

No. 85460-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE RECALL OF DALE WASHAM,
PIERCE COUNTY ASSESSOR/TREASURER,

DALE WASHAM,
APPELLANT

v.

ROBIN FARRIS,
RESPONDENT.

RESPONDENT'S BRIEF

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ISSUES

- A. Did the trial court err in approving the ballot synopsis after Respondent's petition had been amended to add the statutorily-required verification, to correct typographical errors in a statutory citation and the year in which Appellant took office, and to make other insubstantial changes to syntax in sentences set forth in the preamble to her amended petition?

- B. Did the trial court err in ruling that Recall Charge (1) was factually and legally sufficient?

- C. Did the trial court err in ruling that Recall Charge (2) was factually and legally sufficient?

- D. Did the trial court err in ruling that Recall Charge (3) was factually and legally sufficient?

- E. Did the trial court err in ruling that Recall Charge (5) was factually and legally sufficient?

- F. Did the trial court err in ruling that Recall Charge (6) was factually and legally sufficient?

COUNTERSTATEMENT OF THE CASE

In 2005, Appellant, a perennial local candidate, filed an unsuccessful recall petition against then Assessor-Treasurer Ken Madsen.¹ CP 025, 084 - 085, 092. Appellant contended that Mr. Madsen failed to require his office to physically inspect real property in Pierce County, which constituted grounds for his recall. CP 025, 084 - 085, 092. Thurston County Superior Court Judge Thomas McPhee dismissed Appellant's petition as legally and factually insufficient, and held: “[t]he Court further finds that there is a ‘legally cognizable justification’ for Mr. Madsen’s actions and therefore Charge #2 is not legally sufficient.” CP 085.

Appellant was elected Pierce County Assessor-Treasurer in November, 2008. He was sworn into office on January 2, 2009. The oath he took reads, as follows:

I, Dale Washam, do solemnly swear or affirm that I am a citizen of the United States and State of Washington; that I am legally qualified to assume the office of Pierce County Assessor-Treasurer; that I will support the Constitution and laws of the United States and the State of Washington; and that I will faithfully and impartially discharge the duties of this office to the best of my ability.

CP 160.

¹ Appellant has great experience with the recall process, having filed four recall petitions against the Pierce County Auditor from time to time.

After taking office in January, 2009, Appellant quickly began pursuing criminal charges against his predecessor Mr. Madsen and Assessor-Treasurer's office ("AT") staff whom Appellant held culpable for the lack of physical inspections in the Madsen administration, and opened what he referred to as an "official investigation." CP 028, 140 – 141, 149 – 150, 261 – 262, 441 - 483. Since March, 2009, Appellant has written numerous letters to state and county officials, including the Governor, the Attorney General, the State Auditor, the State Treasurer, the Pierce County Prosecuting Attorney, the Pierce County Sheriff and the Tacoma Chief of Police, requesting a criminal investigation of the appraisal practices during Mr. Madsen's tenure as head of the office. These requests were made despite Judge McPhee's finding in 2005 that there was a “legally cognizable justification” for those appraisal practices, and despite a 2009 review by the Pierce County Performance Audit Committee concluding that Mr. Madsen's valuation methodology likely had no negative effect on Pierce County residents. All declined to conduct a criminal investigation. CP 036, 054, 071, 072, 076 - 078, 084 - 087, 140 - 143, 149, 262, 524.

Unsatisfied with having Mr. Madsen as the sole target, Appellant was convinced that because he was elected "they can't touch me. I can run the office as I want. . ." CP 031, 045 – 046, 103, 140. He went so far as

to say that “God got him elected,” CP 102, and that “God doesn’t make mistakes.” CP 125. Appellant quickly turned his attention to career employees of the AT office, CP 028, 050, 099, 101 - 105, 110, 111, 114 - 115, 124 - 126, 128, 130 - 134, 138, 140 - 143, 149, 150 - 152, to whom he referred as “crooks and criminals.” CP 102, 124, 134, 150. On March 11, 2009, Sally Barnes, a career AT employee, filed an Equal Employment Opportunity (“EEO”) Complaint with the Pierce County Human Resources Department alleging discrimination and retaliation by Appellant. CP 020, 260. Ms. Barnes complained that she had been “treated differently than other managers in that she was singled out for harsher treatment, criticism and blame; subjected to angry outbursts, intimidation and hostility; excluded from her normal duties, excluded from communication, excluded from decisions related to her Division, isolated, ostracized, and removed from her job and office and placed on a special project as a pretext for stripping her of her position.” CP 020 - 021.

An independent investigator was retained by the Pierce County Human Resources Department. On August 7, 2009 the investigator, Diane Hess-Taylor, filed her report. CP 019 – 090. She interviewed 23 people. CP 022 - 023. Appellant and his assistant, Gretchen Borck, refused to cooperate. CP 022 - 024. Ms. Hess-Taylor concluded that: "Washam retaliated against the complainant based upon her participation in

complaints against him based on religion (1/22/09), and discrimination and retaliation (3/11/09)." CP 021. She further concluded: "Gretchen Borck, and Dale Washam violated the Pierce County Policy requiring that employees 'participate in and cooperate fully in the investigation of complaints. . .'" CP 022.

Between August 17, 2009 and October 20, 2009, six additional complaints were filed by AT employees with the Pierce County Human Resources Department, alleging improper governmental conduct by Appellant. A second independent investigator was retained. On May 25, 2010 the investigator, Mr. Kent Nakamura, filed his report. CP 091 – 144. He conducted 16 interviews. CP 100. Appellant, Ms. Borck and Appellant's Deputy, Mr. Alberto Ugas, refused to cooperate. CP 100. Mr. Nakamura concluded:

Although Ms. Barnes' previous EEO-complaint's [*sic*] investigation and HR through its adoption of it, concluded that Mr. Washam committed retaliation, he has elected, as the Assessor-Treasurer's Office's County head, to deny any prompt and effective remedial measures, or to seek to protect her or all persons who participated in the investigation of her complaint from retaliation, false accusations, or future improper treatment. The contrary, in fact, appears to have occurred. Several complainants and others have been layoff subjects by Mr. Washam. . .

Mr. Washam has retaliated against the relevant complainants who participated in the prior investigation and/or has retaliated against them for filing their whistleblower complaints. He has, furthermore, used his

authority in a manner that would chill complainants' thinking about filing their whistle-blower complaints and, in effect, has interfered with their rights to do so. These are violations of Chapters 3.14 and 3.16 Pierce County Code, and/or Chapter 49.60 RCW, and constitute improper governmental action as a violation of state or federal law or County Ordinance under 3.14.010(A)(1).

Mr. Washam has abused his authority. . .

Mr. Washam has used his position as Assessor-Treasurer, to intimidate, coerce, or demean several complainants and/or other staff. Additionally, malfeasance may apply to the extent that Mr. Washam's conduct has hampered the performance of his official duty and/or he has committed or continues to commit acts contrary to law. . .

Mr. Washam's use of his office to pursue past matters that have been determined to be unnecessary to continue with, has resulted in his directing of public funds to be used without valuable result. This is particularly so since the County's legal counsel (and others) has repeatedly advised him to move on. This dogged unwillingness to do so has diverted his office's resources and unduly affected the energy, morale, and functioning of the Assessor-Treasurer's office. . .

In summary, Dale Washam has violated the provisions of Pierce County Code 3.14, Improper Governmental Actions, by violating state or federal law, or Pierce County ordinance, by abusing his authority, and/or by acting in ways resulting in a gross waste of public funds.

CP 098 - 100.

Meanwhile, Appellant renewed his efforts to pursue criminal charges against Ken Madsen; despite the fact that former Pierce County Prosecutor Gerald Horne had sent a memorandum to Appellant on May

11, 2009 in which he declined to prosecute Mr. Madsen in large measure because of the finding of Judge McPhee on April 22, 2005 that "[t]he Court further finds that there is a "legally cognizable justification for Mr. Madsen's actions. . .", in which he noted that Judge McPhee's order was not appealed, and in which he further reminded Appellant that the "burden of proof in a criminal case is, of course, much higher than that in a recall matter." CP 084 - 085; 261 - 262. Mark Lindquist was sworn into office as the new Pierce County Prosecutor on September 1, 2009 following the retirement of Gerald Horne. From January 11, 2010 to February 22, 2010, Appellant wrote five letters to Mr. Lindquist repeatedly demanding that he investigate and prosecute what he alleged were 368,642 acts of falsification of records by Mr. Madsen. CP 141 - 142.

Not content in 2010 to confine his obsession with Ken Madsen to his efforts with the Pierce County Prosecutor, Appellant continued his retaliatory actions toward members of the AT staff. On August 12, 2010, a third independent investigator, Donald W. Heyrich, filed a report after being retained by the Pierce County Human Resources Department to investigate four additional EEO complaints by AT employees. CP 145 – 159. Mr. Heyrich noted that “[t]hose who harbor discriminatory or retaliatory motives usually do not announce those motives. I therefore must draw inferences from indirect and circumstantial evidence . .

Inferences of improper intent can be shown from any type of circumstantial evidence tending to show that the decision-maker harbored retaliatory animus.” CP 148.

Mr. Heyrich found that after learning of EEO complaints:

. . . Washam did an about-face. He stepped up his campaign regarding the physical inspection issue and accusations of criminal and fraudulent activity in the prior administration, and he stressed the need to find people "guilty." . . . Washam's campaign on the physical inspection issue has now become the centerpiece of his term in office.

All of this caused the work environment in the AT's office to become fractured, galvanized, and dysfunctional. According to witnesses, Washam became more and more combative, and then increasingly he withdrew himself from any interaction with employees. . .

The relationship between Washam and CE1² began its downhill slide on March 19, 2009. By that time, Washam had been counseled by the Human Resources Department concerning religious references in the workplace and had exhibited anger and verbalized intent to retaliate against those who complained against him. He told CE1 that he intended to fire Sally Barnes by building a case against her “the dirty way.”

CP 150 - 151.

Mr. Heyrich documented several incidents demonstrating that Appellant was targeting CE1, including a fabricated accusation that CE1 had falsified a performance evaluation of another employee. CP 155.

² Mr. Heyrich does not identify the complaining employees in order to protect them from further retaliation. They are referred to in his report at CE1 through CE 4.

Appellant would not accept Mr. Lindquist's refusal to launch a wasteful prosecution against Mr. Madsen, which would have amounted to prosecutorial misconduct, solely to assuage Appellant's personal vendetta. Thus, his Chief Deputy Alberto Ugas, (whom Appellant promoted to that position from a commercial appraiser position, CP 092), whether through persuasion, encouragement, or coercion, filed an unsuccessful recall petition against Mr. Lindquist on October 18, 2010, a mere two weeks before the November 2, 2010 election in which Mr. Lindquist was a candidate for Prosecutor. CP 262.

On October 29, 2010, Respondent Robin Farris filed with the Pierce County Auditor a statement of charges requesting the recall of Appellant (the "Petition"). CP 09 – 160. On November 12, 2010, the Pierce County Special Deputy Prosecuting Attorney commenced the underlying action pursuant to RCW 29A.56.130 to determine the sufficiency of Respondent's Petition to recall Appellant, and to approve a proposed ballot synopsis. CP 04 – 162. On November 18, 2010, Respondent filed with the Pierce County Auditor an amended recall request (the "Amended Petition"). CP 258 – 267. The Amended Petition added a verification of her signature, corrected typographical errors on a statutory citation and the year in which Appellant took office, and made insubstantial changes to syntax of several sentences. The Amended

Petition continued to incorporate by reference the investigative reports appended to the original Petition, and continued its explicit reference to the findings set forth in those reports. It contained the following six charges, all of which were identical to the six charges in the original petition (summarized, below):

1. Mr. Washam unlawfully retaliated against Sally Barnes.
2. Mr. Washam grossly wasted public funds pursuing criminal charges against his predecessor, Mr. Madsen.
3. Mr. Washam unlawfully failed to rectify his retaliatory acts and failed to protect his employees from retaliation, false accusations, or future improper treatment.
4. Mr. Washam used profane, questionable, negative or angry language and gestures in the office, and he brought religious comments into the workplace.
5. Mr. Washam unlawfully refused to participate in and cooperate fully in the investigations.
6. Mr. Washam violated his oath of office by knowingly and purposely violating numerous Pierce County code sections and state law, as described more fully in the Amended Petition.

On Sunday, November 21, 2010, Mr. Washam was personally served with the Amended Petition by a process server retained by the

Pierce County Auditor's office. CP 404, 558. He had previously been served with the original Petition on November 12, 2010. CP 189.

A hearing was held before Pierce County Superior Court Judge Thomas Felnagle on Monday, November 22, 2010. At the hearing, Appellant falsely and repeatedly stated that he had not been served with the Amended Petition. *RP Hearing of November 22, 2010*, p. 6, l. 7 - 9, p. 7, l. 18. By that time, an affidavit of service had not yet been filed memorializing that Appellant had, in fact, been served with the Amended Petition the previous day. Judge Felnagle continued the hearing to December 16, 2010 to afford Appellant sufficient time to respond to the amendments to the petition and to allow Respondent time to file or cause to be filed proof of service. After the hearing was concluded, Appellant was personally served with an additional copy of the Amended Petition. *RP Hearing of November 22, 2010*, p. 14, l. 10 – 20; CP 256 – 267.

At the December 16, 2010 hearing and after oral argument, Judge Felnagle issued an order finding that charges 1 – 3, 5 and 6 in the Amended Petition were factually and legally sufficient for the recall of Appellant and approved a ballot synopsis for that purpose CP 546 - 549. Appellant filed this appeal.

ARGUMENT

I. *The Constitutional and Statutory Framework Surrounding Recall Petitions*

A. *The Constitutional Right to Recall is a Fundamental Right*

The right to recall elected officials is a fundamental right of the people guaranteed by article I, sections 33 and 34 (amend. 8) of the Washington Constitution. *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71, 72 (1984); *Matter of Pearsall-Stipek*, 136 Wn. 2d 255, 262-64, 961 P.2d 343, 347 (1998); *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 764, 10 P.3d 1034, 1039 (2000). By its placement in the Declaration of Rights in article 1, the right to recall finds its wellspring in the inherent sovereignty of the people. *In re Recall of West*, 155 Wn.2d 659, 669, 121 P.3d 1190, 1195-1196 (2005) (J. M. Johnson, J. (concurring)). Section 33 contains the substantive right of recall and provides that “[e]very elective public officer of the state of Washington ... is subject to recall and discharge by the legal voters of the state....” Section 34 permits the Legislature to “pass the necessary laws” to carry out section 33 “and to facilitate its operation and effect without delay.” Pursuant to this authority, the Legislature adopted Chapter 29.82 RCW, which was enacted “to provide the substantive criteria and procedural framework for the recall process.” *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 262-63, 961 P.2d 343, 347 (1998); *In re Recall of Pearsall-Stipek*, 141 Wn. 2d 756, 764, 10

P.3d 1034, 1039 (2000). Chapter 29.82 RCW has since been re-codified as Chapter 29A.56 RCW.

B. *The Statutory Framework for Recall in Chapter 29A.56 RCW*

Flowing from the wellspring of popular sovereignty from which all political power traces its source, the recall statutes are to be construed in favor of the voter, not the elected official. *In re Recall of West*, 155 Wn.2d 659, 663, 121 P.3d 1190, 1193 (2005); *In re Recall of Kast*, 144 Wn.2d 807, 814, 31 P.3d 677, 681 (2001); *Pederson v. Moser*, 99 Wn.2d 456, 462, 662 P.2d 866, 870 (1983). Technical violations of the governing statutes are not fatal so long as the charges, read as a whole, give the elected official enough information to respond to the charges and the voters enough information to evaluate them. *In re Recall of West*, 155 Wn.2d 659, 663, 121 P.3d 1190, 1193 (2005); *In re Recall of Kast*, 144 Wn.2d 807, 814, 31 P.3d 677, 681 (2001). Notwithstanding the petitioner's duty to plead with specificity, this Court has consistently held that it will not strike recall efforts on merely technical grounds. *In re Recall of West*, supra; *In re Recall of Kast*, supra. Accordingly, this Court has uniformly considered supporting documentation to determine whether the charges are factually sufficient. *In re Recall of West*, supra; *In re Recall of Kast*, supra.

The Supreme Court has revisory jurisdiction over the decisions of the superior court. RCW 29A.56.270. This Court reviews recall petitions de novo. *In re Recall of Telford*, 166 Wn.2d 148, 154, 206 P.3d 1248, 1251 (2009). The Court's function is limited to evaluating the legal and factual sufficiency of the charges. *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677, 680 (2001); *In re Recall of Telford*, supra.

C. *The Requirement of Factual Sufficiency*

Factual sufficiency means that the petition must comply with the specificity requirements of RCW 29A.56.110. *In re Recall of Kast*, supra; *In re Recall of Telford*, supra. A charge is factually sufficient if the facts "establish a prima facie case of misfeasance, malfeasance or violation of the oath of office" and are "stated in concise language and provide a detailed description" in order to "enable the electorate and a challenged official to make informed decisions." *In re Recall of Telford*, supra (quoting *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003)(citing *Cole v. Webster*, 103 Wn.2d 280, 285, 692 P.2d 799 (1984); *Chandler*, 103 Wn.2d at 274, 693 P.2d 71)). In this context, "prima facie" means that, accepting the allegations as true, the charge on its face supports the conclusion that the official committed misfeasance, malfeasance, or a violation of the oath of office. *In re Recall of Wade*, 115 Wn.2d 544, 548, 799 P.2d 1179, 1181 (1990).

RCW 29A.56.110 requires that “the person ... making the charge ... have knowledge of the alleged facts upon which the stated grounds for recall are based.” There is no requirement that the petitioner have firsthand knowledge of the facts. Rather, he or she must have some knowledge of the facts underlying the charges. *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170, 172 (2003); *In re Recall of Ackerson*, 143 Wn.2d 366, 372, 20 P.3d 930, 933 (2001). When the charge is violation of law, the Court has repeated that the petitioner must have knowledge of facts indicating that the official intended to commit an unlawful act. *Matter of Pearsall Stipek*, 136 Wn.2d 255, 263, 961 P.2d 343, 347 (1998).

This Court may use supplemental materials to determine whether there is a factual basis for the charge. *In re Recall of West*, 155 Wn.2d 659, 665-66, 121 P.3d 1190, 1193-1194 (2005). It may go outside the petition to determine whether there is a factual basis for the charge. *In re Recall of Anderson*, 131 Wn.2d 92, 95, 929 P.2d 410, 412 (1997).

D. *The Requirement of Legal Sufficiency*

A charge is legally sufficient if the charge defines "substantial conduct clearly amounting to misfeasance, malfeasance or a violation of the oath of office," and there is no legal justification for the challenged conduct. *In re Recall of Telford*, supra (citing *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170). The legal sufficiency requirement "means

that an elected official cannot be recalled for appropriately exercising the discretion granted him or her by law." *Chandler*, 103 Wn.2d 268, 274, 693 P.2d 71, 74. A reviewing court must not consider the truthfulness of the charges but instead must accept the allegations as true and determine whether the charges on their face support the conclusion the officer abused his or her position. *In re Recall of Telford*, supra; *Cole v. Webster*, 103 Wn.2d 280, 287-288, 692 P.2d 799, 804 (1984).

E. *The Definitions of Misfeasance, Malfeasance and Violation of the Oath of Office*

The definitions of misfeasance, malfeasance and violation of the oath of office are found in RCW 29A.56.110:

For the purposes of this chapter:

- (1) "Misfeasance" or "malfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty;
 - (a) Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and
 - (b) Additionally, "malfeasance" in office means the commission of an unlawful act;
- (2) "Violation of the oath of office" means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

II. *The amendment of the original Petition was proper*

A. *Technical violations of the recall statutes are not fatal.*

Recall statutes are construed in favor of the voter. *In re Recall of West*, supra; *In re Recall of Kast*, supra. Technical violations of the governing statutes are not fatal, so long as the charges, read as a whole, give the elected official enough information to respond to the charges and the voters enough information to evaluate them. *In re Recall of West*, supra; *In re Recall of Kast*, supra.³

In *Pederson v. Moser*, 99 Wn. 2d 456, 662 P.2d 866 (1983), this Court said:

Pederson rightly points out that RCW 29.82 nowhere provides for multiple or amended recall demands and argues that they are therefore not permitted.

On the other hand, nothing in RCW 29.82 *prohibits* filing multiple or successive recall demands, either. . . Moreover, the recall statute is to be construed in favor of the voter, not the elected official. [citation omitted]. While we are inclined to imply into the statute a requirement that a voter choose between or consolidate multiple recall demands, Reitsma did so here. We must therefore reject Pederson's claim.

Pederson v. Moser, 99 Wn. 2d 456, 461-62, 662 P.2d 866, 869-70 (1983).

³ Appellant cites *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460 (1988) and *BIAW v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196, 206 (2009) for the proposition that Respondent has to follow "strict statutory procedures." *Brief of Appellant*, pg. 9, fn. 52. *Schweiker v. Chilicky* involved a denial of social security benefits. *BIAW v. McCarthy* involved a Public Records Act violation.

B. Use of the term “Petition” is proper.

In his brief, Appellant makes much ado about the reference by Respondent to her filed charges as a “petition” or “amended petition,” referring to Respondent’s use of those terms in the Superior Court as “surreptitious. . .” *Appellant’s Brief*, p. 12. The use of the term “petition” to describe her filings should come as no surprise.⁴

Although captions of statutory sections are not part of statutes, the Code Reviser captioned RCW 29A.56.120, which designates where the recall charge must be filed, “Petition – where filed.”

This Court has itself used that term in multiple recall efforts to describe the charges filed by the complaining party. *In re Recall of Pearsall-Stipek*, 141 Wn. 2d 756, 761, 10 P.3d 1037 (2000) (“Dale Washam (Washam) has filed a petition to recall Cathy Pearsall-Stipek. . .”); *In re Recall of Wasson*, 149 Wn.2d 787, 789, 72 P.3d 170, 171 (2003)(“Eduardo Pina initiated a recall petition against Des Moines Mayor Donald Wasson. . .”); *In re Recall of Kast*, 144 Wn.2d 807, 810, 31 P.3d 677, 679 (2001)(“On October 10, 2000, Chappell filed a recall petition against Commissioner Kast. . .”).

⁴ Appellant himself referred to Respondent’s filing of “a Recall Petition” multiple times in the Superior Court, prior to retaining counsel on appeal. *E.g.*, *CP 211, 212, passim*.

In his brief, Appellant misquotes *In re Recall of Wasson*, 149 Wn.2d 787, 792-793, 72 P.3d 170, 173 (2003).⁵ He quotes the per curiam opinion of this Court as follows:

The prosecutor should have rejected the additional information because it did not remedy the original deficiencies and Pina did not file an "Amended Request." (Underline in the original. *Italics added*).

This Court did not use the term "*Request*" to describe Pina's filed charges. This Court called the pleading a "*Petition*." The actual language used by this Court follows:

The prosecutor should have rejected the additional information because it did not remedy the original deficiencies and Pina did not file an amended *petition*. (Emphasis added).

In re Recall of Wasson, 149 Wn.2d 787, 792-793, 72 P.3d 170, 173 (2003).

C. *Amendment of the Petition is constitutionally permissible.*

Amendment of the Petition is constitutionally permissible.⁶

Refusal to allow amendment would be constitutionally impermissible.

⁵ *Brief of Appellant*, pg. 11, fn. 63.

⁶ Appellant compares the prosecutor's refusal to take a position on the amendment of the Petition with Pilate's washing of his hands at the trial of Christ. *Brief of Appellant*, pg. 17, fn. 99. Comparing the recall of Dale Washam to the Passion of Christ is a bit of a reach.

Constitutional rights do not submit to red tape. Accordingly, I join the opinion of the court but write separately to underscore the nature and importance of the constitutional right to recall under article I, section 33 of the Washington Constitution. The adjacent constitutional provision authorizes statutes only to “facilitate its operation.” CONST. art. I, § 34. Thus, any laws affecting recall must be construed by courts to assure the free exercise of this right. . .

The right to recall finds its source in the sovereignty of the people, first expressed at the beginning of our constitution in article I, acknowledging the source of all political power.

...

As an article I right in the Declaration of Rights of our state's constitution, the right to recall is an individual right on par with the right to petition and assemble (section 4) and freedom of speech (section 5) of the same article I. It is well established that none of these other article I rights are subject to prior restraint by government or by government officials, and this same protection must be given the right to recall.

In my view, this means that prior restraints upon the exercise of the right to recall are presumptively unconstitutional. Since statutes of the legislature relating to recall are constitutionally allowed only to “facilitate its operation,” such statutes cannot be construed to prohibit or impede exercise of this right. Delay-even in the courts-could work such an impediment.

...

Any legislation at cross-purposes with the facilitation of the right would be constitutionally void. The corollary is that a court should construe and implement any statutory scheme to avoid this effect.

In re Recall of West, 155 Wash. 2d 659, 669-71, 121 P.3d 1190, 1195-97 (2005)(J. M. JOHNSON, J. concurring).

The amendment of the original Petition was proper. Nothing in RCW 29A.56.110 prevents amendment of a petition. Moreover, the amendments were insubstantial. A verification was added to comply with the statute. A typographical error in a citation was corrected. A typographical error in the date Appellant took office was corrected.⁷ Syntax was changed in several sentences in the preamble of the petition, prior to setting out the charges themselves. Not one of these changes substantively affected the Petition. None of them could create any confusion in either the Appellant or the electorate. In fact, the corrections of the typographical errors prevented any confusion that Appellant might otherwise have claimed. Appellant suffered no prejudice.⁸ He had plenty of opportunity to respond, Judge Felnagle having given him 24 extra days from November 22 to December 16 to review the inconsequential amendments.

Appellant's hypertechnical argument that, in effect, requests this Court to direct Respondent to refile the exact same Amended Petition and begin the process anew does nothing to advance the constitutional right of the people to recall Appellant or the legislative intent behind adoption of

⁷ The original petition incorrectly stated that Appellant took office in January, 2008. That would have been a difficult task considering Appellant was not elected until November, 2008.

⁸ Appellant discussed the three investigative reports at length in his Superior Court pleadings, beginning with his Response Declaration filed November 18, 2010, which was *before the Amended Petition was ever served on him*. E.g., CP 214 – 217.

Chapter 29.82 RCW, now codified as Chapter 29A.56 RCW. As this

Court divined that intent:

We believe the changes indicate a legislative intent to place limits on the recall right, *i.e.*, to allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations. . .

Chandler v. Otto, 103 Wn.2d 268, 274, 693 P.2d 71, 74 (1984).

Appellant cites *In re Recall of Wasson*, *supra*, for the proposition that the prosecutor committed error in failing to dismiss Respondent's original Petition for lack of a verification. In *Wasson*, however, this Court recognized that the prosecutor was not statutorily required to summarily reject an incomplete Petition. In fact, in *Wasson*, the prosecutor "initially rejected the petition because it did not contain a concise statement of the charges." *In re Recall of Wasson*, 149 Wn.2d 787, 792, 72 P.3d 170, 173 (2003). The prosecutor then gave the petitioner Mr. Pina the opportunity to remedy the defective petition. *In re Recall of Wasson*, *supra*. Mr. Pina's counsel submitted "revised recall charges with additional facts." *In re Recall of Wasson*, *supra*. This Court did not hold that the prosecutor in *Wasson* could not allow the petitioner to amend a defective petition. On the contrary, this Court held that "[t]he prosecutor should have rejected the additional information because it did *not* remedy the original deficiencies

and Pina *did not file an amended petition.*” (*emphasis added*). In *re Recall of Wasson*, 149 Wn.2d 787, 793, 72 P.3d 170, 173 (2003).

In this case, if the Special Deputy Prosecutor had realized that the original Petition contained a defective verification and had communicated that to Respondent, she would have been entitled under *Wasson* to file an amended Petition remedying the defect, *which is precisely what she did*.

In a prior recall case brought before this Court by Appellant, he wrote the following about the recall process, with which Respondent agrees:

The Courts should not continue to require recall petitioners’ charges to be hyper technical. . . The gate to recall is now de facto closed in Washington State to the ordinary citizen. . . [I]t now takes a persons [*sic*] with legal experience or an attorney to draft a recall charge that would comply with case law requirements. If a recall petitioner was to get a recall charge and a recall ballot synopsis approved by the Superior Court, which, nowadays is an extremely remote possibility, the recall petitioner will then have to face with certainty a delay in the recall process while the elected official whom the recall is against files a costly appeal to the Washington State Supreme Court. . .

This Court should return the recall process back to where it began, a simple process pursuant to Article I Sections 33 and 34 of the Washington State Constitution. . .⁹

Refusal to allow technical amendments to the Petition would therefor constrain a fundamental constitutional right expressly granted to

⁹ *In Re: Recall of Cathy Pearsall-Stipek, Pierce County Auditor*, Supreme Court Case No. 68216-0, *Brief of Appellant Dale Washam*, filed August 27, 1999.

the people in article 1 of the state constitution, while simultaneously doing nothing to advance the legislative concern about protecting public officials from harassment by frivolous recall charges or mere insinuations.¹⁰

D. *Amendment to include a verification is otherwise within this Court's discretion.*

Defective verifications are otherwise correctable at any point in judicial proceedings, including during trial, because the correction does not affect the merits. *RCL NW, Inc. v. Colorado Res., Inc.*, 72 Wn. App. 265, 270-71, 864 P.2d 12, 15-16 (Div. III, 1993). Pleadings statutorily required to be verified may be amended to supply a missing verification. *Griffith v. City of Bellevue*, 130 Wn. 2d 189, 192-94, 922 P.2d 83, 84-85 (1996) (“[T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized . . . as ‘the sporting theory of justice.’ Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.”); *Maggs v. City of Seattle*, 86 Wash. 427, 431, 150 P. 612, 614 (1915) (“While the charter requires that the claim be verified, we have never held

¹⁰ In his brief, Appellant cites *Herron v. McClanahan*, 28 Wn. App. 552, 562, 625 P.2d 707 (1981) for the proposition that procedures pertaining to a purely statutory remedy must be strictly followed. *Brief of Appellant*, pg. 11, fn. 65. Of course, recall of an elected official is an article 1, section 33 right. Not only is it not “purely” statutory, the remedy is not statutory at all. Moreover, the remedy at issue in *McClanahan* was a proceeding to compel the performance of an act required of a public officer “in relation to the recall not in compliance with law.” *RCW 29A.56.270 (formerly RCW 29.82.160)*. That is not yet this case.

that it must be verified upon the exact date when it is filed. We have clearly intimated the contrary. *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31. It seems to us, therefore, that it would be carrying the mandatory provision of the statute farther than was ever contemplated by the Legislature to hold that the claim must be verified upon the exact date of filing.”).

The addition of a verification is allowable in ordinary civil cases. Surely allowing a verification by amendment to the Petition, when the amendment facilitates the operation of recall of an elected official - an article 1, section 34 imperative - has even greater justification.

E. *The Washington Rules of Civil Procedure allow for free amendment of pleadings.*

Washington Rules of Civil Procedure apply to recall proceedings. In *In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wash. 2d 501, 506-07, 173 P.3d 265, 268-69 (2007), this Court held that CR 24 applied in that recall proceeding so as to enable the Seattle School District to intervene.

The Washington Rules of Civil Procedure allow for the free amendment of pleadings. CR 15. Respondent filed her Amended Petition before Appellant filed a response. There can be no legitimate argument that Respondent was not entitled to amend the original Petition

to correct the lack of verification and the scrivener's error in the statutory citation.

F. *The charges in the original Petition and the Amended Petition, read as a whole, give Mr. Washam and the voters sufficient information.*

Assuming, *arguendo*, that amendment of the original Petition constituted a technical violation of RCW 29A.56.110, it is not fatal. The charges in the Amended Petition are exactly the same charges contained in the original Petition. As discussed *infra*, charges 1 – 3, 5 and 6 of the Amended Petition are factually and legally sufficient for the recall of the Appellant.

The Amended Petition was not filed as a new charge, or treated by the Pierce County Auditor or the Special Prosecutor as a new charge. Both of these responsible authorities recognized the Amended Petition for what it was - an amendment to the original charge then pending, and treated it as such.

The three independent investigative reports and their exhibits had previously been filed. Respondent made reference in the Amended Petition to those same documents, incorporating them by reference, and in many instances citing them by document and page number. This case is the opposite situation present in *In Re: Recall of Davis*, 164 Wn.2d 361, 193 P.3d 98 (2008), where documents were filed later, without reference in the

petition and without verification that the Petitioner had knowledge of the facts contained therein.

III. *The trial court did not commit error in continuing the November 22, 2010 hearing.*

A. *RCW 29A.56.140 is to be construed in favor of Respondent.*

This Court has consistently held that the recall statutes are to be construed in favor of the people, not the elected official. The 15 day hearing provision of RCW 29A.56.140 implements the constitutional mandate of article 1, section 34 that the legislature "shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to *facilitate* its operation and effect *without delay*. . . "*(emphasis added)*. This Court should construe the 15 day hearing requirement of RCW 29A.56.140 to have been enacted to benefit Respondent, and by necessary implication the citizens in Pierce County, not Appellant. Such a construction is consistent with article 1, section 34 of the state Constitution.

Appellant's argument that the failure of Judge Felnagle to plow forward with a decision on November 22 requires dismissal of the Amended Petition by this Court cannot be squared with the fundamental constitutional right to recall flowing from the wellspring of popular sovereignty. His argument is not supported by the consistent jurisprudence of this Court construing recall statutes in favor of the people.

B. Appellant's false statement to the superior court that he had not been served with the Amended Petition caused the court to continue the hearing.

Judge Felnagle continued the November 22, 2010 hearing in order to give deference to Appellant's due process rights by ensuring that proof of service of the Amended Petition was on file, and that Appellant had adequate opportunity to respond. Appellant had been served with the Amended Petition the previous day, a Sunday, at his home. His efforts to claim that he was not served with the Amended Petition did not end with the filing of the affidavit of service. Instead, Appellant now implies that he was not served at his home on November 21, 2010 because the declaration of service states that the process server personally served Mr. Washam with an "Amended Request for Adjudication to Petition for Recall of the Pierce County Assessor-Treasurer; Letter Dated November 18, 2010." (*Underline of semicolon added*). Because the Respondent's Amended Petition was filed with the Pierce County Auditor on November 17, 2010 and there is no letter of November 18, 2010 on file, so goes Appellant's argument, he therefore was never served with the Amended Petition. *Brief of Appellant*, pp. 6 - 7 11.

Appellant ignores the facts that (a) the Amended Petition was filed with the Auditor on November 17; (b) the process server was hired by the Auditor; (c) there would be no reason for the Auditor to attempt to serve

Appellant with any "Amended Request" other than the Amended Petition, since no other was filed; (d) the declaration of service recites that Appellant was served with "documents"; (e) the semicolon in the caption of the declaration of service separates the title of *two* documents served on Appellant: (1) the Amended Petition, and (2) a letter dated November 18, 2010, presumably a cover letter from the Pierce County Auditor to Appellant that is not part of the record. He also ignores the fact that he admitted to the trial court that he had been served with the Amended Petition before the November 22, 2010 hearing. Appellant's first admission in open court, at the November 22 hearing, was inadvertent:

MR. WASHAM: Your Honor, at this point, I would be very prejudiced if this thing moves forward, because, *first of all, I only got served -- or if you want to call it service -- I got knowledge of the amendment*, and not to be able to argue it or set forth an argument on it, because once it was there, I knew that there was no basis in law for it to go forward. So, I very definitely -- there would be a prejudice in my situation, and as a matter of fact, I object on the record to that. I did a written rejection -- objection, but also, I reject (sic). (*emphasis added*).

Verbatim Report of Proceedings of November 22, 2010, pg. 13, l. 10 - 20.

Appellant's second admission in open court, at the December 16 sufficiency hearing, was intentional:

MR. WASHAM: there is no provision in civil rules, local rules, or state rules that allow a recall petition or anything to be amended, and if you were going to construe it or attempt to do it, you would have to do it through a motion

to amend and use that motion. To go to the Auditor and say, here, I want to amend this, I mean, that had no meaning at all, period.

And I want to make something clear, too. When I stated that I had not been served by the petitioner or her attorney, that was those two [*indicating Ms. Farris and Mr. Oldfield*] I was talking about in relationship to a proper motion that would have allowed the court to look at it and say, well, you know, this doesn't apply. That wasn't happening.

Verbatim Report of Proceedings of December 16, 2010, pg. 13, 10, l. 2 – 14.

Appellant was served by the Auditor at his home on November 21, 2010 with two documents: the Amended Petition and a letter from the Auditor to the Appellant. The amended declaration of service makes that point unassailable. CP 558. Appellant knows perfectly well that he had been served with the Amended Petition. He does not need to see the amended declaration of service to know he was served. His continuing argument to the contrary, having devolved into the meaning of a semicolon, reflects a lack of candor to the Court.¹¹

The amendments to the Petition were purely technical. Yet at the hearing the following day, Appellant represented to the court that he had not been served, and that the amendments substantively prejudiced him. Although neither of these claims were true, Judge Felnagle properly afforded

¹¹ In fact, Appellant actually drops the semicolon when referring later in his brief to the two documents with which he was served, implying thereby that there was really only one. *Brief of Appellant*, pg. 20.

Appellant additional time to study the amendments, submit additional briefing, and formulate a defense. Had Appellant been candid with the court, the hearing would have gone forward on November 22. Appellant should be estopped on general equitable grounds from complaining about a delay that he caused.

C. *Appellant suffered no prejudice by being given more time to present his defense.*

Appellant was given 24 more days to prepare a defense. A claim by Appellant that he was prejudiced thereby speaks more to his general inability to prepare any defense at all than it does anything else.

IV. *Respondent has sufficient knowledge of the alleged facts upon which the stated grounds for recall are based.*

The original Petition appended as exhibits the reports issued by three separate, independent investigators required to look into Mr. Washam's conduct as Assessor-Treasurer, at taxpayer expense. All were referenced in the Amended Petition as well. There is no requirement that Respondent attach a verification to the evidence upon which a Recall Petition is based. The verification under RCW 29A.56.110 is required to demonstrate that the Respondent "believe[d] the charges or charges to be true and [had] knowledge of the alleged facts upon which the stated grounds for recall [were] based." There is no requirement to lay a foundation for the admission of evidence, as there is in a criminal or civil

legal proceeding. Indeed, the Court may go outside the petition to determine whether there is a factual basis for the charge. *In re Recall of Anderson*, 131 Wn.2d 92, 95, 929 P.2d 410, 412 (1997). Respondent has sufficient knowledge of the findings of those three investigators, and the findings of those investigations are, *a fortiori*, dispositive of the question.

In re Recall of West, supra, the majority opinion by the Supreme Court said the following:

In this case, the factual basis for the allegations is drawn almost entirely from transcripts of internet chats published in the newspapers. Sullivan and the community are aware of the source of the allegations and far better able to judge their credibility.

In re Recall of West, 155 Wn. 2d 659, 666, 121 P.3d 1190, 1194 (2005).

The Respondent is sure of the source of her allegations. The factual basis for the allegations in the Amended Petition is drawn entirely from investigative reports, copies of which had been appended to the original Petition, and were part of the documents originally served on Appellant by the Prosecuting Attorney. They were incorporated by reference in the Amended Petition as well, the amendments of which should be deemed to relate back to the original filing, as is the case in the amendment of any more ordinary pleading. The Respondent has knowledge of the facts upon which the stated grounds for recall are based.

V. *Charge 1 of the Amended Petition is factually and legally sufficient for the recall of Appellant.*

A. *Charge 1 is factually sufficient.*

This Court should find Charge 1 factually sufficient. It charges Appellant with retaliation against Sally Barnes. Charge 1 establishes a prima facie case of misfeasance and/or malfeasance and/or a violation of Appellant's oath of office. It is stated in concise language and provides a detailed description that enables the electorate and Appellant to make informed decisions. It is backed by facts about which Respondent has knowledge. It is backed by Ms. Hess-Taylor's investigative report. She concluded that: "Washam retaliated against the complainant based upon her participation in complaints against him based on religion (1/22/09), and discrimination and retaliation (3/11/09)." Retaliation against Ms. Barnes is wrongful conduct that affects, interrupts, or interferes with the performance of Appellant's official duty as Pierce County Assessor-Treasurer, which defines both misfeasance and malfeasance under RCW 29A.56.110(1). It is also the performance by Appellant of his duty in an improper manner under RCW 29A.56.110(1)(a), and the commission by Appellant of an unlawful act under RCW 29A.56.110(1)(b).

Appellant intended to unlawfully retaliate against Ms. Barnes. As soon as he took office, Appellant obsessively began his personal vendetta to

cleanse the AT office of anyone who had cooperated with Mr. Madsen's prior office policy on physical inspections. He informed AT staff that he believed he was untouchable. When he learned about Ms. Barnes' EEO complaint, his behavior in office changed and worsened. He told one AT employee, identified as CE1 in the third independent investigation, that he intended to fire Sally Barnes by building a case against her "the dirty way." He refused to cooperate with any of the investigations. All these actions demonstrate that Appellant intended to retaliate against Ms. Barnes unlawfully.

B. Charge 1 is legally sufficient.

The retaliation by Appellant against Sally Barnes was substantial. There is no legal justification for the challenged conduct. Appellant's substantial conduct amounts to misfeasance, malfeasance and/or a violation of his oath of office. Appellant's conduct cannot be said to have been exercised within the discretion granted him by law.

VI. Charge 2 of the Amended Petition is factually and legally sufficient for the recall of Appellant.

A. Charge 2 is factually sufficient.

This Court should find Charge 2 factually sufficient. It charges Appellant with grossly wasting public funds pursuing criminal charges against his predecessor, Mr. Madsen. Charge 2 establishes a prima facie

case of misfeasance and/or malfeasance and/or a violation of Appellant's oath of office. It is stated in concise language and provides a detailed description that enables the electorate and Appellant to make informed decisions. It is backed by facts about which Respondent has knowledge. It is backed by all three investigative reports. After taking office in January, 2009, Appellant quickly began pursuing criminal charges against Mr. Madsen and AT staff whom Appellant held culpable for the lack of physical inspections in the Madsen administration. He opened what he referred to as an "official investigation" of Mr. Madsen's assessment practices. Since March, 2009, Appellant has written numerous letters to state and county officials, including the Governor, the Attorney General, the State Auditor, the State Treasurer, the Pierce County Prosecuting Attorney, the Pierce County Sheriff and the Tacoma Chief of Police, requesting a criminal investigation of the appraisal practices during Mr. Madsen's tenure as head of the office. These requests were made despite Judge McPhee's finding in 2005 that those appraisal practices were legally justifiable, and despite a 2009 review by the Pierce County Performance Audit Committee concluding that Mr. Madsen's valuation methodology likely had no negative effect on Pierce County residents. All declined to conduct a criminal investigation.

Rebuffed, Appellant turned his attention to career employees of the AT office, to whom he has referred as "crooks and criminals." The Nakamura report determined Appellant's conduct resulted in his "directing of public funds to be used without valuable result." Mr. Nakamura stated that Appellant's "dogged" single-mindedness "has diverted his office's resources and unduly affected the energy, morale, and functioning of the Assessor-Treasurer's office. . ." Mr. Nakamura concluded that Appellant "has violated the provisions of Pierce County Code 3.14, Improper Governmental Actions, by violating state or federal law, or Pierce County ordinance, by abusing his authority, and/or by acting in ways resulting in a gross waste of public funds."

The Heyrich report concluded that Appellant's "campaign on the physical inspection issue has now become the centerpiece of his term in office. All of this caused the work environment in the AT's office to become fractured, galvanized, and dysfunctional."

Appellant's meritless, dogged pursuit of Mr. Madsen and AT employees is wrongful conduct that affects, interrupts, or interferes with the performance of Appellant's official duty as Pierce County Assessor-Treasurer, which defines both misfeasance and malfeasance under RCW 29A.56.110(1). It is also the performance by Appellant of his duty in an

improper manner under RCW 29A.56.110(1)(a). This unreasonable crusade left the AT office fractured and dysfunctional.

B. Charge 2 is legally sufficient.

Appellant's crusade was substantial. To be legally sufficient, there can be no legal justification for Appellant's conduct in pursuing charges against Mr. Madsen. Certainly, as a statement of general application, an elected official has the right and the duty to bring to the attention of an appropriate law enforcement agency conduct by his or her predecessor, when discovered, that may have been unlawful. However, there comes a point where the exercise of that right and fulfillment of that duty crosses a line.

Judge Felnagle recognized the line and analyzed Charge 2 by analogizing Appellant's conduct with that of Captain Ahab in Herman Melville's classic novel *Moby Dick*. Captain Ahab was willing to risk his ship and her crew in his dogged, obsessive pursuit of the white whale. Appellant has done no differently. Judge McPhee had determined in 2005 in the recall action brought by Appellant that there was a "legally cognizable justification' for Mr. Madsen's actions. . ." Appellant did not appeal this decision. A 2009 review by the Pierce County Performance Audit Committee concluded that Mr. Madsen's valuation methodology likely had no negative effect on Pierce County residents. Appellant dismissed the conclusion. Former Pierce County Prosecutor Gerald Horne sent a

memorandum to Appellant on May 11, 2009 declining to prosecute Mr. Madsen in large measure because of the finding by Judge McPhee. Mr. Horne reminded Appellant that he had not appealed Judge McPhee's finding, and that the burden of proof in a criminal proceeding is much higher than in a recall proceeding.

None of this mattered to Appellant. Like Ahab before him, Appellant had charted a course in pursuit of his prey without pause or reflection as to either the probabilities of success or the consequences of his conduct upon his office and crew. Appellant's substantial conduct amounts to misfeasance, malfeasance and/or a violation of his oath of office. Appellant's conduct cannot be said to have been exercised within the discretion granted him by law.

VII. *Charge 3 of the Amended Petition is factually and legally sufficient for recall of Appellant.*

A. *Charge 3 is factually sufficient.*

This Court should find Charge 3 factually sufficient. It charges Appellant with failing to protect AT employees from retaliation, false accusations or future improper treatment, and by failing thereafter to rectify his retaliatory actions. Charge 3 establishes a prima facie case of misfeasance and/or malfeasance and/or a violation of Appellant's oath of office. It is stated in concise language and provides a detailed description

that enables the electorate and Appellant to make informed decisions. It is backed by facts about which Respondent has knowledge. It is backed by all three investigative reports. Ms. Hess-Taylor's report detailed Appellant's retaliation against Sally Barnes. Mr. Nakamura's report memorialized that following the issuance of Ms. Hess-Taylor's report, Appellant "has elected. . . to deny any prompt and effective remedial measures, or to seek to protect her or all persons who participated in the investigation of her complaint from retaliation, false accusations, or future improper treatment." Mr. Nakamura continued: "The contrary, in fact, appears to have occurred. . . Mr. Washam has retaliated against the relevant complainants who participated in the prior investigation and/or has retaliated against them for filing their whistleblower complaints. He has, furthermore, used his authority in a manner that would chill complainants' thinking about filing their whistle-blower complaints and, in effect, has interfered with their rights to do so. These are violations of Chapters 3.14 and 3.16 Pierce County Code, and/or Chapter 49.60 RCW, and constitute improper governmental action as a violation of state or federal law or County Ordinance under 3.14.010(A)(1). Mr. Washam has abused his authority. . . Mr. Washam has used his position as Assessor-Treasurer, to intimidate, coerce, or demean several complainants and/or other staff."

Appellant intended to unlawfully fail to protect AT employees from retaliation, false accusations or future improper treatment and intended to

unlawfully fail thereafter to rectify his retaliatory actions against Ms. Barnes. The evidence as to Appellant's unlawful intent with regard to Count 1 is equally applicable here.

B. Charge 3 is legally sufficient.

The failure by Appellant to protect AT employees from retaliation, false accusations or future improper treatment and to rectify his retaliatory actions against Ms. Barnes was substantial. There is no legal justification for the challenged conduct. Appellant's substantial conduct clearly amounts to misfeasance, malfeasance and/or a violation of his oath of office. Appellant's conduct cannot be said to have been exercised within the discretion granted him by law.

VIII. Charge 5 of the Amended Petition is factually and legally sufficient for recall of Appellant.

A. Charge 5 is factually sufficient.

This Court should find Charge 5 factually sufficient. It charges Appellant with refusing to participate in investigations of whether he had discriminated and retaliated against his employees. Charge 5 establishes a prima facie case of misfeasance and/or malfeasance and/or a violation of Appellant's oath of office. It is stated in concise language and provides a detailed description that enables the electorate and Appellant to make informed decisions. It is backed by facts about which Respondent has

knowledge. It is backed by all three investigative reports. Diane Hess-Taylor concluded that Appellant violated the Pierce County policy requiring that employees participate in and cooperate fully in the investigation of complaints. He refused to participate in and cooperate with the other two investigations as well.

Appellant intended to unlawfully refuse to participate in and cooperate with the investigations. He was informed by the Pierce County Human Resources Department of his duty to cooperate. He was the target of the investigations, which he knew. When he learned of the investigations, Appellant turned his full ire on the employees in the AT office. Substantial evidence of Appellant's unlawful intent exists.

B. Charge 5 is legally sufficient.

The failure by Appellant to cooperate with the investigations was substantial. He refused to cooperate with each one. There is no legal justification for the challenged conduct. Appellant's substantial conduct clearly amounts to misfeasance, malfeasance and/or a violation of his oath of office. Appellant's conduct cannot be said to have been exercised within the discretion granted him by law.

IX. *Charge 6 of the Amended Petition is factually and legally sufficient for recall of Appellant.*

A. *Charge 6 is factually sufficient.*

This Court should find Charge 6 factually sufficient. It charges Appellant with violation of his oath of office by discharging his duties in an unlawful and biased manner from January 2, 2009 until October 29, 2010.

In his brief, Appellant states that Judge Feltnagle “correctly referred to” Charge 6 “as just a catchall.” *Brief of Appellant*, pg. 33. That is a misrepresentation of what Judge Feltnagle held with regard to Charge

6. His ruling bears repeating:

Finally, we've got Number 6, discharging duties in an unlawful and biased manner. Now, unlawful probably only states the legal test and doesn't really allow us much as to what the activity involved is, but bias does. *So, on the one hand, you could look at this charge and say, you know, it's just a catchall.* It's nothing more than a restating of all the other charges kind of put together, and that's too vague to be factually sufficient.

On the other hand, you can look at it and say, what it really is, is the essence of all these charges, that this whole office is allegedly run in a biased and completely improper manner, and there are plenty of facts to support the charge, and they come from multiple sources with firsthand knowledge. So, I find that they're factually sufficient, so we turn to whether or not they're legally sufficient. The test there would be, does it violate the oath of office? Is it such that it interferes with the performance of the elected official's official duties?

With regard to the intent, if you believe that he actively sought to impose his biases on the office, then you

have to believe that the intent was there, and the intent was to do an act that is unpermitted and does support recall. *And if you believe all of the charges that are made under this allegation, then the end result would be an office that's so permeated with bias, such as to not be able to carry out their official duties or at least not to be able to carry them out to the extent necessary to protect the public interest.*

. . . I am making a determination as to whether the charges, themselves, when viewed not as to truth or falsity, but only as to sufficiency, are legally recognizable as reasons for recall. Number 6 is, as are the other four that I determined. One is not.
(*Emphasis added*).

Verbatim Report of Proceedings Hearing of December 16, 2010, p. 39, l. 14 – 25, p. 40, l. 1 – 25, p. 41, l. 1 – 2.

Judge Felnagle correctly held that Charge 6 was *not* just a catchall. He correctly held that Charge 6 was “the essence of all these charges.” The Amended Petition contains “plenty of facts to support the charge, and they come from multiple sources with firsthand knowledge.” Charge 6 is factually sufficient to demonstrate that Appellant, in imposing his biases unlawfully, has “run [the Pierce County Assessor-Treasurer's office] in a biased and completely improper manner.”

B. *Charge 6 is legally sufficient.*

As Judge Felnagle correctly held, the test of legal sufficiency with regard to Charge 6 is whether Appellant violated his oath of office. Has his biased and unlawful conduct “interfere[d] with the performance of the elected official's official duties?” If the voters believe all of the charges,

“then the end result would be an office that's so permeated with bias, such as to not be able to carry out their official duties or at least not to be able to carry them out to the extent necessary to protect the public interest.”

Appellant dismissively refers to his conduct as "discretionary personnel decisions." To consider his obsessive pursuit of Mr. Madsen and AT employees as a "discretionary personnel decision" is like referring to Captain Ahab's obsession with the white whale as a summer fishing trip.

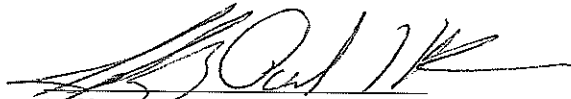
CONCLUSION

This Court should find that charges 1 - 3, 5 and 6 set forth in Respondent's Amended Petition are factually and legally sufficient to warrant the recall of Dale Washam. The constitutional role of this Court is to give deference to the sovereignty of the people of the state of Washington in general, and Pierce County in this particular instance. The charges are substantial. The evidence in support of them is overwhelming. Mr. Washam's conduct is inexcusable. It is beneath the standard of conduct we expect from our elected leaders.

The only real defense he raises is hypertechnical. This proceeding is not like a review of a trial court's order allowing the introduction of unauthenticated documents into evidence in a criminal or civil trial. This proceeding is of the highest nature. It is fundamentally political. The role of

this Court is to decide whether to open the sluice gate freeing the waters of popular sovereignty to burst from their wellspring. The voters in Pierce County have the right to drink from those waters. Respondent respectfully requests that this Court allow this recall to proceed without delay.

Respectfully submitted this 27th day of January, 2011.



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