted with a legally cognizable justification. *In re Recall of Kast*, 144 Wn.2d 807, 818-19, 31 P.3d 677 (2001). Therefore, the Court should examine whether Sheriff Fortney perceived or believed that "just cause" did not support the discipline imposed by his predecessor, as alleged in the union's grievances. *See In re Recall of Kast*, 144 Wn.2d at 818-19.

With regard to Sheriff Fortney's perception, when he took office, the Deputy Sheriff's Association had already filed a grievance challenging

² The decision was published in 1999 and explained that the meaning of "just cause" had been established under 30 years of case law. Twenty years later, "just cause" is still the standard in labor contracts and has now been established by 50 years of case law.

Deputy Wallin's termination for violating the just cause requirement in the CBA and had advanced the grievance to binding arbitration, which was not yet scheduled. CP 250. Sheriff Fortney reviewed the files related to Deputy Wallin's discipline, including the administrative investigation performed by the Office of Professional Accountability and the SMART³ report, which included a letter from Prosecutor Adam Cornell. *See* CP 250. Based on his review, Sheriff Fortney drafted a seven-page memorandum explaining his conclusion that Deputy Wallin did not violate department policy. CP 247-53. In his memorandum, he set forth tenable reasons for his belief that Deputy Wallin acted within policy. *See* CP 247-53. Clearly, he overturned Deputy Wallin's discipline because he believed "just cause" did not support the termination, meaning the discipline violated the CBA. He acted with a legally cognizable justification, which renders the recall charge legally insufficient.

Similarly, when Sheriff Fortney took Office, the Deputy Sheriff's Association had already filed a grievance challenging the terminations of Deputies Boice and Twedt for violating the just cause requirement in the CBA. CP 240. The prior administration had not yet held a Step 1 hearing,

³ SMART is the Snohomish Multi-Agency Response Team, which is composed of criminal investigators from various law enforcement agencies within Snohomish County. SMART responds to officer involved shootings and in custody deaths, as the Independent Investigative Team.

which is the first step in the grievance process, so Sheriff Fortney and a bureau chief conducted the hearing. CP 242. During that hearing, Sheriff Fortney heard from Deputies Boice and Twedt, their union representatives, and union attorneys. CP 242. Sheriff Fortney also reviewed “all documents in the personnel complaints, including the termination and pre-disciplinary letters, the entire personnel complaint file, and written responses provided by the DSA to the former administration.” CP 240.

After his review and the Step 1 hearing, he issued a seven-page memorandum, reinstating the employees and granting their grievance in part. CP 240-46. Sheriff Fortney concluded that the deputies did not violate the most serious policy allegations, so he reduced the severity of their discipline consistent with the requirements of “just cause.” CP 243-46. He reached his decision “in full consultation with the Snohomish County Prosecutors Office” and considered their legal counsel. CP 115. Consequently, he acted with a legally cognizable justification that renders the recall charge legally insufficient.

Therefore, the charges based on Sheriff Fortney’s decision to resolve the labor grievances by reinstating employees are legally insufficient.

B. Additionally, a recall charge is legally insufficient when an elected official reasonably exercises discretion to resolve labor grievances short of arbitration, where the official has provided reasonable and tenable grounds for the decision

An elected official cannot be recalled for resolving labor grievances short of arbitration if he or she provides reasonable and tenable reasons for exercising discretion. This Court's precedent clearly establishes that discretionary acts of elected officials are not a basis for recall unless the discretion was exercised in "a manifestly unreasonable manner." *In re Recall of Inslee*, 194 Wn.2d 563, 572, 451 P.3d 305 (2019). "An attack on the official's judgment in exercising discretion is not a proper basis for recall." *Lindquist*, 172 Wn.2d at 132. Therefore, recall petitioners cannot simply disagree with an official's judgment; they must establish that an exercise of judgment was "manifestly unreasonable," such that, for example, it was based on "untenable grounds or untenable reasons." *Inslee*, 194 Wn.2d at 572.

A county official's decision to resolve labor grievances short of binding arbitration is a discretionary act. Early cases recognized that county officials, such as sheriffs, had an "absolute right to the personnel" of their deputies. *Thomas v. Whatcom Cnty.*, 28 Wn. 113, 123-24, 143 P. 881 (1914); see *Osborn v. Grant Cnty*, 130 Wn.2d 615, 622-24, 926 P.2d 911 (1996). This absolute right to hire and fire has lessened over the years with

the adoption of various statutes, civil service rules, and collective bargaining agreements. *See Green v. Cowliz Cnty. Civ. Srv. Comm'n*, 19 Wn. App 210, 213-24, 577 P.2d 141 (1978).

This largely discretionary nature of personnel decisions is consistent with RCW 36.16.070, which provides county officers with the right to employ deputies and other necessary employees with the consent of county council. The statute provides that the appointing officer is “responsible for the acts of his or her appointees” and “may revoke each appointment at pleasure.” RCW 36.16.070. Here, the collective bargaining agreement restricts the Sheriff’s ability to terminate employees without “just cause” and state and federal laws provide additional restrictions. Beyond these caveats, personnel decisions remain largely discretionary. Therefore, a sheriff’s decision to resolve grievances before arbitration cannot form the basis for recall if he or she is able to provide reasonable and tenable reasons for the decision.

This is significant because elected officials must be free to exercise discretion and work collaboratively with labor organizations to resolve workplace disputes. By working collaboratively with public employers, public employee unions secure fair and competitive wages for Washington workers; hours that are conducive for families; robust health insurance; and fully paid leave benefits that give employees the time off they need while

sick, while caring for sick loved ones, for recreation, and to lead a balanced life. Additionally, unions help secure due process in the workplace, including that discipline be fair and warranted.

If this Court allows elected officials to be subject to recall for reasonably exercising their discretion in labor disputes, it would hinder the important work performed between public employers and public employee unions. Elected officials would be hesitant to resolve meritorious grievances for fear of recall and would be discouraged from settling labor disputes. The result will be increased costs for all involved, due to the cost of arbitration and backpay awards, and would result in more workplace disruptions. These results would contravene the public policy underlying PECBA, which is to improve the relationship between public employers and their employees. RCW 41.56.010. This Court must continue to allow elected officials the freedom to exercise reasonable discretion when working with labor unions to resolve disputes.

Here, Sheriff Fortney provided reasonable and tenable grounds for reinstating each of the employees. He authored lengthy memoranda explaining his decisions to modify the discipline, after the Deputy Sheriff's Association filed grievances challenging the discipline for violating the "just cause" provision in the CBA.

For the grievance relating to Deputy Wallin, Sheriff Fortney listed extensive reasons for concluding that Deputy Wallin did not violate a pursuit policy and a use of force policy in a memorandum, which is included in the record. See CP 247-53. Sheriff Fortney also submitted a letter by the prosecutor about Deputy Wallin's use of force to the Superior Court that was important in his decision-making. CP 46. Deputy Wallin's case involved an officer involved shooting, and Prosecutor Adam Cornell concluded that, "under the totality of the circumstances," a jury would likely find Deputy Wallin was "justified in using the force" CP 63-68.⁴

Likewise, Sheriff Fortney provided extensive reasons for concluding that Deputies Boice and Twedt did not violate the most serious policy allegations raised against them. CP 240-46. The recall petitioners failed to establish that the reasons provided by Sheriff Fortney were unreasonable or untenable. Therefore, his discretionary action in settling the grievances before binding arbitration is not subject to recall.

The recall petitioners make assumptions based on the nature of the allegations, rather than focusing on the facts of the cases and whether Sheriff Fortney's actions were manifestly unreasonable. For example, they

⁴ Interestingly, the recall petitioners never submitted into evidence the former sheriff's disciplinary letter for Deputy Wallin, which would explain former sheriff's reason for finding a policy violation and terminating the deputy's employment.

assume that reinstating Deputy Wallin will endanger the public but ignore relevant evidence. The prosecutor determined that a jury would find the use of force was justified. CP 67. Sheriff Fortney came to the same conclusion based on his review of the investigation. CP 251-53. Evidence rebuts the recall petitioners' assumptions.

The recall petitioners also focus on the fact that Deputies Boice and Twedt remain on the prosecutor's *Brady* list, despite Sheriff Fortney reversing all findings based on dishonesty. As background, *Brady v. Maryland* requires prosecutors to provide exculpatory evidence to an accused upon request, such as information indicating an investigator's past dishonesty. *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Pursuant to this constitutional responsibility, prosecutors maintain *Brady* lists of employees they may need to disclose information about to criminal defendants. Snohomish County has 79 individuals named on its *Brady* list. CP 324. The inclusion of an officer's name on the list does not mean that the officer cannot testify or that the officer's employment must be terminated. *See Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.*, 167 Wn.2d 428, 438-39, 219 P.3d 428 (2009). The mere fact that these deputies remain on the prosecutor's *Brady* list does not establish that Sheriff Fortney exercised discretion in a manifestly unreasonable manner or that the deputies were dishonest.

V. CONCLUSION

The Superior Court's order must be reversed, as it relates to the charges involving reinstatement of three employees. Allowing the order to stand would hinder collective bargaining between public employers and public employees in Washington.

DATED this 21st day of August, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the Motion to File Amicus Curiae Brief of Snohomish County Deputy Sheriff's Association and Amicus Curiae Brief of Snohomish County Deputy Sheriff's Association with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of these documents to all counsel/parties of record:

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