

Supreme Court No. 85460-2

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

**IN RE THE RECALL OF DALE WASHAM
PIERCE COUNTY ASSESSOR-TREASURER
Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle**

**APPELLANT PIERCE COUNTY ASSESSOR-TREASURER
DALE WASHAM'S OPENING BRIEF**

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I. INTRODUCTION

The right to recall is conditioned on compliance with a strict statutory process that ensures uniformity and impartiality. The process was not followed in this case.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred by considering unverified charges and unverified additional information.
2. The superior court erred by considering Farris's "Amended Request" as an "Amended Petition."
3. The superior court erred by failing to determine the sufficiency of the charges and the adequacy of the petition within the 15 day statute of limitations.
4. The superior court erred by certifying a ballot synopsis formulated on unverified additional information.

B. Issues Pertaining to Assignments of Error

1. Did the superior court err by considering unverified charges and unverified additional information? Yes. (Assignment of Error 1)
2. Did the superior court err by considering Farris's "Amended Request" as an "Amended Petition"? Yes. (Assignment of Error 2)
3. Did the superior court err by failing to determine the sufficiency of the charges and the adequacy of the petition within the 15 day statute of limitations? Yes. (Assignment of Error 3)
4. Did the superior court err by certifying a ballot synopsis

formulated on unverified additional information and charges which were neither concise nor legally and factually sufficient? Yes. (Assignment of Error 4)

III. STATEMENT OF THE CASE¹

A. Unverified statement of charges with enclosures.

This action was initiated by Robin Farris, “as the Chairman of the Committee to Recall Dale Washam,”² based on an unverified statement³ of six (6) charges filed with the Pierce County Auditor⁴ on October 29, 2010.⁵ The Pierce County Prosecutor formulated, certified and transmitted the language of the ballot synopsis based on the unverified charges to Farris, Washam and the Pierce County Superior Court within fifteen days after receiving those (unverified) charges (on November 12, 2010).⁶ The Prosecutor also prepared, filed and served his Summons and Recall Petition⁷ on November 12, 2010.⁸

¹ See App. B: Chronology

² CP 9

³ CP 16

⁴ See App. A: “RCW 29A.56.120 Petition — Where filed.

Any person making a charge shall file it with the elections officer whose duty it is to receive and file a declaration of candidacy for the office concerning the incumbent of which the recall is to be demanded. The officer with whom the charge is filed shall promptly (1) serve a copy of the charge upon the officer whose recall is demanded, and (2) certify and transmit the charge to the preparer of the ballot synopsis provided in RCW 29A.56.130. The manner of service shall be the same as for the commencement of a civil action in superior court.”

⁵ CP 190 [herein referred to as the “original unverified statement of charges”]

⁶ See App. A: RCW 29A.56.130; CP 1, 4 and 162

⁷ See App. A: RCW 29A.56.130(2) [“The prosecutor shall additionally certify and transmit the charges and the ballot synopsis to the superior court of the county in which the officer subject to the recall resides and shall petition the

The governing statute instructs this Court to hold a hearing and make a determination on the petition within 15 days of its filing (i.e. by November 28, 2010).⁹

B. “Amended Request” without enclosures

On November 17, 2010, Farris filed with the Auditor¹⁰ an:

Amended Request Adjudication to Petition to the Citizens of Pierce County for Recall of the Pierce County Assessor-Treasurer, Mr. Dale Washam (To Correct Citation in Page 2, These are the Allegations, Line 19, Charge 6, Line 2, and to Correct Verification)¹¹

According to Farris, the amendment was “necessary” to “include dates and times.”¹²

However, her “Amended Request” did not accurately reflect the extent of the purported changes;¹³ did not include the 141 pages of unverified enclosures attached to the original

superior court to approve the synopsis and determine the sufficiency of the charges.”]

⁸ CP 189 [Special Deputy Prosecutor Alan Miles is designated as “Attorney for Plaintiff/Petitioner”]. CP 250

⁹ See App. A: RCW 29A.56.140; CP 165; See App. B: Chronology

¹⁰ CP 190 (4)

¹¹ CP 190-191 [Hereinafter referred to as the “Amended Request”]

¹² VRP 11/22/10 at 12:19-24; 13:7-9; Indeed, the “Amended Request” changed more than the ones identified in the subject line [CP 193]. This includes Farris’s undisclosed change in page 2, last paragraph. The original (October 29) statement refers to 2008 while the “Amended Request” refers to 2009.

¹³ CP 193-202[When Washam pointed this out at the 12/16/10 hearing, Mr. Oldfield responded: “I simply did not know that that change had occurred. I apologize for not pointing that out.” VRP 12/16/10 starting at 5:15; 9:3-4].

unverified statement of charges;¹⁴ and did not include any ballot synopsis¹⁵ filed with the original unverified charges.¹⁶

On or about November 18, 2010, Farris served Washam with her “*Memorandum in Support of Sufficiency of Charges*”¹⁷ and *Adequacy of Ballot Synopsis*” along with a proposed order.¹⁸ In it, Farris states that “the Petition and ‘Amended Request’”¹⁹ are to be referred to as the “Recall Petition.”²⁰ However, the “Amended Request” was not attached to her Memorandum. The amendment

¹⁴ This apparently was intentional given the language differences from the original October 29 statement of charges and the November 17 “Amended Request.” The original statement of charges included this sentence at the end of the second to last paragraph at page 2: “Due to the large number of examples of Mr. Washam’s poor judgment, attitude and behavior; *only a few samples have been extracted for illustration purposes from Enclosures (1) through (3).*” [CP 10]. Farris changed that sentence without notice in her “Amended Request” to exclude reference to the enclosures and replace the highlighted language with the following: “*I have selected the ones I have found to be the most offensive.*”

¹⁵ CP 19-162

¹⁶ CP 193-202[When Washam pointed this out at the 12/16/10 hearing, Mr. Oldfield responded: “*I simply did not know that that change had occurred. I apologize for not pointing that out.*” VRP 12/16/10 starting at 5:15; 9:3-4].

¹⁷ The Memorandum was misleading and violated the civil rules of procedure. It gave no notice to Washam that Farris had filed her “Amended Request” with the Auditor. Farris did not attach her “Amended Request.” She did not wait on the prosecutor to amend the petition. In fact, although the prosecutor took “no position on the validity or effect, if any, of the Amended Request” [CP 191:9-10], Farris deceptively re-characterized her “Amended Request” as an “Amended Petition” when only the prosecutor is the statutorily authorized petitioner. CP 206:21-25; RCW 29A.56.130(2)

¹⁸ CP 204

¹⁹ The charging party (voter) is not the “petitioner” in recall cases. That function is performed by the prosecutor after he has prepared the ballot synopsis and transmitted the charges and the ballot synopsis to the superior court. RCW 29A.56.130; See CP 4, 250

²⁰ CP 206

was not authorized by the trial court²¹ and was not served on Washam as required by law.²²

C. Prosecutor declines to act on “Amended Request”

The “Amended Request” was attached to the Declaration of Alan L. Miles, Special Deputy Pierce County Prosecuting Attorney and mailed to Washam on November 18, 2010.²³ However, Deputy Miles did not include the 141 pages of unverified enclosures that were filed with the original unverified petition or any ballot synopsis formulated from those unverified charges.²⁴ Neither the Auditor nor the Prosecutor served Washam with a copy of the amended charges as required by law.²⁵

The prosecutor did not petition, move to amend his petition or otherwise ask the court for a determination of the sufficiency of the “Amended Request.”²⁶ On the contrary, Deputy Miles stated

²¹ CP 206:21-25. The recall petition is to be served by the Auditor (not the voter/charging party) in the same manner as for the commencement of a civil action in superior court. RCW 29A.56.120. Judge Felnagle did not grant Farris’s request to amend until December 16, 2010. VRP 12/16/10 at 11:14

²² RCW 29A.56.120; CR 15

²³ CP 203; See App. C

²⁴ CP 19-162

²⁵ See App. A: RCW 29A.56.120 [The Auditor is required to serve a copy of the charges on the officer whose recall is demanded in the same manner as for the commencement of a civil action in superior court.] The prosecutor simply mailed his declaration and the “Amended Request” to Washam on November 18, 2010. [CP 203] The only declaration of service in the record from the Auditor refers to an “Amended Request” and “Letter dated November 18, 2010.” Farris’s Amended Request letter is dated November 17, 2010. CP 193; 404.

²⁶ See App. A: RCW 29A.56.130 See also CP 167

that “The Prosecuting Attorney takes no position on the validity or effect, if any, of this Amended Request.”²⁷

Washam filed his response to the petition on November 18, 2010.²⁸ He did not reference the “Amended Request.” Among the arguments Washam raised was the fact that the petition should be dismissed *sua sponte* by the court since it was not verified as required by RCW 29A.56.110.²⁹

On November 21, 2010,³⁰ the Auditor served Washam with an “Amended Request for Adjudication to Petition for Recall of the Pierce County Assessor-Treasurer; Letter Dated November 18, 2010” on November 21, 2010.³¹ However, the “Amended Request” filed by Farris is dated November 17 not November 18.³² There is no “Letter dated November 18, 2010” in the record.³³ There is no evidence the Auditor served Washam with Farris’s November 17 “Amended Request” and/or the 141 pages of unverified enclosures with the original petition or the prosecutor’s

²⁷ CP 191; See App. C

²⁸ CP 211

²⁹ CP 212

³⁰ CP 284, 404

³¹ CP 284, 404

³² CP 193; 258

³³ CP 555-556

ballot synopsis.³⁴ Washam has always maintained he was never served as required by law³⁵ with the amended charges.³⁶

D. November 22 hearing

A hearing on the original petition was scheduled³⁷ for November 22, 2010.³⁸ Washam objected to the court's consideration of the "Amended Request" and moved it be stricken.³⁹ He also maintained he had not been served.⁴⁰ Farris argued that "The onus is on the Auditor, then, to make the deliveries and the service on the other parties."⁴¹ In response, Judge Felnagle stated:

THE COURT: Well, unfortunately, we don't have, as I've already lamented about, a procedure for what you do when you amend. One of the things I could do would be to strike it and start all over. There is a degree of formality in this process that I think needs to be followed. Every time we deviate from it, we are leaving a big, gaping hole as to whether or not this is going to be an effective procedure, or not, so I think we need to be sure we are doing it in the right way, which means that the

³⁴ CP 19-162. RCW 29A.56.130(2) requires the prosecutor to "certify and transmit the charges and the ballot synopsis to the superior court ... and shall petition the superior court to approve and to determine the sufficiency of the charges."

³⁵ See App. A: RCW 29A.56.120 requires the Auditor to serve the charges in the same manner "as for commencement of a civil action in superior court."

³⁶ CP 399:6-8; CP 531 (Farris unsuccessfully sought CR 11 sanctions against Washam for his claims.)

³⁷ CP 184 Amended Notice of Recall Hearing (11/15/10)

³⁸ VRP 11/22/10

³⁹ CP 253-254

⁴⁰ VRP 11/22/10 at 6:23-25 [Farris admitted to the Court that there was no "documentation of the attempts to serve or the actual service."]

⁴¹ VRP 11/22/10 at 14:23-25

amended petition needs to be delivered in the appropriate fashion and Mr. Washam needs to be given the time to respond to it, which is going to necessitate rescheduling this hearing. So, that's the ruling of the Court. I regret that, because I'd like to decide it right here and now. I guess what we will do is leave you to your respective devices.....⁴²

There was no evidence the Auditor served Washam with the amended charges after that hearing. Instead, Farris's counsel (Mr. Oldfield) served Washam directly with a copy of the "Amended Request" after the hearing and again on or about December 2, 2010.⁴³ However, that did not include the 141 pages of unverified enclosures⁴⁴ filed with the original unverified charges⁴⁵ and relied upon by Farris. Furthermore, she did not file a motion to amend as required by CR 15 but unilaterally re-characterized her "Amended Request" as an "Amended Petition" contrary to RCW 29A.56.130(2).⁴⁶

F. December 16 Hearing

Judge Felnagle did not rule on the "amendment" until the final hearing on December 16, 2010⁴⁷ - *the same hearing where he issued his final order.*⁴⁸ In so doing, he considered both the

⁴² VRP 11/22/10 at 15:4-20

⁴³ CP 256; 285

⁴⁴ CP 19-162

⁴⁵ CP 9

⁴⁶ CP 206: 21-25

⁴⁷ VRP 12/16/10 at 11:14

⁴⁸ CP 546

unverified original charges and the “Amended Request.”⁴⁹ The ballot synopsis lists five (5) charges.⁵⁰ The order was served on Washam on December 22, 2010.

G. Washam appeals

Pursuant to RCW 29A.56.270, Washam filed this petition for review on December 29, 2010.⁵¹ On that same date, Farris filed a motion seeking accelerated review. That motion was considered by Deputy Clerk Susan L. Carlson via teleconference with counsel on January 6, 2011. A letter setting the briefing schedule was sent via email on January 6, 2011.

IV. SUMMARY ARGUMENT

Any voter seeking to recall an elected official must follow strict statutory procedures.⁵² By law, the charges must be verified by the voter.⁵³ The voter then files the charges with the county auditor.⁵⁴ The auditor then serves copies of the charges upon the officer whose recall is demanded and certifies and transmits the

⁴⁹ CP 546

⁵⁰ CP 549

⁵¹ CP 554. This court reviews the sufficiency of a recall petition *de novo*. *Teaford v. Howard*, 104 Wn.2d 580, 590, 707 P.2d 1327 (1985).

⁵² See App. A: RCW 29A.56.110-.270. These “statutory mechanisms” condition any action and preclude any direct private right of action by the proponent. See *Schweiker v. Chilicky*, 487 US. 412, 423 (1988); *BIAW v. McCarthy*, 152 Wn.App. 720, 218 P.3d 196, 206 (2009)

⁵³ See App. A: RCW 29A.56.110

⁵⁴ See App. A: RCW 29A.56.120

charges to the county prosecutor.⁵⁵ The manner of service is “the same as for the commencement of a civil action in superior court.”⁵⁶ Within 15 days after receiving the charges, the prosecutor “shall formulate a ballot synopsis of the charge” and certify and transmit the synopsis to the voter filing the charge, the official subject to recall and the superior court.⁵⁷ The prosecutor also “shall petition the superior court to approve the synopsis and to determine the sufficiency of the charges.”⁵⁸ Within 15 days after receiving the petition, the superior court shall conduct a hearing on and shall have determined the sufficiency of the charges and adequacy of the ballot synopsis.⁵⁹ The court certifies and transmits the ballot synopsis to the officer subject to recall, the voter and the auditor.

In this case, everything that could go wrong did go wrong. The case started with what the Judge Felnagle recognized as “a big *red flag* ... that could have been rectified by a new filing of a petition.”⁶⁰ Specifically, the initial charges were not verified⁶¹ and,

⁵⁵ See App. A: RCW 29A.56.120

⁵⁶ See App. A: RCW 29A.56.120

⁵⁷ See App. A: RCW 29A.56.130

⁵⁸ See App. A: RCW 29A.56.130

⁵⁹ See App. A: RCW 29A.56.140

⁶⁰ VRP 11/22/10 at 10: 11-15 [Judge Felnagle stated “I’m reluctant to have a question of law with a big *red flag* on it sitting right at the start of this case when that could have been rectified by a new filing of a petition and the service of it and the rescheduling of the hearing.”] (Emphasis added)

therefore, void.⁶² The charges should have been rejected by the prosecutor⁶³ on that basis alone before he filed his petition. He did not. Once the court became aware that the charges were not verified,⁶⁴ it lacked jurisdiction and should have dismissed the petition.⁶⁵ It did not.

As for Farris's "Amended Request"⁶⁶ to correct the verification and amend the charges,⁶⁷ there is no evidence the auditor certified and transmitted the "Amended Request" to the prosecutor and served a copy on Washam as required by law.⁶⁸ In

⁶¹ CP 16

⁶² "Void" means "[n]ull; ineffectual; nugatory; having no legal force or binding effect." *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004) [quoting *Black's Law Dictionary* 1822 (3d Ed. 1933)]

⁶³ *In re Recall of Wasson*, 149 Wn.2d 787, 792-793, 72 P.3d 170 (2003)

["Furthermore, the petitioner did not sign the letter, affirm or adopt the revised charges, or verify under oath that he believed the revised charges to be true as required by statute. Despite these formal deficiencies, the prosecutor drafted the ballot synopsis. The prosecutor should have rejected the additional information because it did not remedy the original deficiencies and Pina did not file an "Amended Request." (Emphasis added)]

⁶⁴ On or about November 18, 2010. CP 190 [Declaration of Alan L. Miles, Special Deputy Pierce County Prosecuting Attorney] See: App. C.

⁶⁵ In commenting on the failure of a petitioner to timely appeal a ballot title rejection, the Court stated "[w]hen an available remedy is purely statutory in character, the procedures provided in the statute are exclusive and mandatory and must be strictly followed. Otherwise, the court has no jurisdiction to hear the matter at issue." *Herron v. McClanahan*, 28 Wn.App. 552, 562, 625 P.2d 707 (1981) Emphasis added.

⁶⁶ Dated November 17, 2010 and filed with the auditor on November 17, 2010.

⁶⁷ CP 193 - 202

⁶⁸ See App. A: RCW 29A.56.120. While there is a Declaration of Service of: "Amended Request for Adjudication to Petition for Recall of the Pierce County Assessor-Treasurer; Letter Dated November 18, 2010," Farris' letter is dated and filed stamped: November 17, 2010. CP 404, 193. There is no letter in the record dated November 18, 2010. CP 555-556.

fact, the prosecutor took “no position on the validity or effect, if any, of the Amended Request.”⁶⁹

The prosecutor did not: “formulate a ballot synopsis;” “certify and transmit” the ballot synopsis to Farris and Washam; “certify and transmit the charges and the ballot synopsis to the superior court;” or “petition the superior court to approve the synopsis and determine the sufficiency of the charges.”⁷⁰ Nor did he move to amend his petition.

Farris unilaterally and without any authority surreptitiously introduced her “Amended Request” into the case via the text of her “Memorandum in Support of Sufficiency of Charges and Adequacy of Ballot Synopsis” by referencing it as an “Amended *Petition*” (*sic*).⁷¹ She mischaracterized her unprocessed “*Amended Request*” as an “*Amended Petition*”⁷² when the prosecutor expressly took “*no position*”⁷³ whatsoever and, therefore, in effect, denied her request. Moreover, Farris failed to attach he “Amended Request” or any exhibits to her memorandum.

⁶⁹ CP 191:9-10 See App. C

⁷⁰ See App. A: RCW 29A.56.130(2)

⁷¹ CP 206:21-25 [“An amended Petition correcting one citation and correcting the verification to include proper statutory language was submitted by Ms. Farris on November 17, 2010 (together, the Petition and Amended Petition are referred to herein as the ‘Recall Petition’).”]

⁷² CP 206:21-25.

⁷³ CP 191:9-10; See App. C

Proceeding with unverified charges contaminated the entire recall process. There is no authority to allow the charging party (Farris) to unilaterally amend void charges by serving Washam and filing charges directly with the court. That is not how the recall process works. She should have served her verified charges (including all attachments) on the auditor⁷⁴ who would then certify and transmit those to the prosecutor. The prosecutor would then prepare the ballot synopsis and petition the superior court to approve the synopsis and determine the sufficiency of the verified charges.⁷⁵ The prosecutor is the petitioner – not Farris.⁷⁶

Moreover, the charges are not legally or factually sufficient. Farris argued that the “Recall Petition” includes both the petition filed by the prosecutor and her “amended request” filed with the auditor.⁷⁷ She and the court erroneously refer to *her* “Amended Request” as “an amended petition.”⁷⁸ RCW 29A.56.130 clearly states that the prosecutor is the petitioner, not the charging party. Even assuming the “Amended Request” is

⁷⁴ See App. A: RCW 29A.56.120

⁷⁵ See App. A: RCW 29A.56.130

⁷⁶ CP 4; See App. A: RCW 29A.56.130

⁷⁷ CP 206:24-25

⁷⁸ CP 206; VRP 1112/16/10 at 11:14

valid, it did not include the additional unverified information⁷⁹ filed with the original unverified charges relied upon by Farris and the Court for the details as required by law.⁸⁰ The trial court erred in allowing Farris to amend the petition at same hearing it made a final determination⁸¹ and then relying on unverified exhibits to find each charge legally and factually sufficient.⁸²

V. ARGUMENT

A. The superior court erred by considering unverified charges and unverified additional information.

Judge Felngle lamented at the November 22, 2010

hearing,

I'm reluctant to have a question of law with a big *red flag* on it sitting right at the start of this case when that could be rectified by a new filing of a petition and service of it and the rescheduling of the hearing.⁸³

The recall process is governed by statute⁸⁴ with the courts serving as gatekeepers to ensure that process is followed.”⁸⁵ As this Court recently stated In *In re Recall of Telford*⁸⁶:

⁷⁹ Farris did not include the 141 pages of enclosures to her unverified statement of charges [CP 19-162] with her verified “Amended Request” [CP 193-202] and, therefore, cannot be considered.

⁸⁰ See App. A: RCW 29A.56.110

⁸¹ VRP 12/16/11 at 11:14

⁸² VRP 12/16/11 at 34:3; 35:16-17; 37:8-9; 38:14; 40:1-3

⁸³ VRP 11/22/10 at 10:11-15 (Emphasis added)

⁸⁴ See App. A: RCW 29A.56.110 - .270

⁸⁵ *In re Recall of Kant*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001) [“We merely function as a gatekeeper to ensure that the recall process is not used to harass

The question as to whether the grounds for recall are sufficient to cause the voters to desire the removal of the official in question is always a political one to be determined by them, and as to this courts will never interfere. *But the question as to whether or not the proceedings looking to the recall of the officer comply with the constitutional and statutory law upon the subject is purely and wholly a judicial question.*⁸⁷

Here, the recall proceedings did not comply with state law.

First, Farris filed unverified charges with the auditor.⁸⁸ Second, the prosecutor⁸⁹ failed to reject those unverified charges⁹⁰ as required by law.⁹¹ Third, the superior court lacked jurisdiction⁹²

public officials by subjecting them to frivolous or unsubstantiated charges.... Accordingly, our role is limited to ensuring that only legally and factually sufficient charges go to the voters.”] cited in *In re Recall of West*, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005); See also *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 764, 10 P.3d 1034 (2000).

⁸⁶ 166 Wn.2d 148, 153-154, 206 P.3d 1248 (2009)

⁸⁷ Emphasis added

⁸⁸ CP 9-162.

⁸⁹ Compare the role of the secretary of state and code reviser with respect to initiatives and referenda. RCW 29A.72.020; WAC 434-379-007.

⁹⁰ CP 16

⁹¹ See App. A: RCW 29A.56.110; See also: *In re Recall of Wasson*, 149 Wn.2d 787, 792-793, 72 P.3d 170 (2003); see also *In re Recall of Davis*, 164 Wn.2d 361, 365, 193 P.3d 98 (2008) [“The initial petition was rejected by the prosecuting attorney because the oath did not meet the requirements of state law. Clifford filed another petition April 25, 2007, with a corrected oath, containing six charges. Clifford later filed a memorandum and supplemental materials supporting his recall petition on May 16, 2007.”] Compare filing an initiative or referendum also requires an affidavit signed by the sponsor. WAC 434-379-005(2) [“The proposed measure is not considered filed with the secretary of state until all documents and fees are filed, including any original versions required.”] See:

http://www.sos.wa.gov/_assets/elections/initiatives/2009%20Affidavit%20-%20Initiative.pdf.

⁹² In commenting on the failure of a petitioner to timely appeal a ballot title rejection, the Court stated “[w]hen an available remedy is purely statutory in character, the procedures provided in the statute are exclusive and mandatory and must be strictly followed. Otherwise, the court has no jurisdiction to hear

over the unverified charges⁹³ and should have dismissed the resulting petition.⁹⁴ Fourth, the “Amended Request” was ineffective because it was not processed according to the recall statute by either the auditor or prosecutor. Finally, even assuming the “Amended Request” was properly processed and before the court, it did not include the lengthy unverified enclosures Farris relies upon to substantiate her charges.⁹⁵ Hence, the charges are legally and factually insufficient. Judge Felnagle’s decision to rely upon that unverified additional information to correct a ballot synopsis (which itself was formulated on unverified charges) was erroneous.

In response to Washam repeated objections,⁹⁶ Judge

Felnagle stated:

The problem is twofold. One is that there is no real procedure set out in the statute or in the constitution as to what one does if there’s a need to amend. On the one hand, you could say, well, an amendment would be like with any other legal pleading. You simply propose the amendment and give notice to

the matter at issue.” Herron v. McClanahan, 28 Wn.App. 552, 562, 625 P.2d 707 (1981) Emphasis added).

⁹³ *Levy v. State, 91 Wn.App. 934, 936, 957 P.2d 1272 (1998) [Concerning an unverified claim for damages filed with the State Office of Risk Management.]*

⁹⁴ *In re Recall of Davis, 164 Wn.2d 361, 193 P.3d 98 (2008) [fn. 3 “The superior court in this case struck Clifford’s memorandum and supplemental materials, including a copy of the bylaws of the Port of Seattle, because they did not conform to verification requirements of RCW 29A.56.110.”]*

⁹⁵ The Supreme Court must review the verified charges as they are contained in the recall petition. *In re Zufelt, 112 Wn.2d 906, 914, 774 P.2d 1223 (1989) (“The sufficiency of the charge must be determined from the face of the petition.”)*

⁹⁶ VRP 11/22/10 at 7:10-12 [“...there is no authorization of law in the recall statute under 29A.56 that allows any kind of amendment.”]

the other side, and you keep the process moving.
The other way to look at it would be that it's a
defect and you need to start over.⁹⁷

However, lack of verification is “more than just a technicality.”⁹⁸

Lack of verification is a fatal defect necessitating that the charging party to start over. Allowing Farris to bypass the auditor and prosecutor and amend the prosecutor's petition in the existing case was clearly erroneous. In fact, the prosecutor washed his hands⁹⁹ of it when Deputy Miles declared: “The Prosecuting Attorney takes no position on the validity or effect, if any, of the Amended Request.”¹⁰⁰

This case is similar to *In re Recall of Wasson*.¹⁰¹ In that case,

The prosecutor drafted the ballot synopsis after receiving additional information from petitioner's counsel. The petitioner did not sign the additional information or verify under oath that he believed the charges to be true and that he had knowledge of the facts as required by RCW 29.82.010.¹⁰²

⁹⁷ VRP 11/22/10 at 9:11-19; Farris questioned the constitutionality of the verification requirement. CP 275: 2-8. This court has rejected such challenges. *In re Recall of Telford*, 166 Wn.2d 148, 152, 206 P.3d 1248 (2009) [Petitioner challenged the constitutionality of RCW 29A.56.110 -.140].

⁹⁸ VRP 11/22/10 at 10:3-6; see *Levy v. State*, 91 Wn.App. 934, 936, 957 P.2d 1272 (1998) [Concerning an unverified claim for damages filed with the State Office of Risk Management.]

⁹⁹ See The Holy Bible, Matthew 27:24 [“When Pilate saw that he could prevail nothing, but that rather a tumult was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it.”]

¹⁰⁰ CP 191:9-10; See App. C.

¹⁰¹ 149 Wn.2d 787, 72 P.3d 170 (2003)

¹⁰² *Id.*, at 790

In that case,

The trial court found that the charges were factually insufficient, legally insufficient, or both, for several reasons ... including that the charges failed to satisfy RCW 29.82.010¹⁰³ because the petitioner failed to satisfy the specificity requirements, failed to sign the charges forming the bases for the recall, and *failed to verify under oath that he believed the facts to be true and had some knowledge of the facts.*¹⁰⁴

Moreover, this Court stated:

Pina's failure to satisfy the specificity requirements was also observed by the prosecutor tasked with developing the ballot synopsis. The prosecutor *initially rejected the petition* because it did not contain a concise statement of the charges. The petitioner's counsel then sent a letter to the prosecutor containing revised recall charges with additional facts. This letter, however, did not satisfy the petition requirements of RCW 29.82.010. Furthermore, the petitioner did not sign the letter, affirm or adopt the revised charges, or verify under oath that he believed the revised charges to be true as required by statute. Despite these formal deficiencies, the prosecutor drafted the ballot synopsis. *The prosecutor should have rejected the additional information because it did not remedy the original deficiencies and Pina did not file an amended petition.* Because Pina's petition does not satisfy the qualitative prong of the factual sufficiency analysis, we do not need to reach the other elements of the analysis.¹⁰⁵

¹⁰³ RCW 29.82.010 is now RCW 29A.56.110 [See App. A]

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at 792-793 [Emphasis added]. The prosecutor in this case took the erroneous position that he does not “*determine whether the statement of charges meets statutory requirements as to form. Rather, the Prosecuting Attorney is merely the statutorily designated conduit for placing this matter before the Court for hearing.*” CP 5:1-3

The prosecutor is not “merely the statutorily designated conduit for placing this matter before the Court for hearing.”¹⁰⁶ This Court ruled *In re Recall of Wasson*¹⁰⁷ that the prosecutor should act affirmatively to reject unverified charges. Should the prosecutor fail in that duty for whatever reason,¹⁰⁸ the Court must assume its gatekeeping duty and dismiss the original unverified charges and petition just as courts have done with unverified charges in other recall cases.¹⁰⁹

Here, the prosecutor “*should have rejected*” the initial unverified charges and had Farris file the new “Amended Request” and enclosures with the auditor. Farris’s failure to verify her original charges contaminated the time sensitive recall process.¹¹⁰

¹⁰⁶ CP 5:2-3 [Petition to Determine Sufficiency of recall Charges and for Approval of Ballot Synopsis]. Compare the role of the secretary of state and code reviser with respect to initiatives and referenda. RCW 29A.72.020; WAC 434-379-007.

¹⁰⁷ 149 Wn.2d 787, 72 P.3d 170 (2003)

¹⁰⁸ Note one of Farris’s charges is that Washam’s Deputy “*Mr. Ugas filed a document with the Pierce County Auditor’s office to recall the Pierce County Prosecuting Attorney.*” CP 197(B)

¹⁰⁹ See, e.g. *In re Recall of Davis*, 164 Wn.2d 361, 365, 193 P.3d 98 (2008) [“*The initial petition was rejected by the prosecuting attorney because the oath did not meet the requirements of state law.*”]; *In re Recall of Wasson*, 149 Wn.2d 787, 790, 72 P.3d 170 (2003) [“*The petitioner did not sign the additional information or verify under oath that he believe the charges to be true and that he had knowledge of the facts as required by RCW 29.82.010.*”]

¹¹⁰ “State law directs the Court to conduct a hearing to determine the following within 15 days after receiving this Petition: (1) Whether the statement of charges filed by Robin Farris, Chairman, Committee to Recall Dale Washam attached as Exhibit A, is or is not factually and legally sufficient to support the recall of Dale Washam as Pierce County Assessor-Treasurer; (2) Whether the ballot synopsis attached to the Petition as Exhibit B is adequate, and to correct

including any ballot synopsis, and deprived the court of jurisdiction to hear that petition.¹¹¹

B. The superior court erred by considering Farris's "Amended Request" as an "Amended Petition".

By filing her "Amended Request" (Letter dated November 17, 2010) with the County Auditor on November 17, 2010, Farris started the recall process anew. However, as noted above, this second statement of charges did not include additional verified information she relied upon for those charges¹¹² and was not processed in accordance with law.

Petitions must be filed with the auditor's office which serves it on the officer and certifies and transmits it to the prosecutor.¹¹³ There is no certification or proof of service for the "Amended Request" (Letter dated November 17, 2010) in the record.¹¹⁴

that synopsis if the Court finds it inadequate; and (3) such other and further relief as the Court deems just and appropriate." CP 6:11-20 (Petition to Determine Sufficiency of Recall Charges and for Approval of Ballot Synopsis).

¹¹¹ In commenting on the failure of a petitioner to timely appeal a ballot title rejection, the Court stated "[w]hen an available remedy is purely statutory in character, the procedures provided in the statute are exclusive and mandatory and must be strictly followed. Otherwise, the court has no jurisdiction to hear the matter at issue." *Herron v. McClanahan*, 28 Wn.App. 552, 562, 625 P.2d 707 (1981) Emphasis added.

¹¹² Compare the original charges and enclosures with the "Amended Request" which had no enclosures. CP 9-160; CP 193-202

¹¹³ See App. A: RCW 29A.56.120.

¹¹⁴ See CP 404 Declaration of Service of Amended Request "Letter Dated November 18, 2010". There is no such letter in the record. CP 555-556.

Within fifteen days after receiving a charge, the County Prosecutor “shall formulate a ballot synopsis of the charge”, certify and transmit the synopsis and charge to the superior court and “petition the superior court to approve the synopsis and to determine the sufficiency of the charges.”¹¹⁵ The Prosecutor never prepared a synopsis based on the “Amended Request” or petitioned the superior court based on those amended charges. Instead, the Special Prosecutor simply attached the “Amended Request” to his declaration dated November 18, 2010 with this caveat: “The Prosecuting Attorney has discharged these duties. The Prosecuting Attorney takes no position on the validity or effect, if any, of the Amended Request.”¹¹⁶

The prosecutor knew the procedure¹¹⁷ and should have rejected the original charges for lack of verification.¹¹⁸ Failure to

¹¹⁵ See App. A: 29A.56.130(2):

¹¹⁶ See App. C. Nevertheless, Farris immediately began referring to her “Amended Request” as an “Amended Petition” stating “together, the Petition and Amended Petition” should be referred as the “Recall Petition.” CP 206 [“Memorandum in Support of Sufficiency of Charges and Adequacy of Ballot Synopsis”]. Farris did not file or attach her “Amended Request” or the 141 pages of enclosures filed with the original unverified charges to that Memorandum.

¹¹⁷ CP 165-176 [See CP 169:1-5: “The statement making the charge or charges must be signed by the person or persons bringing the charge, verified under oath that the person or persons believed that the charge or charges are true and that he or she has knowledge of the alleged facts upon which the stated grounds for recall are based. RCW 29A.56.110.”]

¹¹⁸ *In re Recall of Wasson*, 149 Wn.2d 787, 793, 72 P.3d 170 (2003) [“Despite these formal deficiencies, the prosecutor drafted the ballot synopses. The

do so triggered a time sensitive chain of events and processes that are ignored if the original unverified charges are allowed to be amended by the voter with the court by-passing the recall process. There is no authority in the recall statute that allows a charging party to unilaterally amend a petition filed by the prosecutor.¹¹⁹ Moreover, she mischaracterized her unprocessed “*Amended Request*” as an “*Amended Petition*”¹²⁰ when the prosecutor took “no position”¹²¹ and, therefore, did not grant her request.

Having been filed, the petition should have been dismissed immediately by the trial court.¹²² The court had no jurisdiction to entertain a request to amend the petition by Farris when she is not the designated petitioner by law.¹²³ Moreover, the trial court’s decision to allow the amendment at the final hearing (which was

prosecutor should have rejected the additional information because it did not remedy the original deficiencies and Pina did not file an amended petition.”]
¹¹⁹ See App. A: RCW 29A.56.130(2) “The preparer shall additionally certify and transmit the charges and the ballot synopsis to the superior court of the county in which the officer subject to recall resides and shall petition the superior court to approve the synopsis and to determine the sufficiency of the charges.” Farris relied upon *Pederson v. Moser*, 99 Wn.2d 456, 662 P.2d 866 (1983) to erroneously claim that a recall *petition* can be amended by the charging party. [CP 525-526]. However, that case involved amended recall *demands* made by the charging party before any action was taken. *Pederson v. Moser*, 99 Wn.2d 456, 458 & 461, 662 P.2d 866 (1983).

¹²⁰ CP 206:21-25.

¹²¹ CP 191:9-10; See App. C

¹²² The courts has the power to enjoin a recall election if proper procedures are not followed. See *Gibson v. Campbell*, 136 Wn. 467, 471, 241 P. 21 (1925). In addition, the court may stay an election until some appropriate future date. See *Janovich v. Herron*, 91 Wn.2d 767, 780, 592 P.2d 1096 (1979).

¹²³ See App. A: RCW 29A.56.130 (The prosecutor is the petitioner.) ; VRP 11/22/10:3-5

beyond the 15 day statute of limitations)¹²⁴ deprived Washam of due process as required by law and civil rules.¹²⁵

C. The superior court erred by failing to determine the sufficiency of the charges and the adequacy of the petition within the 15 day statute of limitations.

RCW 29A.56.140 provides:

Within fifteen days after receiving the petition, the superior court shall have conducted a hearing on and shall have determined, without cost to any party, (1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed, and (2) the adequacy of the ballot synopsis.

The 15 day statute of limitations is “a strict, uniform deadline” for the trial court to make its decision.¹²⁶ The 15 day statute of limitations¹²⁷ was specified in the summons.¹²⁸ The summons and petition were filed by the prosecutor on November 12, 2010.¹²⁹ This included a “Ballot Synopsis of Recall Charge.”¹³⁰ Consequently, the 15 day statute of limitations for determination by the Superior Court would have been November

¹²⁴ RCW 29A.56.140

¹²⁵ See App. A: RCW 29A.56.120; CR 15

¹²⁶ See, e.g. RCW 36.70C.040(2)-(3) [LUPA’s 21 day statute of limitations]

¹²⁷ See App. A: RCW 29A.56.140; see also CP 163 [Letter from Prosecutor to Superior Court Clerk dated November 9, 2010 stating “This letter is to call the above-referenced case to your attention because it is required by statute to be heard within 15 days of filing. RCW 29A.56.140”].

¹²⁸ CP 2:4-6 [“By statute, the Court is directed to conduct a hearing within 15 days of the filing of the Petition.”]

¹²⁹ CP 2 et seq..

¹³⁰ CP 162.

30, 2010. While there was a hearing on November 22, 2010, no determination was made until December 16, 2010 due to the petitioner's attempt to amend the petition.¹³¹

Although Farris filed a verified "Amended Request" without any of the enclosures she relied on originally with the county auditor on November 17, 2010,¹³² the auditor did not "certify and transmit the charge to the preparer of the ballot synopsis" as required by RCW 29A.56.120(2).¹³³ The prosecuting attorney did not act upon her "Amended Request" because he did not draft a new ballot synopsis or petition the Superior Court for a determination of the sufficiency of the "Amended Request."¹³⁴ Special Deputy Miles wrote "The Prosecuting Attorney takes no position of the validity or effect, if any, of the Amended Request."¹³⁵ By the time the Superior Court made a determination on December 16, 2010,¹³⁶ the 15 day statute of limitations¹³⁷

¹³¹ VRP 11/22/10 at 15:4-18

¹³² CP 193; RCW 29A.56.120

¹³³ There is no certification by the Auditor. Compare CP 6:3-8 [prosecutor's certification and transmittal of the original charges and ballot synopsis as required by RCW 29A.56.130(2)]. See (cases)

¹³⁴ See App. A: RCW 29A.56.130

¹³⁵ CP 191:9-10; See App. C

¹³⁶ CP 546-548 [Order re: Sufficiency of Recall Charges and Adequacy of Ballot Synopsis]

¹³⁷ See App. A: RCW 29A.56.140; see also CP 163 [Letter from Prosecutor to Superior Court Clerk dated November 9, 2010 stating "*This letter is to call the above-referenced case to your attention because it is required by statute to be heard within 15 days of filing. RCW 29A.56.140*"].

specified in the summons¹³⁸ had expired causing the court to lose jurisdiction.¹³⁹

D. The superior court erred by certifying a ballot synopsis formulated on unverified additional information and charges which were neither concise nor legally and factually sufficient.

Recall charges must be *both* factually and legally sufficient before the petitioner may proceed further in the recall process.¹⁴⁰

If a recall charge is either legally insufficient or factually insufficient as those terms are defined by law, the charge must be dismissed.¹⁴¹ The charging party may support his or her statement of charges with additional materials beyond the face of the charges themselves.¹⁴² Any inferences must be supported by facts set forth in the statement of charges or supporting documentation.¹⁴³ “Such materials, however, must be timely submitted *and* the Superior

¹³⁸ CP 2:4-6 [“By statute, the Court is directed to conduct a hearing within 15 days of the filing of the Petition.”]

¹³⁹ In commenting on the failure of a petitioner to timely appeal a ballot title rejection, the Court stated “[w]hen an available remedy is purely statutory in character, the procedures provided in the statute are exclusive and mandatory and must be strictly followed. Otherwise, the court has no jurisdiction to hear the matter at issue.” *Herron v. McClanahan*, 28 Wn.App. 552, 562, 625 P.2d 707 (1981) Emphasis added.

¹⁴⁰ *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984); *In re Recall of Sandhaus*, 134 Wn.2d 662, 668, 953 P.2d 82 (1998).

¹⁴¹ *Chandler v. Otto*, 103 Wn.2d at 274.

¹⁴² CP 172 [citing *In re Recall of West*, 155 Wn.2d 659, 666, 121 P.3d 1190 (2005)].

¹⁴³ CP 171:19-21 [citing *In re Recall of Carkeek*, 156 Wn.2d 469, 474, 128 P.3d 1231 (2006)]

Court may properly decline to accept materials that are not offered in a timely fashion.”¹⁴⁴

The charges filed by Farris depend on 141 pages of unverified additional information.¹⁴⁵ She relies on that additional information for the statutorily required¹⁴⁶ detailed description of the acts complained of and the laws violated.¹⁴⁷ Farris acknowledged that “The investigative reports appended to the Amended Petition provide sufficient factual predicate to recall Mr. Washam.”¹⁴⁸ However, that additional information was neither verified nor appended to her “Amended Request.” Therefore, it was erroneous for the court to rely on that unverified information.¹⁴⁹

RCW 29A.56.110 requires charges to

[S]tate the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complain of, be signed by the person or persons making the charge ... and be verified under oath.

¹⁴⁴ CP 172-173 [citing *In re Recall of Reed*, 156 Wn.2d 53, 124 P.3d 279 (2005)]

Emphasis added

¹⁴⁵ CP 9-160

¹⁴⁶ See App. A: RCW 29A.56.110

¹⁴⁷ CP 10 [“The following charges are based on these three investigations ...”]

¹⁴⁸ CP 278

¹⁴⁹ VRP 12/16/11 at 34:3; 35:16-17; 37:8-9; 38:14; 40:1-3

The Court was aware of that statutory requirement but erroneously chose to correct the charges by correcting the ballot synopsis.¹⁵⁰

THE COURT: Do you think there's a defect as to the requirement of dates and location with regard to the other charges that don't specify dates?

MR. WASHAM: Your Honor, that's the point ...¹⁵¹

....

THE COURT: All right. What I am going to propose to do --- and I will hear you on this -- is accept the amended -- I am not accepting, but *adopting as my own the version* by the petitioning party with the need to re-number and with the insertion in Charges 2 and 6 of the term of office of Mr. Washam as the dates that are the appropriate one, because those two charges talk about the office as a whole and the kind of overarching conduct that permeated the office

MR. WASHAM: Your Honor, you're manufacturing. I want to go on record to object to what you are doing here with this ballot synopsis.

THE COURT: I'm supposed to --

MR. WASHAM: You are manufacturing dates in, giving these people dates that I am supposed to have done something that should've been in the charge in the very beginning.¹⁵²

An objective comparison of the ballot title formulated based on the unverified charges¹⁵³ with the one developed by the superior court based on the "Amended Request"¹⁵⁴ shows that the court tried to

¹⁵⁰ See VRP 12/16/11 at 41:9-11 [THE COURT: "I know Mr. Oldfield pointed out that the requirement is that the synopsis talk about dates and locations, and you have a proposal to do that."]

¹⁵¹ VRP 12/16/11 at 42:5-10

¹⁵² VRP 12/16/11 at 44 (beginning at line 11) -- 45:1 [Emphasis added]

¹⁵³ CP 162

¹⁵⁴ CP 549

“correct” the charge by correcting the ballot synopsis by adding approximated dates from unverified additional information.¹⁵⁵

However, the trial court cannot “save” the ballot synopsis by considering unverified additional information filed with Farris’s unverified charges. As Justice Madsen wrote in her concurring opinion in *In re Recall of West*,¹⁵⁶

Although the trial court has the authority to "correct" the ballot synopsis to adequately reflect the charge, regardless of whether the "correction" pertains to factual or legal matters, *the court cannot "correct" the charge by correcting the ballot synopsis*. Thus, if the charge meets the statutory requirements then the trial court has the authority to ensure that the ballot synopsis correctly sets forth the allegations that support the recall charge. *If, conversely, the charge is legally and/or factually insufficient then the recall petition must be dismissed and no "correction" by the trial court to the ballot synopsis can save it.*

This Court has expressly held that it will not consider unverified charges or additional unverified evidence in a recall action.¹⁵⁷

Because Farris’s petition does not satisfy the qualitative prong of the factual sufficiency analysis, the Court does not need to reach

¹⁵⁵ Compare CP 162 with CP 549.

¹⁵⁶ *In re Recall of West*, 155 Wn.2d 659, 668-669, 121 P.3d 1190 (2005) [concurring opinion]. Emphasis added.

¹⁵⁷ *In re Recall of Wasson*, 149 Wn.2d 787, 790, 72 P.3d 170 (2003) [“The petitioner did not sign the additional information or verify under oath that he believed the charges to be true and that he had knowledge of the facts as required by RCW 29.82.010.”]

the other elements of the analysis.¹⁵⁸ Nevertheless, each of the charges¹⁵⁹ is factually and legally insufficient.

Recall charges must state the acts complained of in concise language, and provide a detailed description including the approximate date, location, and nature of each act.¹⁶⁰ Charges must also specify why the challenged acts constitute misfeasance, malfeasance or violation of oath of office.¹⁶¹ Recall charges must not only demonstrate the facts supporting that charge, but must also show that the acts were wrongful.¹⁶² Recall charges must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.¹⁶³ Where commission of an unlawful act is alleged, the petitioner must show knowledge of facts indicating intent to commit an unlawful act.¹⁶⁴ Recall charges are required to demonstrate not

¹⁵⁸ *Id.*, 793 [“Because Pina’s petition does not satisfy the qualitative prong of the factual sufficiency analysis, we do not need to reach the other elements of the analysis.”]

¹⁵⁹ See “Amended Request” (Nov. 17, 2010) CP 195 et seq.

¹⁶⁰ See App. A: RCW 29A.56.110; *In re Lee*, 122 Wn.2d 613, 616, 859 P.2d 1244 (1993).

¹⁶¹ *Jewett v. Hawkins*, 123 Wn.2d 446, 448, 868 P.2d 146 (1994).

¹⁶² *Matter of McNeill*, 113 Wn.2d 302, 306, 778 P.2d 524 (1989).

¹⁶³ *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 585, 30 P.3d 474 (2001).

¹⁶⁴ *In re Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990).

only that the official intended to commit the act, but also that the official intended to act unlawfully.¹⁶⁵

Charge 1: Mr. Washam violated the Pierce County Code 3.14.030(e) Reporting Improper Government Action – Employee Protection, Pierce County Code 3.14.030(d) Retaliatory Action Prohibited, and Pierce County Code 3.14.030(e) Confidentiality of a Person Filing a Complaint.

Judge Felnagle questioned if there was “any improper intent” necessary to support this charge.¹⁶⁶ However, he concluded there was based on “circumstantial evidence or inference and surrounding circumstances.”¹⁶⁷ Thus, this charge is not concise, fails to provide requisite detail or establish just cause for recall. Furthermore, the charge relies on unverified additional “circumstantial evidence or inferences and surrounding circumstances.” Washam had a legally cognizable justification for discretionary personnel decisions.¹⁶⁸

Charge 2: Gross Waste of Public Funds as defined in RCW 42.40.020(5)

This charge alleges that Washam

[W]asted hundreds of thousands of dollars pursuing criminal charges for his predecessor’s use of

¹⁶⁵ *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 765, 10 P.3d 1034 (2000) (quoting *Pearsall-Stipek*, 136 Wn.2d at 263); in addition see *In re Telford*, 166 Wn.2d at 158.

¹⁶⁶ VRP 12/16/10 at 33:15-25.

¹⁶⁷ VRP 12/16/10 at 33 (starting at 25) – 34:5

¹⁶⁸ The Diamond report summary confirms a coordinated campaign to falsify public assessment records. CP 394

statistical valuation rather than the physical inspections required by law.¹⁶⁹

This charge relies upon numerous unverified sources, including an unverified and incomplete report by Kent Nakamura dated May 25, 2010.¹⁷⁰ As noted in her “Amended Request,” the “Attachments *not available.*”¹⁷¹

Moreover, Washam had a legally cognizable justification for his discretionary decision to petition the prosecutor and other public agencies to pursue wrongdoing by his predecessor in office.¹⁷² Such petitions are protected as a matter of law and public policy.¹⁷³

Charge 3: Mr. Washam violated the Pierce County Code Chapter 3.14.030(c), Improper Governmental Action, by failing to rectify his retaliatory acts and 3.16 Equal Employment Opportunity Policy. “Under Chapter 3.16, he failed to protect Sally Barnes from retaliation, false accusations, or future improper treatment and has not taken reasonably prompt and effective remedial measures.” Enclosure (2) page 47.

As with the first charge, the issue here is one of intent.

Again, this charge relies on unverified additional information.

¹⁶⁹ CP 196

¹⁷⁰ CP 91 et seq.

¹⁷¹ CP 193

¹⁷² The Diamond report summary confirms that employees were directed by former Assessor-Treasurer Ken Madsen and Deputy Kathy Fewins “to enter and count statistically updated property records ... as physically inspected properties in reports submitted to Pierce County Budget & Finance and the Washington Department of Revenue from 2001-2008.”). CP 394. False reporting/false swearing is a crime. RCW 9A.72.040

¹⁷³ RCW 4.24.510

Judge Felngale relied on an unverified investigation report.¹⁷⁴

Washam had a legally cognizable justification for all he did regarding discretionary personnel decisions.¹⁷⁵

Charge 4: Violated Pierce County Code 3.15.020(b)(2)

This charge involved “repeatedly invoking religion in the workplace”¹⁷⁶ and was dismissed by the trial court.¹⁷⁷

Charge 5: Violated Pierce County Code 3.16.080(a) – Deliberate non-participation in Discrimination and Retaliation investigation held on August 7, 2009, May 25, 2010, and August 12, 2010, and RCW 42.20.080, Other Violation by Officers.

This charge relies upon numerous unverified sources. Additionally, there is the question of “intent.” Washam had a legally cognizable justification for all he did regarding discretionary personnel decisions.¹⁷⁸ He also had a fiduciary duty to protect the taxpayer’s interest in the correctness of assessment records.

Charge 6: Mr. Washam violated his Oath of Office by knowingly and purposely violating the RCW 42.20.080 and Pierce County Code 3.14.030(c) , 3.14.030(d), 3.14.030(f), 3.15.020(b)(2), 3.16.090 and the intent of the law covered under RCW 42.40.010.¹⁷⁹

¹⁷⁴ VRP 12/16/10 at 37:8-9

¹⁷⁵ The Diamond report summary confirms a coordinated campaign to falsify public assessment records. CP 394

¹⁷⁶ VRP 12/16/10 at 38:7-11

¹⁷⁷ VRP 12/16/10 at 38:7-11

¹⁷⁸ The Diamond report summary confirms a coordinated campaign to falsify public assessment records. CP 394

¹⁷⁹ CP 199

Judge Felnagle correctly referred to this as “just a catchall.”¹⁸⁰ As such, the charge is not concise. Moreover, it is not legally sufficient or sustainable since our state’s public policy and statues encourages citizens to complain to government about illegal activities, waste and fraud.¹⁸¹ Washam had a legally cognizable justification for all he did regarding discretionary personnel decisions.¹⁸² He also had a fiduciary duty to protect the taxpayer’s interest in the correctness of assessment records.

The unverified enclosures attached to the unverified statement of charges dated October 29, 2010, have no legal standing and do not support the requirement of factual and legal sufficiency. Moreover, they were not attached to the “Amended Request.”

VI. CONCLUSION

Pierce County Assessor-Treasurer Washam respectfully requests this Court reverse the superior court’s recall decision based on procedural and substantive grounds.

¹⁸⁰ VRP 12/16/10 at 39:19

¹⁸¹ RCW 4.24.510

¹⁸² The Diamond report summary confirms a coordinated campaign to falsify public assessment records. CP 394

Dated: 1/20/11



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