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No. 98968-1

In the
SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL
CHARGES AGAINST
BENTON COUNTY SHERIFF,
GERALD D. HATCHER,

Appellant.

On Appeal from the Superior Court
Of the State of Washington
For Benton County, Cause No. 20-2-00980-3

The Honorable Scott Wolfram,
Walla Walla Superior Court, Department 23

APPELLANT'S BRIEF

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I. INTRODUCTION

Courts are supposed to function as a gatekeeper for recall actions. Claims made against elected officials in recall petitions are to be carefully evaluated to ensure both legal and factual sufficiency is met before advancing the ballot synopsis to the voters. This Honorable Court has previously recognized that the legislature's intent to limit the recall process so that public officials are protected from petitions based on frivolous or unsubstantiated charges.

Not long ago in November 2018, Sheriff Gerald D. Hatcher received in excess of 55,000 votes by the citizens of Benton County to become the elected Sheriff. Over time, political undertones ascended such that Jason Erickson, a disgruntled former Command staff officer submitted a recall petition against his boss, Sheriff Hatcher. Mr. Erickson submitted various declarations from similarly-minded officers as well as other records and attachments in effort to effectuate the coup d'etat within the Sheriff's department. Despite requirements that a recall petition be a concise statement, Mr. Erickson filed over 330 pages. The recall petitioner advanced twenty-six (26) allegations/charges of wrongful conduct which were summarized in the ballot synopsis into eight (8) distinct categories. Each of the charges on their face cannot support a conclusion that Sheriff Hatcher executed his duties or failed to perform his duties, thereby abusing his position. Nevertheless, the Benton County Superior Court quickly and abruptly approved the petition without analysis to any of the

individual charges. Since the recall charges fail to meet the factual and legal sufficiency requirements, the Superior Court committed significant error in advancing the recall petition. This Court is now asked to review the unsubstantiated charges.

II. ASSIGNMENT OF ERROR

1. Did the Benton County Superior Court err in approving the recall petition, in its entirety and without any change to the ballot synopsis?

2. Did the Benton County Superior Court properly determine the recall petitioner's charges were both legally and factually sufficient?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the allegation that Sheriff Hatcher *illegally* appropriated for his own use 14 cases of ammunition belonging to Benton County as identified in charge #4, both legally and factually sufficient for purposes of recalling an official?

2. Is the charge that Sheriff Hatcher *illegally* tampered with the physical evidence by directing the distribution of ammunition that was *potential evidence* of his own alleged unlawful acts as identified in charge #5 & #6 both legally and factually sufficient?

3. Is the charge that Sheriff Hatcher interfered in an investigation into his conduct by acting to prevent witnesses from being interviewed as identified in charge #11 & #12, both legally and factually sufficient?

4. Is the charge that Sheriff Hatcher violated the County anti-discrimination policy by hindering an investigation into his conduct and

retaliating against the complainant and witnesses to the investigation as identified in charge #'s 7, 13, 14, 19, 20, 22, 23, 24, & 26 both legally and factually sufficient?

5. Is the charge that Sheriff Hatcher illegally intimidated a public servant and witnesses in investigations into his conduct by raising false allegations of impropriety and threatening witnesses' jobs as identified in charge #'s 15, 16, 17, 18, 21, & 25 both legally and factually sufficient?

6. Is the charge that Sheriff Hatcher illegally made false or misleading statements to law enforcement and other court regarding a number of firearms he needed to surrender pursuant to a court order as identified in charge #1, #2, #3 both legally and factually sufficient?

7. Is the charge that Sheriff Hatcher illegally made false or misleading statements to public servants claiming he had initiated a criminal investigation into his own conduct when he had not, as identified in charge #8 & #9 both legally and factually sufficient?

8. Is the charge that Sheriff Hatcher falsified a public record by placing a false date on an investigation request as identified in charge #10 both legally and factually sufficient?

IV. STATEMENT OF THE CASE

Specific facts identified in the recall petitioner's charges/ allegations are to be evaluated on their face and accepted if such facts support the conclusion that the officer abused his position. See CP 49-63. As shown below, the Superior Court gave no consideration to the

sufficiency requirements. The Superior Court didn't address any individual 26 charges. In fact, the Superior Court failed to do any factual or legal analysis at all. RP 108. Inexplicably, during counsel for Sheriff Hatcher's rebuttal argument, the Court even answered a phone call. RP 61. Subsequent to the lengthy hearing, a ruling was immediately issued from the bench. Rather than addressing any individual charge, the Court rendered its "sufficient" conclusion in a puzzling haphazardly fashion as follows:

"THE COURT: Okay. So I think my duty is with reference to finding whether the charges are sufficient. Is the ballot synopsis adequate? And are the charges legally sufficient?"

And from a factual standpoint, I find that there's basis and knowledge of the facts.

Question is, if that's true, is the malfeasance a violation of the oath?

And just from a record standpoint, it's not my duty with reference to the truth of the charges. Its its [sic] only the sufficiency of the charges.

And, further, I don't consider the motives for the people who filed the charges. And it just goes back to the factual and legal sufficiency.

I find that the ballot synopsis does provide the voters with sufficient information on which to determine what acts were thought to be committed and whether they believe those facts to be true. And I find that the charges are sufficient in their entirety.

And I see that the ballot synopsis is under the 200-word limit; so that's sufficient. Anything further?" RP 107-108.

Counsel for Sheriff Hatcher then inquired if the Court had found all eight issues on the synopsis to be both legally and factually sufficient.

RP 108. The answer was ‘yes’. *Id.* Reviewing the Superior Court’s verbal ruling shows its erroneous understanding of the law as well as its duty to act as a gatekeeper. The charges lack merit and should have been dismissed as insufficient.

V. ARGUMENT

A. The Trial Court Incorrectly Ruled that the Recall Charges Are Sufficient.

A nonjudicial elected official can only be recalled from office if a petition charges that the official has committed misfeasance or malfeasance while in office or that the official has violated the oath of office. Const. art. I, §§33-34. “Misfeasance” and “malfeasance” means “any wrongful conduct that affects, interrupts, or interferes with the performance of official duty”. RCW 29A.56.110(1). “Misfeasance” also means that “performance of a duty in an improper manner”, RCW 29A.56.110(1)(a) and “malfeasance” also means that “commission of an unlawful act,” RCW 29A.56.110(1)(b). Malfeasance has been previously defined as:

“Evil doing; ill conduct; the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which the person ought not to do at all; the doing of what one ought not to do; the performance of some act which ought not to be done; the unjust performance of some act which the party had no right, or which he had contracted not, to do.”

In re DeBruyn, 112 Wash.2d 924, 930, 774 P.2d 1196 (1989)

Finally, a “violation of the oath of office” is the “neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law”. RCW 29A. 56.110(2) (Emphasis added).

Courts are to act as a gateway to confirm that the charges in the recall petition alleging malfeasance, misfeasance, or violation of the oath of office are factually and legally sufficient before they are placed before the voters. RCW 29A.56.140; **In re Recall of Kast**, 144 Wn.2d 807, 813-15, 31 P.3d 677 (2001). Courts are not to evaluate the truthfulness of the charges but ensure that public officials are not subject to frivolous or unsubstantiated charges. RCW 29A.56.140; **In re Recall of Lindquist**, 172 Wn.2d 120, 131-32, 258 P.3d 9 (2011); **In re Recall of Kast**, 144 Wash.2d 807, 812-13, 31 P.3d 677 (2001).

The proponent of a recall petition bears the burden of establishing that the charges alleged in the recall petition are both legally and factually sufficient. **In re Recall of Kelly**, 185 Wn.2d 158, 163, 369 P.3d 494 (2016); **In re Recall of Sun**, 177 Wn.2d 251, 255, 299 P.3d 651 (2013). The superior court makes the initial sufficiency determination, subject to de novo review by this court. See RCW 29A.56.140; **In re Recall of Telford**, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009). The court must determine the sufficiency from the face of the recall petition, in other words the ‘charges’. **In re Recall of Telford**, 166 Wn.2d at 148, 153, 206 P.3d 1248 (2009).

Factual sufficiency requires that the recall petition concisely states each charge with “a detailed description including the approximate date, location, and nature of each act that, if accepted as true, would constitute a prima facie case of misfeasance, malfeasance, or the violation of the oath of office”. **In re Recall of Sun**, 177 Wn.2d at 255, 299 P.3d 651 (quoting RCW 29A.56.110). This is sometimes referred to as the “specificity requirement”. RCW 29A.56.110. Each charge in the recall petition must demonstrate that the petitioner “knows of identifiable facts that support the charge”. **In Recall of Reeve**, 156 Wn.2d 53, 58, 124 P.3d 279 (2005). Thus, conjecture that the official knew what he was doing was unlawful is insufficient. **In re Recall of DeBruyn**, 112 Wash.2d 924, 930, 774 P.2d 1196 (1989).

Further, factual sufficiency means that the charges (1) satisfy the specificity requirements described above and (2) enable the public and the challenged public official to identify the ‘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.’ **Kast**, 144 Wash.2d at 813, 31 P.3d 677 (quoting **Chandler v Otto**, 103 Wash.2d 268, 274, 693 P.2d 71 (1984)). If an official is charged with a violation of the law, “the petitioner must at least have knowledge of the facts which indicate an intent to commit an unlawful act.” **In re Recall of Wade**, 115 Wash.2d 544, 549, 799 P.2d 1179 (1990). Importantly and as discussed

further below, no facts were advanced by recall petitioner to demonstrate Sheriff Hatcher intended to commit an unlawful act.

Once the court is satisfied with the factual sufficiency of the charge(s), it must find legal sufficiency. Along these lines, “legal sufficiency requires that the petition state, with specificity, **substantial conduct clearly amounting** to misfeasance, malfeasance, or violation of the oath of office.” **In re Recall of Sun**, 177 Wn.2d at 255, 299 P.3d 651 (Emphasis added). Thus, conduct that is insubstantial is legally insufficient. **Kast**, 114 Wash.2d at 815, 31 P.3d 677. To establish legal sufficiency for each charge, the recall petition must identify the “standard, law, or rule that would make the officer’s conduct wrongful, improper, or unlawful...”. **In re Recall of Ackerson**, 143 Wn.2d 366, 377, 20 P.3d 930 (2001)(holding that a recall petition charging a council member with sleeping during a public meeting was legally insufficient because it failed to identify the rule that made such conduct wrongful).

This Court has outlined additional rules for legal sufficiency when charges involve conduct which concern an official’s discretionary acts. Along these lines, “discretionary acts of a public official are not a basis for recall insofar as those acts are an appropriate exercise of discretion by the official in the performance of his or her duties.” **Cole v Webster**, 103 Wash.2d 280, 283, 692 P.2d 799 (1984). An official may be recalled for execution of discretionary acts only if the “**official exercised discretion in a manifestly unreasonable manner.**” **In re Recall of Shipman**, 125

Wash.2d 683, 685, 886 P.2d 1127 (1995) (Emphasis added). Similarly, an elected official may not be recalled if his or her actions occurred in the course of justifiable conduct. **Kast**, 144 Wash.2d at 815, 31 P.3d 677. A clear abuse of discretion may be shown by demonstrating discretion was exercised for untenable grounds or for untenable reasons. **Cole**, 103 Wash.2d at 284-85, 692 P.2d 136 (1978).

1. Charges #1, #2, and #3: Illegally made false or misleading statements to law enforcement and the court concerning the number of firearms he needed to surrender - should have been dismissed.

In charge #1, the recall petitioner alleges on October 7, 2019 the Sheriff made a false or misleading statement to a law enforcement officer regarding the number of firearms located at his shared residence.¹ CP 49. The recall petitioner claims Sheriff Hatcher “indicated” there were two (2) firearms and that the statement must have been false because there were subsequently many more retrieved from his estranged wife’s home. CP 49. Likewise, charge # 2 involves the same subject matter wherein recall petitioner alleges on October 15, 2019 Sheriff Hatcher made no effort to inform a Superior Court Judge of his prior false or misleading statement (as set forth in charge #1). CP 50. From a factual standpoint, the conduct complained involves the Jerry Hatcher, a divorce litigant, in his personal capacity, not any conduct undertaken in his official duties as the sheriff. For this reason alone, the charges should be dismissed.

¹ The term “shared residence” mischaracterizes the facts. In October 2019, a court order prevented Sheriff Hatcher from entering his former marital residence. CP 338. Thus, Sheriff Hatcher’s estranged wife, Monica Hatcher maintained sole possession and control for purposes of tendering any firearm or other contents. CP 338.

Sheriff Hatcher responded that upon being served with the protection order, he immediately complied with the requirement to surrender all firearms in his possession. CP 337. He advised KPD (an outside law enforcement agency), that there were “additional” firearms but that he could not physically turn in because of the protection order prohibiting him from entry into the former marital residence. Id. He volunteered information in that there were two specific *department issued* firearms that were under the control of his estranged wife and they would need to make arrangements with her to collect them and return to county. CP 338. Sheriff Hatcher also advised there were some firearms located in Montana. Id. He later retrieved such firearms and surrendered those on October 15, 2019. CP 338. In other words, Sheriff Hatcher advised KPD of both the *department issued* firearms and *County owned* practice ammunition were at his former marital residence. Id. Sheriff Hatcher further followed up with Commander Guerrero in a text on October 7 reminding him that the two (2) *department issued* firearms and practice ammo needed to be picked up. CP 338-339.

Importantly, there was never a criminal complaint alleging Sheriff Hatcher violated the DVPO by virtue of this alleged criminal conduct concerning statements about his firearms or that in his possession. Likewise, there were no complaints that he violated the criminal code and committed a crime. No complaints to this day. No investigation by law

enforcement. Nothing. Yet the recall petitioner seeks court approval to pass these allegations to the voters.

Assuming the alleged conduct could survive factual sufficiency, the legal sufficiency of these charges fail. RCW 9A.76.175 states it is a crime to make a false or misleading statement to a public servant. Yet, Sheriff Hatcher was neither investigated nor charged to prove such conduct in fact amounted to a violation of RCW 9A.76.175. Looking at the report which allegedly supports the Sheriff's purportedly 'false statement' to law enforcement, shows that the Sheriff "*acknowledged* having 2 other department firearms (AR style rifle and shotgun) the petitioner's residence at 98303 E. Ridgeview drive and other firearms at a residence in Montana". CP 206. (Emphasis Added). Moreover, the report refers not to the sheriff but shows the purpose of the contact was 'service of an order on Respondent Gerald Hatcher'. CP 206. Most importantly, the report shows Gerald Hatcher did not state he had only 2 firearms at the former marital residence just that BCSO property needed to be collected because it was owned by the County. Id. Further, law enforcement records show that Gerald Hatcher contacted Commander Guerrero later the same day wherein he surrendered *another* firearm that he mistakenly didn't realize he had in his possession. CP 210. Hatcher then met with the Commander to surrender possession of the handgun. Id. This conduct evidences an intent to comply with the divorce court order, not disobey it.

Records also show on October 15, 2019, Gerald Hatcher called and advised he wanted to turn in firearms per the court order (those he had retrieved from Montana). CP 212. During this contact, Hatcher advised while he was not in possession of any additional firearms, his wife Monica Hatcher had several more of his firearms at her residence. Id. Officers' reports state: "Hatcher made it very clear he was not going to have any contact with Mrs. Hatcher and did not want [officers] to even tell him if she was willing to surrender the weapons." CP 212. These records and facts do not support the charge that Sheriff Hatcher intended to mislead a public servant.

Charge #2 fails to provide a standard, law, or rule that requires an individual 'make *effort* to inform a Superior Court of a prior false or misleading statement'. CP 50. This would be particularly troublesome if an individual's statement wasn't false or misleading to begin with. The transcript of Hatcher v. Hatcher's dissolution hearing is provided forth by the recall petitioner but at no time does the Superior Court ask Gerald Hatcher *how many* weapons he possessed. The court was simply confirming that all firearms would get surrendered in compliance with the its order.

Charge #3 is confusing since it alleges Sheriff Hatcher made a false or misleading statement to law enforcement on October 15 wherein, he indicated there were "several" firearms at his shared residence. CP 50. Most likely recall petitioner added this fact to establish an inconsistency.

Since there were in fact ‘several’ firearms retrieved, the statement is a true statement, not false or misleading.

2. Charge #4: Illegally appropriated for his own use 14 cases of ammunition belonging to Benton County - should have been dismissed.

Recall petitioner alleges between October 7, 2019 and February 14, 2020 Sheriff Hatcher violated RCW 40.16.020² by fraudulently appropriating 14 cases of ammunition belonging to the County for his own personal use. CP 51. Recall petitioner reasons that Sheriff Hatcher’s storage of the County’s ammo in his personal garage prevented others from having access to it and somehow the Sheriff’s conduct is fraudulent since he couldn’t personally access or remove the ammo due to a court order. Id. But nothing suggests Sheriff Hatcher couldn’t have a deputy or outside law enforcement agency retrieve the ammo at any time. On its face however, it is doubtful a court could conclude the facts support a conclusion that Sheriff Hatcher abused his position.

Even if a court could find such conduct was an abuse of his position, there is no showing that Sheriff Hatcher intended to commit an unlawful act by storing it at home. At best, the court order was the cause which prevented Sheriff Hatcher from accessing the County ammo. There is no allegation by the recall petitioner that shows Sheriff Hatcher

² RCW 40.16.020 provides in relevant part: “Every officer who shall ...conceal, erase, obliterate, or falsify any record or paper appertaining to the officer’s office, or who shall fraudulently appropriate to the officer’s own use or to another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to the officer by virtue of the officer’s office, is guilty of a class B felony...”

unlawfully used the ammo for personal use, that he secreted it away, or gave it to any unauthorized person. In fact, all the County ammo and the two department firearms were documented, photographed, and inventoried by KPD. CP 231. Charge #4 fails factually.

Likewise, recall petitioner fails to provide legal sufficiency for Charge 4. The standard, rule, or law that purportedly makes the official's conduct wrongful is a criminal law. There is a process for violating criminal code. It starts with a complaint, prosecution charge, a process which provides rights to the accused, and ends in a jury trial. Recall petitioner wishes to 'convict' Sheriff Hatcher, claiming violation of a criminal law amounting to a class B felony without having the elements of proof required for any criminal law violation. Beyond this, Sheriff Hatcher is allowed official autonomy to make discretionary decisions over his department. There is no showing by recall petitioners that he acted in a manifestly unreasonable manner and/or without justification, when storing the ammo at his personal residence.

To the contrary, Sheriff Hatcher's response explains that Benton County Standard Operating Procedures provide no limit on the number of practice rounds a deputy may possess or shoot at any given time. CP 339. There is no formal check out process for practice ammo and there are a wide variety of ways in which practice ammo is retrieved, issued, and/or used for practice. Id. A large number of staff are authorized to issue out practice ammunition; all firearms instructors, corporals, sergeants,

lieutenants, commanders, undersheriff and the sheriff (approximately 26 staffers) have direct access to practice ammunition and are authorized to issue rounds out. CP 339. In addition, the tactical team is issued approximately 2,000 rounds above their normal practice rounds at the beginning of each year for their personal practice and typically maintain large amounts of practice ammunition at their residence and/or in their patrol vehicles. Id. There is no standard requirement addressed in the County's policies and procedures of where the practice ammunition may be stored or kept. Id. Additionally, during Sheriff Hatcher's surrender of firearms on October 7 and October 15, he made KPD well aware of the additional firearms and practice ammunition stored at his former marital residence. Id. Besides, Sheriff Hatcher specifically advised, requested, and reminded KPD to work on retrieving Benton County's property in full compliance with the law and the superior court order. CP 339. In short, without a standard legal sufficiency is not established. Charge 4 fails legal sufficiency and should be dismissed.

3. Charge #5 and # 6: Illegally tampered with physical evidence by directing the distribution of ammunition that was potential evidence of his own alleged unlawful acts – should be dismissed.

Recall Petitioner alleges between January 13, 2020 and February 13, 2020, Sheriff Hatcher violated the law when he solicited another to violate the same law. CP 51. Specifically, the charge alleges that Sheriff Hatcher had reasonable knowledge that the 14 cases of county ammunition, physical evidence, obtained from his former marital

residence *could* become evidence in a future official proceeding and violated the sheriff's oath of office when he told Commander Caughey to re-distribute the 14 cases of ammunition back to the use of the deputies. CP 51. Charge No. 6 includes that Sheriff Hatcher did intentionally commit an unauthorized act under the color of law and he intended to obtain a benefit for himself when he directed the commander to re-distribute the ammunition. These charge fail the specificity requirement because even if the court accepts them on their face, it does not support the conclusion that the official abused his position when telling his commander to re-distribute the ammunition for practice to various deputies in the county. The ammo was not evidence of any crime. Further, other than the conclusory statement, there is no indication that Sheriff Hatcher had any intent to commit an unlawful act by re-purposing the practice ammunition.

Sheriff Hatcher explained this allegation attempts to paint an illusion that he violated the law by simply asking his commander who took possession of his department-issued firearms and practice ammunition from his estranged wife's residence, at the sheriff's request, and place it back in our practice ammunition inventory. CP 340. Given that there was no official proceeding (nor any official proceeding identified by the recall petitioner), there would be no way the sheriff would have "reasonably known" that the practice ammunition could be evidence in the future. Again, there is no police report or complaint filed.

Sheriff Hatcher didn't violate any criminal law. To the contrary, Sheriff Hatcher responded that all practice ammunition and department firearms that were retrieved by KPD were photographed and inventoried by KPD. CP 340.

The recall petitioner is well aware of the facts in this matter because in mid-February, the recall petitioner availed a non-criminal concern to the sheriff who then tendered an investigation into the ammo to the Franklin County Sheriff's office. CP 340. That investigation concluded, "there was no sustained factors concerning BCSO firearms policies and procedures". Id. In addition, the Franklin County Sheriff's office, upon investigation notified Sheriff Hatcher that there was no wrong-doing or violations of the law in maintaining the 14 cases of ammunition. Id. Besides, had KPD commanders recovered the practice ammunition and had any issues, they could have launched an investigation, if appropriate. The KPD did not.

As for the legal sufficiency requirements, the recall petitioners fail to appreciate that such conduct constitutes a discretionary act, so long as those acts are an appropriate exercise of discretion by the official in performing his official duties. There is no indication that Sheriff Hatcher exercised his discretion in a manifestly unreasonable manner, particularly when all of the cases of ammunition were inventoried, accounted for, and returned and re-distributed to other county employees. CP 341. For these reasons, the charges should have been dismissed.

4. Charge #10: Falsified a public record by placing a false date on an investigation request – should have been dismissed.

Recall petitioner alleges that on February 21st, 2020, in violation of RCW 40.16.020, Sheriff Hatcher modified an official record by “back dating” his letter with February 14, 2020. CP 53. Recall petitioner claims the letter contained a false date of creation. Id. The letter is located at Clerk’s Papers 324. Again, RCW 40.16.020 is a criminal law which classifies the falsification of records or papers pertaining to the officer’s office as a Class B felony. See RCW 40.16.020. Thus, there is a criminal process and remedy for violating this statute. Recall petitioners seek to get around the criminal process by hoping the allegation to be accepted as true on its face. Even if the court accepts this allegation as true, the charge or conduct does not support a conclusion that Sheriff Hatcher abused his position.

The record itself was a letter requesting administrative review from Sheriff Hatcher to Sheriff Raymond. Sheriff Hatcher explained that he met with recall petitioner, Jason Erickson, on February 14, and then immediately called Sheriff Raymond on the same day. CP 343. The sheriffs agreed to meet the following Monday or Tuesday and discuss the nature of the requested investigation. CP 343. Thereafter, Sheriff Hatcher explains that he met with Sheriff Raymond on Tuesday, February 18, and during the meeting, he indicated he had already agreed to do the requested investigation on February 14, but asked Sheriff Hatcher to send an official letter requesting the investigation. Id. Sheriff Hatcher indicates that he

wrote the letter requesting the Franklin County Sheriff's office services on Wednesday, February 19 and sent it to Sheriff Raymond on Friday, February 21. Id. As a result, he found it appropriate to back date it to February 14th based on when Sheriff Raymond actually received the verbal request to commence the investigation. Id. There is no showing that Sheriff Hatcher intended to commit an unlawful act as required under the factual sufficiency standard. Beyond that, there is no indication that the recall petitioner can meet the legal sufficiency insofar as this charge does not qualify as substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. Insubstantial conduct is not legally sufficient for purposes of a recall.

5. Charges #11 and #12: Interfered in an investigation into his conduct by acting to prevent witnesses from being interviewed – should have been dismissed.

Recall petitioner alleges Sheriff Hatcher, on March 9, 2020, violated the 2008 Benton County Anti-Discrimination and Harassment Policies relating to Erik Magnuson's HR complaint by interfering/preventing an interview from occurring with a witness. CP 53. According to charges #11 and #12, the recall petitioner specifically claims, an HR investigation was launched and Sheriff Hatcher purportedly violated county policy by telling Commander Steve Caughey and Commander Jon Law that they could not participate in an interview scheduled for March 9, 2020. CP 54. Peeling this allegation back, recall petitioner submitted declaration of BCSO Commander Jon Law which states, "prior to the 19th of March,

2020, I was informed by Sheriff Hatcher that I was not to be interviewed at the Benton County Sheriff's Office and/or while I was on duty for the purposes of this investigation". CP 72. Thus, recall petitioner mischaracterizes and/or misleads this court by failing to include additional facts such that Sheriff Hatcher instructed that the interview would not be in the office while on duty. Id.

BCSO Commander Jon Law specifically stated:

"During the earlier part of the day on the 19th of March 2020, Cmdr. Caughey and I approached Sheriff Hatcher and requested if we could have the afternoon off. Sheriff Hatcher inquired in summary why this was necessary. It was communicated that we were going to be interviewed by Ms. Blatt, an independent outside investigator, regarding Lt. Magnuson's complaint. Sheriff Hatcher followed up with some more inquiry and it was disclosed that our attorney, Alan Harvey would be present for the interview. Sheriff Hatcher then indicated clearly that we could not attend any interview on the 19th of March 2020 while on duty."

CP 70. Nevertheless, Cmdr. Jon Law subsequently was, in fact, interviewed on April 13, 2020 by Ms. Blatt while he was not on duty. CP 72. There are no facts to suggest that Sheriff Hatcher had an intent to commit an unlawful act in requiring an interview to occur off duty. When reviewing the facts in support of the charges, it is clear that language has been intentionally omitted by the recall petitioner. Such omission changes the entire charge. Should the omitted language have been included insofar as Sheriff Hatcher simply told his command staff that they could not

participate while on duty, such conduct is a discretionary act and does not appear on its face to be exercised in a manifestly unreasonable manner.

Under the legal sufficiency standard, recall petitioner does not make any attempt to show that the conduct is substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. For these reasons, these charges should have been dismissed as insufficient.

6. Charge #8 and # 9: Illegally made false or misleading statements to public servants claiming he had initiated a criminal investigation into his own conduct when he had not – should have been dismissed.

Recall petitioner alleges in charge #8 and charge #9 that Sheriff Hatcher stated to petitioner Sgt. Jason Erickson and Cmdr. Tom Croskrey that he, Sheriff Hatcher, was instituting a criminal investigation related to Sheriff Hatcher's own conduct. CP 52-CP 53. Recall petitioner indicates that the statement was false, as no criminal investigation was ever assigned by Sheriff Hatcher to be instituted against him for his actions in possessing 14 cases of county ammunition at his shared residence.

Again, recall petitioner relies upon the criminal code for improper purposes in advancing his recall petition. If in fact a criminal law had been violated, recall petitioner Sgt. Erickson probably had a duty to report and initiate a criminal investigation into such conduct. Rather, recall petitioner seeks to have the court adopt his allegation as true as an end run, as opposed to using the appropriate criminal channels/process.

Nevertheless, according to the criminal code, the statement must be

“material relied upon by a public service in the discharge of his or her official powers or duties”. See RCW 9A.76.175. On its face, Sheriff Hatcher’s statement to members in his staff indicating he would have a criminal investigation launched since his conduct had been questioned by his staff, is likely not a “material statement” nor was his staff actually discharging their duties while having a conversation with their superior.

Even if the court were to accept the allegations addressed in Charge #8 and 9, it does not support the conclusion that Sheriff Hatcher abused his position or intended to commit an unlawful act. Whether or not Sheriff Hatcher made a statement that he would initiate a criminal investigation into his own conduct and then didn’t, does not appear to be substantial conduct clearly amounting to misfeasance, malfeasance, or a violation of the oath of office. Finally, the sheriff maintains the ability to make discretionary decisions which are not manifestly unreasonable. Charges set forth in 8 and 9 and advanced by the recall petitioner fail for both legal and factual sufficiency.

7. Charge #7, #13, #14, #19, #20, #23, #24, #26: Violated county anti-discrimination policy by hindering an investigation into his conduct and retaliating against the complainant and witnesses to the investigation – should have been dismissed.

Recall petitioner lodges a slew of factual allegations/charges claiming Sheriff Hatcher violated the county anti-discrimination and harassment policy with respect to an internal investigation launched by human resources to do an investigation within the sheriff’s department. CP 344. For background purposes, it is important to note that Sheriff Hatcher

had significant concerns about how such investigation would proceed and that it would be fairly in alignment with county policy. Id. This was not a criminal investigation, but if it could potentially involve criminal violations, the sheriff wanted to ensure the interviews were properly documented since the investigation would not be conducted as traditionally done by trained officers. Id. Additionally, it is largely believed that this recall petition is politically motivated. CP 337. Recall petitioner is represented by Alan Harvey, attorney on behalf of the Fraternal Order of Police. Id. Mr. Harvey and other department heads have been attempting to garner support to have Sheriff Hatcher removed. Id. Mr. Harvey has specifically had contact with other Department heads and the Benton County Commissioners, all who have previously expressed desire and requested that Sheriff Hatcher resign for several months leading up to the petition. Id. When such efforts were not effective against Sheriff Hatcher, this recall petition was filed on the heels of the “Blatt investigation”. Id. What was initially advanced as an HR investigation had turned into an administrative proceeding against Sheriff Hatcher for violation of policy, which has proper administrative remedies. In terms of political motivations, it is notable that Sheriff Hatcher was denied county defense costs responding to this petition. CP 337. Nevertheless, each charge must be evaluated individually as to whether or not it meets the sufficiency requirements by law.

- a) Charge #7 – should have been dismissed:

Recall petitioner alleges in Charge No. 7 that on February 5, Sheriff Hatcher violated county policy which protects the confidentiality of complainants and that Sheriff Hatcher used his authority to order a subordinate, Cmdr. Steve Caughey to disclose the fact of a complaint and the identify of complainant, Lt. Erik Magnuson. CP 52. Recall petitioner goes on to note that the action violated the county policy and that it subjected both Steve Caughey and/or Erik Magnuson into a situation where they *may be* deterred from engaging in protected activity.

As alleged, Charge #7 fails to meet factual sufficiency on its face because it merely alleges that individuals may be deterred, but does not show that they were in fact deterred from engaging in any protected activity. The fact that the Sheriff may have commanded his subordinate to disclose a complaint was filed and by whom, to the extent his subordinate was aware, would not appear to meet any legal sufficiency standard either. Charge #7 further fails to establish that Sheriff Hatcher had an intent to commit an unlawful act. To the contrary, without his knowledge of the existence of a complaint and whom the complaining party was, the Sheriff would have no way to ensure his office protects said individual. Accordingly, Charge #7 should have been dismissed by the superior court.

b) Charge #13 and #14 –should have been dismissed.

Recall petitioner alleges in Charge #13 and #14 that on March 10, 2020 and April 10, 2020, Sheriff Hatcher violated county policy relating to Erik Magnuson's HR complaint by interfering with the interview

process. Namely, requesting Cmdr. Caughey and Cmdr. Law could only be interviewed so long as Sheriff Hatcher could have a representative sit in on their interviews. CP 54.

Factual sufficiency has not been met on this charge. Simply because a human resource investigation conducted within the Benton County Sheriff's office, does not suggest that the Benton County Sheriff cannot make decisions concerning the investigative process. Besides, there is no indication that such alleged "interference" actually deterred either individual from engaging in any protective activity or reporting. Given the speculative nature of the impact such alleged conduct would have, factual sufficiency has not been met to establish Sheriff Hatcher abused his position by engaging in misfeasance, malfeasance, or violation of his oath of office. In the event a court would evaluate Charge #13 and #14 for legal sufficiency, the charges likewise fail. Discretionary acts are not the basis for recall insofar as those acts are an appropriate exercise of discretion by an official in the performance of his duties. Likewise, this conduct is not substantial.

In explaining his conduct, Sheriff Hatcher stated:

"When I learned of the complaint, I submitted a letter to Lexie, the HR manager, stating my concerns and a clear path forward for the investigation that would be in alignment with the county policy. The letter was dated February 10. I did not hear back from the HR manager before Ms. Blatt contacted me about doing the investigation within my office. I explained to her I had no issue with her conducting the investigation and I expressed to her the same political concerns and requests that I had expressed with the HR manager. Ms. Blatt understood my concern

and had seen my letter to the HR manager, but she was concerned about having an independent elected sheriff sit in on the interviews as an independent witness to ensure everything that was said got documented properly. I told her I wanted to get this worked out before she started the interviews. Ms. Blatt indicated she would reach back out to Benton County HR and legal and would get back to me. I did not hear back from her before Cmdr. Law informed me that he had been contacted by Ms. Blatt to schedule an interview for March 9. I explained to both commanders that I had no issue with them participating in the investigation, but I had written a letter to HR outlining the proposed process for the investigation and had discussed my requests with Ms. Blatt who indicated she would get back with me after she spoke with HR and legal but had not. They both indicated they had no issue with waiting until it was resolved with Ms. Blatt and HR.”

CP 343-344, 1. 25-19.

c) Charge #19 and #20 – should have been dismissed.

Similarly, recall petitioner lodges charges against Sheriff Hatcher for his conduct towards his command staff, Cmdr. Jon Law and Cmdr. Steve Caughey. CP 57-58. Recall petitioner alleges between February 5, 2020 and April 24, 2020, Sheriff Hatcher retaliated against the two commanders for participating as witnesses in the administrative investigation specifically, by engaging in the following actions:

(1) started using sticky notes in meetings allegedly to document his negative performance; (2) warned him that Sheriff Hatcher would find out what he said as a witness in this process and would take great exception to disloyalty, and (3) told him that he also could “whistle blow” and promptly after making this comment surfaced an allegation that the witness had engaged in inappropriate activity in 2017 by using county ammunition for personal purposes during a hunting trip.

CP 58.

Similar to the fatal flaw outlined in the above charges, recall petitioner uses supposition and speculation in claiming, “the sheriff’s motive for raising this allegation for the first time was for no other purpose than to retaliate against the witness for participating in an investigation against him”. First, the alleged comment/statements do not amount to retaliation, nor does it logically follow that the connection between the conduct/ statements was a goal to damage the reputation of witnesses. CP 58.

Both Charges #19 and #20 suggest that Cmdr. Caughey and Cmdr. Law, as a result of the comment/statements made by the sheriff, were in fear of demotion or discharge and that such fear was reasonable because Sheriff Hatcher admitted during his interview that he would be filling an undersheriff position and making changes to the structure of his command staff. Sheriff Hatcher is more than entitled to make any and all changes to his command staff at any time as the appointed Sheriff. On its face, these charges fail to meet factual sufficiency as required by law.

Along these lines, Charges #19 and #20 do not meet the requirements for legal sufficiency. Given that only two members of Sheriff Hatcher’s command staff were subject to such alleged conduct, it is impossible for the petitioner to establish this amounts to substantial conduct or in any way constitutes misfeasance, malfeasance, or violation of the oath of office. Thus, the conduct complained of in Charges #19 and #20 are legally insufficient.

d) Charge #21, #22, #23 and #24 – should have been dismissed.

Similar to the above charges, recall petitioner alleges in Charge #21, #22, #23 and #24 that on May 7, 2020, Sheriff Hatcher purportedly retaliated and/or intimidated Commanders Steve Caughey and Jon Law for participating in the “Blatt investigation”. CP 60-61. Specifically, recall petitioner alleges that the Sheriff used his position to engage in a 6.5 hour meeting with his command staff. Id. It is alleged that Sheriff Hatcher warned the commanders that he would find out what was said during the Franklin County investigation and that there would be consequences for anyone who was not loyal to him or indicated that the Sheriff was a thief. CP 60. Recall petitioner claims the repeated references to job security and statements made during the Franklin County investigation could result in a loss of job or demotion. Id. The three charges involve the same two command staff individuals who purportedly felt threatened. Nevertheless, despite high ranking law enforcement officials claiming they were issued “threats” in violation of the criminal code, it is important to note that neither officer reported such conduct to an independent law enforcement agency for purposes of pursuing criminal charges against Sheriff Hatcher.

The three charges on their face do not meet factual sufficiency standards. None identify an act or failure to act without justification that would constitute a prima facie case of misfeasance, malfeasance, or violation of the oath of office. Likewise, there is no indication that Sheriff

Hatcher maintained an intent to commit an unlawful act in conducting a meeting and making statements to his command staff who serve at his pleasure.

Moreover, as explained by Sheriff Hatcher in response to the charges:

“The allegation that I violated county anti-harassment policy by engaging in the following actions: This issue started when I announced to my staff, that I could not keep doing the job of both the Undersheriff and the Sheriff jobs it was just too much for me. They clearly state in this investigation they took this as to mean that one of them was going to be demoted if I went to the command structure of having an undersheriff, we have used this model here at the sheriff’s office forever and it is the current command structure within our SOP. In retrospect, I also feel my statement or organizational needs by stating I was going to change the command structure is what predicated them to make the allegation against me in the first place. I believe they somehow thought it would stop me from making the change to an undersheriff model. Which by their own admission, they felt would cause one of them to move back to their last held position.”

CP 347.

“It is important to note I have hired an undersheriff and made the operational changes to properly manage the Benton County Sheriff’s office and Caughey, Law, or Magnuson were not demoted, nor did they lose their job or have any reduction in pay. Their personal fear had no merit.”

CP 348.

“Whenever we as a command team have talked about “loyalty” I have always stated loyalty is to the direction I have set for the agency and they have instrumental part in implementing that direction. If a senior appointed command staff person is not or does not want to help move the agency in the direction needed, then they can step down to their last held position or rank. This is precisely why the sheriff is also granted 5 appointed positions by law, so he

has a committed staff to implement his vision and direction for the agency.”

CP 349.

“It should be noted that Law and Caughey have not received any disciplinary action from me nor have they ever been demoted.”

CP 349.

Based on the above Charges #21, #22, #23, and #24 should have failed for not meeting the sufficiency standards required by law in advancing a recall petition.

e) Charge #26 – should have been dismissed.

In Charge #26, recall petitioner alleges that on June 23, 2020, Sheriff Hatcher violated county policy by retaliating against Tom Croskrey, for participating in an investigation by engaging in the following actions: “This allegation was made with the intent to damage the reputation of the complainant, Tom Croskrey, by raising an allegation of impropriety and/or to make the witness believe he was being investigated for improper conduct and/or a crime.” CP 62. Said charge is confusing. Charge #26 fails the factual sufficiency requirement because it fails to allege facts to support a conclusion the officer abused his position or in any way engaged in misfeasance, malfeasance, or a violation of the oath of office. The charge does not state what conduct is complained of, nor does it provide any indication of a standard, law, or rule that would make the suggested conduct by the official wrongful, improper, or

unlawful in any way. For these reasons, the superior court should have dismissed Charge #26.

8. Charge #15, #16, #17, #18, #21 and #25: Illegally intimidated public servants and witnesses in investigations into his conduct by raising false allegations of impropriety and threatening witnesses' jobs – should have been dismissed.

While the ballot synopsis summarizes the allegations stated the conduct complained of in Charge #s 15, 16, 17, 18, 21, and 25, each charge must be evaluated under the sufficiency standards.

- a) Charge #25 – should have been dismissed.

Recall petitioner alleges in Charge #25 that on June 23, 2020, Sheriff Hatcher violated the criminal code by intimidating a witness, i.e., Tom Croskrey, who Sheriff Hatcher reasonably knew *could* be a witness in a future proceeding and that Sheriff Hatcher used his position to “threaten” former Cmdr. Tom Croskrey. CP 61. Specifically, the recall petitioner alleges that Sheriff Hatcher “made an allegation of improper conduct related to former Cmdr. Tom Croskrey, during a KONA radio broadcast”. CP 62. Purportedly, the sheriff made comments that Tom Croskrey had issues with his time card or accounting for his time, and that such public accusation was intended to damage the reputation of Tom Croskrey and/or to make him believe that he was being investigated for improper conduct and/or a crime. CP 62. Even if the court were to accept the allegations as true on their face, such conduct does not support a conclusion that Sheriff Hatcher abused his position by making statements on a radio broadcast. Such conduct certainly does not arise to the level of

making a prima facie case of misfeasance, malfeasance, or violation of an oath of office. Besides, even if Sheriff Hatcher had made comments with intention as alleged in Charge #25, the conduct does not constitute substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. Besides, recall petitioner fails to identify the standard, law, or rule that would make Sheriff Hatcher's comments wrongful, improper, or unlawful.

Sheriff Hatcher explained in response to Charge #25, to-wit:

The KONA radio host was reading off a document I had not seen or been provided that allegedly had been written by Croskrey and provided to HR. Reference to time card issue: I received a call around June 10-11 from HR asking me if I heard from Tom Croskrey and I indicated I had not heard from him for approximately two weeks. I received follow up call from HR saying he had left employment effective on June 1. There are several discrepancies in his time card history that will be looked into. This is not intended to damage his reputation, but when there appears to be discrepancies, it has to be looked into by law. Croskrey asked me to be the undersheriff on three separate occasions and appeared very upset with me that I would not promote him. It was nothing personal, he just wasn't ready and did not have the skill set to be an undersheriff.

CP 350.

b) Charge #15-18 – should have been dismissed.

Again, recall petitioner alleges the sheriff violated criminal laws by intimidating witnesses and threatening witnesses he reasonably *could* have known to be witnesses in a future official proceeding. CP 55-57. In all four charges, recall petitioner alleges that “Sheriff Hatcher *surfaced* an allegation during his April 7, 2020 meeting with Detective Todd Carlson”.

Id. The recall petitioner's logic is confusing. In Charge #15 and #16, it is alleged that Sheriff Hatcher violated two different criminal codes. CP 55. First, RCW 9A.72.110 intimidating a witness by suggesting Sheriff Hatcher used his position as sheriff to threaten Cmdr. Jon Law and relies upon the same conduct alleging violation of RCW 9A.76.180, intimidating a public servant. CP 55. The charges of #15 and #16 cut and paste allegations of same conduct into Charges #17 and #18 albeit instead of Cmdr. Jon Law, it is Cmdr. Steve Caughey to whom the sheriff's alleged conduct was directed to. CP 56.

All four charges suggest that Sheriff Hatcher "surfaced an allegation" during his April 7, 2020 meeting with Det. Todd Carlson, insofar as Cmdr. Law and Cmdr. Caughey engaged in inappropriate activity in 2017 using county ammunition for personal purposes during a hunting trip. CP 55-56. Recall petitioner suggests that Sheriff Hatcher's disclosure to Det. Carlson was intended to "damage the reputation of the witness", by "raising an allegation of impropriety and/or to make the witness believe he could lose his job or be demoted if he shared negative information about the sheriff in any future proceedings". Id.

None of the charges satisfy the factual sufficiency requirements for a recall petition. On its face, no court could determine that such facts support a conclusion that the sheriff abused his position. Indeed, these allegations support the notion that the prevailing political winds are against Sheriff Hatcher within his command staff. Even if the court were

to accept the factual assertions of the charges, such conduct does not constitute prima facie case of misfeasance, malfeasance, or a violation of the oath of office.

Sheriff Hatcher provided some additional context relative to charges #15-#18:

I have never heard of any deputy taking practice ammunition and using it for anything other than its intended purpose firearms practice. If I had thought one of Cmdr. Caughey or Law had used the practice ammunition for personal gain, resale, or inappropriately, I would have started an investigation in accordance with the law in my oath of office. I only had a private conversation with them during senior staff meetings and the firearms instructor outlining the accusation against me but that if this same distrust or logic being used by some against me, they “could” think their use of practice ammunition was likewise inappropriate. I did not ask Det. Carlson to tell anyone about our conversation and felt it should have been kept private.

CP 346.

Further, Sheriff Hatcher stated:

Cmdr. Caughey and Law made the decision to put our private conversation into the Blatt report and FCSO report which is now a public record and shared with the media. There was no violation of any criminal code ever made. My conversation with Det. Carlson was a private conversation and it was with the lead firearms instructor to learn about how practice ammunition was to be issued and used and the process he was using to track it. The discussion did talk about how suddenly everyone had an opinion on how much practice ammunition a deputy could have or where it could be or how it was used. Again, we talked about how if these new opinions or standards were evenly applied, the commander’s action would be deemed inappropriate by some of the department. I was very clear with Todd I did not have a problem with their use of the ammunition, I was more concerned with the inequities being applied by some members of the department with an

agenda. I further stated I want to continue to encourage all deputies to practice as much as possible with firearms proficiency. As a sheriff, that is my decision and I have the authority to do so. This gopher hunt in Oregon was done in 2017 and 2018 (three years ago). My intent as alleged was to cause the Commanders to “believe” they could lose their jobs or be demoted I would not have defended their actions and the use of the department practice ammunition on the gopher hunt. Neither Commander received any discipline nor was demoted.

CP 346-347.

VI. CONCLUSION

Based on the foregoing, Sheriff Hatcher respectfully asks this court to reverse the superior court and dismiss each and every charge identified in the recall petition.

DATED this 21st day of September, 2020.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on September 21, 2020, I caused the original of the foregoing document to be filed electronically with the Supreme Court of the State of Washington.

I also caused a true and correct copy of the foregoing document to be served on the following, via email and the Clerk's electronic portal on September 21, 2020, to:

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DATED this 21st day of September, 2020, at Richland, Washington.

TELARE LAW, PLLC



By: _____
KRISTI FLYG, *Legal Assistant*

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September 21, 2020 - 4:57 PM

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