FILED
SUPREME COURT
STATE OF WASHINGTON
9/2/2020 3:14 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98683-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PETITION OF RECALL FOR ADAM FORTNEY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

RESPONSE TO AMICUS CURIAE BRIEF OF THE SNOHOMISH COUNTY DEPUTY SHERIFF'S ASSOCIATION

COLIN MCMAHON
SAMANTHA SOMMERMAN
BRITTANY TRI
TERRY PRESHAW
Pro Se
PO Box 2591
Everett, WA 98213
(425) 299-6227
Respondents

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INTRODUCTION

The Snohomish County Deputy Sheriff's Association ("SCDSA") raises meritless challenges to Charge Three of the Recall Petition. These challenges are premised on a Collective Bargaining Agreement ("CBA") that was neither presented to nor considered by the superior court. SCDSA seeks now to add supplemental materials to the record that this Court should not consider. Even if the Court were to entertain these arguments, a police union and the county cannot contract around the voter's constitutional right to oversight of elected officials through the recall process.

First, the CBA does not mandate that Fortney rehire deputies Twedt, Boice, and Wallin. Rather, it allows Fortney the discretion to rehire officers. Here, Fortney exercised that discretion in a manifestly unreasonable manner amounting to misfeasance. Second, the legal authority to exercise discretion in personnel matters does not act as a shield from the recall process when that authority is abused, as it was in this case. Thus, the principle of a "legally cognizable justification" is misapplied by SCDSA. Finally, regardless of Fortney's discretion to hire and fire his deputies, his actions here amount to an abuse of that discretion where he reinstated deputies who are political allies and are

known to violate the constitutional rights and endanger the peace and safety of Snohomish County citizens.

ANALYSIS

A. The Collective Bargaining Agreement Does Not Limit the Voters' Right to Recall.

Article 16.1 of the Collective Bargaining Agreement ("CBA") simply provides that "[t]he Employer shall not discipline any employee unless just cause for such discipline exists."

There is nothing in the CBA that compelled Fortney to reinstate the three deputies. By his own admission he exercised his discretion and chose to find that there was "no-just-cause" in order to facilitate the end to three pending grievance cases.

The issue is whether Respondents have demonstrated with legal sufficiency that Sheriff Fortney's **determination of no-just-cause** was manifestly unreasonable so as to invite the voters' oversight. *See In re Recall of Bolt*, 177 Wn.2d 168, 174, 298 P.3d 710 (2013) ("An official may be recalled for execution of discretionary acts only if the official exercised discretion in a manifestly unreasonable manner"). As the lower court held:

> It would be **a reasonable inference the voters could conclude** that Sheriff Fortney **exercised his discretion in a manifestly unreasonable manner** in rehiring those

> individuals who had been held to have been dishonest and violated policy, violated civil rights, and certainly legal standards in case law. Again, that's including based on what could be reasonable inference that voters could conclude in terms of conflict of interest, disregard for the findings made in a previous investigation, as well as an inference that voters could make in terms of putting future prosecutions in jeopardy given what's been referenced being a disclosure the prosecutor's office has made and most likely would continue to make with regard to those officers.

RP2 94 (emphasis added).

Simply because the CBA requires Fortney to establish good cause before imposing discipline, does not immunize any and all of his discretionary personnel determinations from recall. Essentially, the SCDSA asks this Court to allow it and the Snohomish County Sheriff's Office to contract around the public's constitutional and statutory right to recall. But the CBA is silent on the public's right, and courts presume that parties enter into contracts with reference to the surrounding statutory context unless the instrument says otherwise. *Sagner v. Sagner*, 159 Wn. App. 741, 749, 247 P.3d 444 (2011). Accordingly, the CBA, otherwise silent on the public's right to recall the Snohomish County Sheriff if he unreasonably determined that good cause did not exist to discipline any particular deputy, presumes that public retains that very same right.

However, even if the CBA somehow bars a recall in this instance it would violate public policy, as well as the constitution, county charter, and applicable statutes. It is a basic principle of contract law "that a contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible [sic]." *Jordan v. Nationstar Mortg., LLC*, 185 Wn.2d 876, 883, 374 P.3d 1195 (2016) (internal citations omitted). Fortney and his deputies' union cannot contract away the public's democratic oversight authority.

The SCDSA is not the first police union to attempt to hoist up a CBA as a barrier to public accountability, and scholars have increasingly noted the threats to democratic justice such efforts entail. *See e.g.* Catherine L. Fisk, L. Song Richardson, *Police Unions*, 85 Geo. Wash. L. Rev. 712 (2017). Courts nationwide have also acted with vigor in rejecting such undemocratic arguments.

In one recent and illustrative case, the Chicago police union argued that its CBA required that certain police disciplinary records be destroyed, even if in violation of state public records law. *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831, ¶ 1. The Court expressly rejected that position. Instead, it held that "[a]s with any contract, a court may not enforce a collective-bargaining agreement in a

manner that is contrary to public policy." *Id.* at ¶ 50 (internal citations omitted). "A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the courts." *Id.* (internal citations omitted). Accordingly, the court affirmed the vacatur of an underlying arbitration award that had enforced the CBA in violation of state law.

Here, the public, through their representatives, expressly reserved the right to recall the officials they elect when they commit malfeasance, misfeasance, or a violation of their oath, including abuse of discretion in reinstating employees. While an elected official, as employer, can limit his own discretion by executing a CBA, that limitation binds only the parties to contract, and must leave the public's preeminent role in the democratic process, including the process of recall, unharmed.

B. The Existence of a Collective Bargaining Agreement is Immaterial to the Sufficiency of Charge Three.

A recall petition is legally sufficient if it alleges substantial conduct that amounts to misfeasance, malfeasance, or violation of the oath of office. RCW 29A.56.110(1). "The recall statute, does not require an act to be unlawful in order to form a legally sufficient

basis for recall." *In Re Recall of Pepper*, 189 Wn.2d 546, 559, 403 P.3d 839 (2017). While elected officials may not be recalled for appropriately exercising their discretion, an elected official may be recalled for exercising that discretion in a "manifestly unreasonable" manner. *Greco v. Parsons*, 105 Wn.2d 669, 672, 717 P.2d 1368 (1986).

This Court has recognized three separate defenses to a recall petition: insubstantial conduct, reasonable exercise of discretion, and legally cognizable justification. *Id.* at 671.

In *Greco*, petitioners alleged a county auditor failed to revise county precinct boundaries within the 32-day timeframe mandated by county ordinance. *Id.* at 671. The legally cognizable justification defense was created in *Greco* to prevent recall of an elected official where they may have violated the law on its face but had a legally cognizable reason for doing so. *Id*. In that case, when complying with the law was impossible. *Id.*

The "legally cognizable justification" defense is a response to an allegation that the elected official broke the law and only applies to allegations in that context. *In re Recall of Washam*, considered a county assessor accused of violating various anti-retaliation laws. 171 Wn.2d 503, 516, 257 P.3d 513 (2011). In response, the assessor asserted

that he had a legally cognizable justification because he had broad discretionary authority to make personnel decisions. *Id.* at 514. The Court held that to establish a legally cognizable justification for breaking the anti-retaliation laws, the elected official bears the burden of a substantial statement of the alleged justification so that the court can weigh whether it is cognizable and lawful. *Id.*

This case is distinguishable from *Washam*, because the Respondents are not alleging that Fortney broke a specific law on charge 3, but rather that he exercised his discretion in a manifestly unreasonable manner. Fortney did not raise a legally cognizable justification defense to this charge at the superior court level nor in his appellate briefing. Presumably, this was because he understood the respondents are not alleging that Fortney broke the law when he rehired these deputies. If he were raising that defense, he would bear the burden of a substantial statement explaining his legal justification, which he has not done.

Asserting the legality of one's actions is not an applicable response to a charge that does not actually allege a violation of the law. In *Pepper*, the petition alleged that a city council member was routinely absent from city council meetings. *In Re Recall of Pepper*, 189 Wn.2d 546, 559, 403 P.3d 839 (2017). Pepper responded that attendance at

meetings was not required and that her routine absences were therefore legal. *Id.* The Court held that the legality of meeting attendance was immaterial to its analysis of whether the charge was "legally sufficient" because the petitioner did not allege a violation of the law but argued that preventing meetings from taking place had the effect of violating the council member's oath of office. *Id.* at 560. The Court reasoned, "the recall statute, does not require an act to be unlawful in order to form a legally sufficient basis for recall." *Id.*

Similarly here, whether Fortney's actions comport with or violate a contract, law, ordinance, or policy is immaterial to the question of whether he exercised his discretion in a manifestly unreasonable manner. Again, Respondents are not arguing that Fortney intentionally broke the law in charge three. Rather, that he acted improperly by making the manifestly unreasonable decision to rehire three deputies after extensive proceedings established their misconduct. Arguing that Fortney had the legal discretion under the CBA to make hiring and firing decisions does not help the Court in its analysis as to whether Respondents have met the low bar of factual and legal sufficiency. The Respondents have met this burden and it should be up left to the voters

to determine whether the decision to rehire these deputies was manifestly unreasonable.

C. Fortney Exercised His Discretion in a Manifestly Unreasonable Manner When He Rehired Deputies Twedt, Wallin, and Boice.

While the Court reviews the superior court decision de novo, it will "affirm the trial court's factual conclusions so long as substantial evidence exists supporting the trial court's conclusion." *In re Recall of Harrison*, 144 Wn.2d 583, 587, 30 P.3d 474 (2001). Recall statutes are construed in favor of the voter and the voters should be "left to draw reasonable inferences from the facts". *Pepper*, 189 Wn. 2d at 554.

Whether Fortney's rehiring of three deputies who were terminated for misconduct constitutes a manifest abuse of discretion is appropriately left in the hands of the voters. SCDSA focuses on the need for the Sheriff to have the ability to exercise this discretion, which no one is disputing. Ultimately, Fortney chose to reinstate three of his close colleagues, whom he had spent months defending in a very public way. CP 153.

In the case of Deputies Twedt and Boice, Fortney had been their immediate supervisor, and wrote a letter in support of both during the investigation into their misfeasance. CP 336-37. Fortney later

issued a public Facebook post on his campaign page indicating his belief that they had not done anything wrong, and that they were terminated for political reasons. CP 333-34. Regarding Deputy Wallin, Fortney was himself involved and reprimanded for his involvement in the incident that lead to Wallin's termination. CP 348. It is on untenable grounds and for untenable reasons that Sheriff Fortney disregarded the prior extensive investigations of misconduct in deciding to reinstate his friends, and political cronies, less than a month after taking office. This is a manifest abuse of discretion.

The right of the people to recall elected officials in our constitution exists to "preserve the people's most basic right of self-governance." *Pederson v. Moser*, 99 Wn.2d 456, 460, 662 P.2d 866 (1983). Police officers hold a particularly powerful and important role in our society. Police are supposed to serve and protect the community. It is because of this great and formidable power bestowed on police officers that the community is uniquely invested in personnel decisions regarding patrol officers.

Certainly, not all hiring and firing decisions regarding patrol officers involve an abuse of discretion that could subject an elected sheriff to recall. However, decisions motivated by personal relationships

and political purposes that demonstrably endanger the peace and safety of the community most certainly constitute a showing of misfeasance.

Fortney intentionally re-instated deputies who are political allies and are known to violate the constitutional rights Snohomish County citizens. This was an abuse his discretion that endangers the peace and safety of the community in Snohomish County. To tell the people of Snohomish County that they cannot or should not be able to hold the most powerful elected county official accountable for actively placing their lives in danger would be an unprecedented restriction on the right to recall.

CONCLUSION

The arguments raised by the Snohomish County Deputy Sheriff's Association are without merit. The Collective Bargaining Agreement should not even be considered by this Court as it was not provided to the superior court, and no basis has been established for the failure to present that document previously. However, even if the Court should take the Collective Bargaining Agreement into account in its determinations as to the legal and factual sufficiency of Charge Three, its provisions do not supersede the constitution, county charter, and applicable statutory rights to a citizens' recall.

The Respondents respectfully request this Court disregard the Amicus Curiae Brief of the Snohomish County Deputy Sheriff's Association and affirm the holdings of the lower court.

Respectfully submitted,

/s/ Colin McMahon
Colin McMahon

/s/ Samantha Sommerman
Samantha Sommerman

/s/ Brittany Tri
Brittany Tri

/s/ Terry Preshaw
Terry Preshaw

CERTIFICATION OF SERVICE

We, the respondents, hereby swear under penalty of perjury that on September 2, 2020, the foregoing document was electronically filed via the Washington Appellate Courts, which will effect service on all attorneys of record.

Signed in Everett, Washington this 2nd day of September 2020.

/s/ Colin McMahon
Colin McMahon

/s/ Samantha Sommerman
Samantha Sommerman

/s/ Brittany Tri
Brittany Tri

/s/ Terry Preshaw
Terry Preshaw

COLIN MCMAHON - FILING PRO SE

September 02, 2020 - 3:14 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98683-5
Appellate Court Case Title:	In Re Petition for Recall of Adam Fortney
Superior Court Case Number:	20-2-02972-4

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- mark@northcreeklaw.com
- scanet@ahrendlaw.com

Comments:

Sender Name: Colin McMahon - Email: colinjamesmcmahon@gmail.com
Address:
PO Box 2591
Everett, WA, 98213
Phone: (425) 299-6227

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