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**Honorable Charles Mertel
Hearing to determine sufficiency of Recall**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE THE MATTER OF RECALL)	
CHARGES AGAINST PORT OF)	No. 07-2-14732-2-SEA
SEATTLECOMMISSIONER)	
PAT DAVIS)	PETITIONERS MEMORANDUM AND
)	SUPPLEMENTAL MATERIALS
)	SUPPORTING RECALL PETITION
)	
)	

COMES NOW, PETITIONER for Recall, Christopher Clifford, and submits this memorandum in support of the Petition for Recall of Port of Seattle Commission Pat Davis. Petitioner respectfully requests that the Court support the Petition for Recall and allow the ballot synopsis to move forward.

I. THE PETITION

Pat Davis was elected to a four year term as Port of Seattle Commissioner in November 2005 and had previously been elected in 2001, 1997, 1993, and 1989. On April 21, 2007, Christopher Clifford filed a recall petition (Attachment A) with the King County Records, Elections and Licensing Services Division. (Records and Elections) Pursuant to RCW 29A.56.120 and RCW 29A.56.130, the Director of Records and Elections transmitted Mr. Clifford’s petition to the King County

1 Prosecutors Office. On May 7, 2007, the Prosecutors Office prepared and certified a
2 ballot synopsis of the recall charges, and filed those documents with King County
3 Superior Court. The ballot synopsis includes the following five charges:

4 Charge I: Commissioner Davis committed an act of malfeasance when she
5 signed and agreement to provide Mic Dinsmore, an outgoing Port of Seattle
6 employee, with a gift of \$339,841 of public money outside of his employment
contract. Mr. Dinsmore sought to collect this money in March or April of
2007.

7 Charge II: Commissioner Davis committed and act of malfeasance by
8 obligating the Port of Seattle to pay monies not voted on or approved by Port
of Seattle Commissioners at a regularly scheduled public hearing.

9 Charge III: Commissioner Davis committed an act of misfeasance and
10 malfeasance when she used her position as Port Commissioner to provide her
personal friend and political ally, Mic Dinsmore, with a gift of public money.

11 Charge IV: Commissioner Davis committed acts of malfeasance by voting in
12 executive session on or about January 10, 2006 and June 8, 2006, in violation
of the Washington State Open Public Meetings Act (Ch. 42.30 RCW).

13 Charge V: Commissioner Pat Davis committed and act of malfeasance by
14 exceeding the purposes for executive session in the Washington State Open
Public Meetings Act (Ch. 42.30 RCW) by negotiating an voting on a gift of
15 public money in executive session.

16 **II. LAW**

17 The Washington State Constitution provides that the citizens of this state may
18 Seek removal of a public official through the recall petition process, and election.
19 “Recall is the electoral process by which an elected officer is removed before the
20 expiration of the term of office.” *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71
21 (1984). Pursuant to sec. 33 of Article 1 of the Washington State Constitution, an
22 “elective public officer in the State of Washington ... is subject to recall and
23 discharge” if a petition demanding his or her recall puts forth “that such officer has

1 Committed some act or acts of malfeasance or misfeasance while in office, or has
2 violated his oath of office...” The State Constitution “requires a showing of cause
3 before a recall will be allowed.” *In re Ackerson*, 143 Wn.2d 366, 270, 20 P.3d 930
4 (2001) “Recall for cause requires a petition to be both legally and factually sufficient.”
5 *In re Call*, 109 Wn.2d 954, 957, 749 P. 2d 674 (1988). The Superior Court does not
6 have the authority to “consider the truth of the charges...” (RCW 29A.56.140).

7 **A. Sufficiency of Charges**

8 The criteria for evaluating the sufficiency of recall charges is set forth in RCW
9 29A.56.110. The charge or charges must state that the public officer “has committed
10 an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has
11 violated the oath of office, or has been guilty of any two or more of the acts specified
12 in the Constitution as grounds for recall.” (RCW 29A.56.110.)

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

21 RCW 29A.56.110

22 Additionally, “[t]he charge shall state the act or acts complained of in concise
23 language, give a detailed description including the approximate date, location, and
nature of each act complained of, be signed by the person or persons making the
charge, give their respective post office addresses, and be verified under oath that the

1 person or persons believe the charge or charges to be true and have knowledge of the
2 alleged facts upon which the stated grounds for recall are based.

3 “To be legally sufficient under these circumstances, the charge must
4 specifically allege substantial conduct clearly amounting to misfeasance.” *In re Recall*
5 *of West*, 121 P.3d 1190 (citation omitted), 155 Wash.2d 659 (2005) (citing *Kast*, 144
6 Wn.2d at 815)

7 If a petition has minor problems or fails to state clearly a point later shown by
8 supplemental material to be supported by the facts the petition is still allowed to move
9 forward.

10 “We are not unmindful of the fact that the original petition did not specifically
11 articulate this charge in this way and that recourse to the attached documentation was
12 required. However, we find that this will not defeat an otherwise adequate charge if
13 the “gist” of the original charge is sufficiently similar to the charge as stated in the
14 amended ballot synopsis. *In re Recall of Lee*, 122 Wn.2d 613, 618, 859 P.2d 1244
(1993). The petition read as a whole gave fair notice of the actual charges, and
Sullivan unequivocally adopted the trial court’s articulation of the charge at oral
argument before us. We find that the charge is legally sufficient. *In re Recall of West*,
121 P.3d 1190 (citation omitted)

15 In the *West* decision the concurring opinion of Justice J. M. Johnson states that
16 in regards to recall “as with the initiative process or referendum statutes, interpretation
17 of statutes preserving the people’s right to recall must be liberally construed.” See
18 *Gibson*, 136 Wash. at 474-75 (“in carrying out the salutary purposes intended in the
19 adoption of the recall, the provisions of the statute shall be liberally construed.”)

20 **B. Factual Sufficiency**

21 “Factual sufficiency means the facts must establish a prima facie case of
22 misfeasance, malfeasance, or violation of the oath of office (quantitative prong).” *Cole*
23 *v. Webster*, 103 Wn.2d 280, 285, 692 P.2d 799 (1984) “The charge must on its face

1 show the official acted wrongfully, improperly, unlawfully or negligently in the
2 performance of his duties.” *In re Teaford*, 104 Wn.2d at 586 “A recall petition must
3 describe the charges with sufficient precision and detail to enable the electorate and
4 the challenged official to make informed decisions in the recall process.” *In re Zufelt*,
5 112 Wn.2d at 911.

6 “On the whole, the facts must indicate an intention to violate the law....” *In re*
7 *Feetham*, 149 Wn.2d 860, 865, 72 P.3d 741 (2003). “A charge must also sufficiently
8 specify why the challenged acts constitute misfeasance, malfeasance or violation of
9 the oath of office....” *In re Beasley*, 128 Wn.2d at 425.

10 “In order to be legally sufficient, “the petition must state with specificity
11 substantial conduct clearly amounting to misfeasance, malfeasance or violation of the
12 oath of office” *Chandler*, 103 Wn.2d at 274....To present a prima facie case of
13 misfeasance, the petition must “allege {the elected official’s} abuse of discretion” or
14 “identify a standard, law or rule which would make his conduct wrongful, improper or
15 unlawful.” *In re Recall of Zufelt*, 112 Wn.2d 906, 914, 774 P.2d 1223 (1989).”
16 Dissenting Opinion of Justice R. Sanders, *In re Recall of West*, 121 P.3d 1190 (citation
17 omitted)

18 III. ANALYSIS

19 Four of the five charges in the ballot synopsis prepared by the King County
20 Prosecuting Attorney allege acts of malfeasance, and one charge (charge 3) claims an
21 act of malfeasance and or misfeasance. As will be discussed below the charges are
22 legally and factually sufficient to support the recall petition and meet the requirements
23 set forth in RCW 29A.56.110

1 **A. Charge one: Signing Agreement and Gifting of Public Funds**

2 The first charge in the Ballot Synopsis states:

3 Commissioner Davis committed an act of malfeasance when she signed an
4 agreement to provide Mic Dinsmore, an outgoing Port of Seattle employee,
5 with a gift of \$339,841 of public money outside of his employment contract.
6 Mr. Dinsmore sought to collect this money in March or April of 2007.

7 Petitioner offers as supplemental proof, the October 10, 2006, memorandum signed by
8 both Commissioner Pat Davis (then commission president) and Mr. Mic Dinsmore the
9 outgoing Chief Executive Officer of the Port of Seattle. (Attachment B)

10 The powers and duties of the Port Commissioners are outlined in
11 RCW 53.12.245.

12 The port commission shall organize by the election of its own members of a
13 President and secretary, **shall by resolution adopt rules governing the**
14 **transaction of its business** and shall adopt an official seal. All proceedings of
15 the port commission shall be by motion or resolution recorded in a book or
16 books and kept for such purpose, which shall be public records.
17 (emphasis added)

18 The Port of Seattle Commissioners abided by the mandate of RCW 53.12.245
19 and adopted the Bylaws of the Port of Seattle as amended by the Port of Seattle on
20 February 23, 1993, by the Port of Seattle Commission, Resolution No. 3137.

21 (Attachment C) Commissioner Pat Davis was a member of the commissioner at the
22 time of this resolution and the adoption of these bylaws. The Port Bylaws Article III
23 states:

 1) The President shall preside at all public meetings of the commission and at
 executive sessions of the Commission, and **shall sign all resolutions,**
 contracts, and other instruments on behalf of the Commission as
 authorized by the Commission, and shall perform all other such duties as are
 incident to the office or are properly required by the Commission. (emphasis
 added)

1 Port of Seattle Bylaws, Exhibit A to Bylaws of the Port of Seattle, Commission
2 Working Rules and Operating Procedures:

3 **12) Individual Commissioners serve as members of the Commission, a**
4 **body which acts by majority vote.** (emphasis added)

5 Article II of the Port of Seattle Bylaws:

6 5. The Commission shall abide by the Commission Working Rules and
7 Operating Procedures set forth in Exhibit A, which is incorporated in the
8 Bylaws by this reference.

8 Article VII of the Port of Seattle Bylaws:

9 1. All matters, which in the judgment of the Commission, are of a legislative
10 character shall be embodied in the form of resolutions.A resolution put on
11 for final passage may be passed with the consent of three(3) Commissioners
12 attending the meeting.

12 No resolution was passed in a public meeting authorizing Commissioner Pat
13 Davis to sign the agreement she signed on October 10, 2006, extending additional
14 benefits to Mic Dinsmore. Her action of unilaterally signing this document violates
15 the above cited sections of the RCW and the Port of Seattle Bylaws which she herself
16 voted to adopt in 1993.

17 Attached are supplemental documents to show that Mr. Mic Dinsmore
18 exchanged a number of emails relating to the benefits extended to him by
19 Commissioner Pat Davis. (Attachment D) One of the emails outlines the payment
20 schedule of the additional benefits. It is clear that the Port of Seattle employees
21 believed the document signed by Pat Davis granted Mic Dinsmore the additional
22 benefits outlined in the agreement. "I also learned via Linda that the agreement was
23 apparently for 40 weeks of paid leave."

1 It is likely Commission Davis will seek to claim that the signed agreement of
2 October 10, 2006, was “nothing” and only served to memorialize an agreement that
3 had been reached by the Port Commissioners with Mic Dinsmore. Support of this
4 claim may come from notes taken at an executive session by Mic Dinsmore.

5 (Attachment E)

6 This is a Clintonian defense that tortures logic and defies fact. If it is correct
7 that the memo only memorializes an agreement reached in Executive session then
8 there must have been a vote since the State law and the Port Bylaws clearly state that
9 the president “shall sign all resolutions, contracts, and other instruments on behalf of
10 the Commission as authorized by the Commission” (Port Bylaws Article III) and that
11 “Individual Commissioners serve as members of the Commission, a body which acts
12 by majority vote”. If the Commissioner claims there was a “vote” that would be a
13 clear violation of the Washington State Open Meetings Act (RCW 42.30), and Port
14 Bylaws.

15 Based upon the supplemental documents, all of which have been provided by
16 the Port of Seattle and are available to Commissioner Pat Davis, the Petitioner satisfies
17 the threshold of a prima facie case on this charge. The documents are facts that speak
18 for themselves. Petitioner puts forth that the RCW 53.12.245, and the cited Port
19 Bylaws, as laws and rules that have been violated by the actions of this elected
20 official. RCW 29A.56.140 directs the Court to “not consider the truth of the charges,
21 but only their sufficiency”. It is clear petitioner has on this charge met the sufficiency
22 requirement of RCW 29A.56.110.

1 **B. Charge Two, Agreement Not Authorized By the Commission**

2 The second charge of the Ballot Synopsis states:

3 Charge II: Commissioner Davis committed and act of malfeasance by
4 obligating the Port of Seattle to pay monies not voted on or approved by Port
5 of Seattle Commissioners at a regularly scheduled public hearing.

6 Commissioner Davis signed an agreement to provide benefits to an individual
7 who would no longer be working for the Port of Seattle. The October 10, 2006, is
8 unambiguous in its language:

- 9 • “As **agreed**”
- 10 • “you **will** be provided benefits”
- 11 • “These benefits **will** be modeled on the...”
- 12 • “your transition benefits **will** begin March...”
- 13 • “your actual termination date...mid March,2008.”

14 Commissioner Davis has signed a document indicating the past tense, and all
15 the language indicates the terms outlined in the memo she signed as a done deal.

16 What sticks out is what is missing. None of the other Commissioners are
17 CC'd. This memo deliberately contains the circle of communication to two people.
18 There is nothing to indicate that this memo is subject to pending Commission approval
19 or a public vote. This “memorandum” is a contract; it offers set benefits in exchange
20 for service, it has a signature line, and is signed by both parties.

21 It is clear the Port of Seattle Commission believed this document was more
22 than a mere “memorializing” of a potential severance agreement. On April 23rd, 2007,
23 the Port of Seattle Commissioners moved, and voted to not pay the severance package
24 to Mic Dinsmore. If this memorandum truly were nothing, no Port action would have

1 Ms. Davis from businesses that depended upon the Port. While never giving money
2 himself directly, Mr. Dinsmore used his position as Chief Executive to pressure those
3 doing business with the Port to help and contribute to Pat Davis's reelection.

4 This issue raised ethical debates and was widely publicized in Newspapers and
5 local television. The facts are the Pat Davis has consistently supported Mic Dinsmore
6 for fourteen years, voted to make him the highest paid Port Director in America, and
7 now has signed an agreement that states "you will be provided benefits to assist you in
8 your own transition away from the organization." (Attachement B)

9 It appears there is a rather generous give and take relationship between Mic
10 Dinsmore and Pat Davis. Based upon the agreement signed on October 10, 2006, a
11 rather lucrative relationship involving hundreds of thousands of taxpayer dollars.
12 Pat Davis violated the powers vested in a Port Commissioner through state law, and
13 Port Bylaws to improperly and possibly illegally enrich her personal friend. This
14 abuse of power is an act of misfeasance at best, and malfeasance at worst. Petition has
15 shown a prima facie case for charge #3 and satisfies the requirements of legal and
16 factual sufficiency in accordance with RCW 29A.56.110.

17 **D. Violating the Open Meetings Act**

18 The fourth charge on the Ballot Synopsis states:

19 Charge IV: Commissioner Davis committed acts of malfeasance by voting in
20 executive session on or about January 10, 2006 and June 8, 2006, in violation
of the Washington State Open Public Meetings Act (Ch. 42.30 RCW).

21 According to Commissioner Pat Davis the Commissioners agreed during an
22 executive session on either January 10, 2006, or on June 8, 2006, a majority of the
23 Port Commissioners agreed to provide a severance package to Mic Dinsmore as

1 stated in the October 10, 2006 memorandum signed by Commissioner Davis.
2 (Attachment B) If this is true and Commissioner Davis signed a document agreed
3 upon by a majority of the Commissioners, she must have been signing based upon a
4 vote taken during the executive session. If the Commission voted during the executive
5 session that would be violation of the Washington State Open Meeting Act:

6 **(1) No governing body of a public agency shall adopt any ordinance,**
7 **resolution, rule, regulation, order, or directive, except in a meeting open to**
8 **the public** and then only at a meeting, the date of which is fixed by law or rule,
9 or at a meeting of which notice has been given according to the provisions of
10 this chapter. Any action taken at meetings failing to comply with the
11 provisions of this subsection shall be null and void.

12 **(2) No governing body of a public agency at any meeting required to be**
13 **open to the public shall vote by secret ballot. Any vote taken in violation of**
14 **this subsection shall be null and void, and shall be considered an "action"**
15 **under this chapter.**

16 RCW 42.30.060

17 If in fact the Commission did act as a majority, vote, pass a resolution, or
18 engage in a secret vote, these would be violations of the open meetings and act and
19 those actions would be null and void.

20 Even with a majority nod (secret vote) the actions are null and void and
21 Commissioner Pat Davis had no right to sign the agreement on October 10, 2006.

22 (Attachment B) If this is in fact a defense of Commissioner Pat Davis this only
23 compounds the first two charges with an additional violation of state law (RCW
42.30.060). Pat Davis has claimed she only acted with the consent of the majority of
the Port Commissioners in news articles and in multiple television interviews. Based
upon these statements by the public official a prima facie case for charge #4 is legally
and factually sufficient in accordance with RCW 29A.56.110.

1 **E. Violating Executive Session Provision**

2 The fifth charge in the Ballot Synopsis states:

3 Charge V: Commissioner Pat Davis committed an act of malfeasance
4 by exceeding the purposes for executive session in the Washington State Open
5 Public Meetings Act (Ch. 42.30 RCW) by negotiating and voting on a gift of
6 public money in executive session.

7 Commissioner Pat Davis has maintained publicly that she only acted in a
8 manner approved by the majority of the Port Commissioners when she signed the
9 agreement of October 10, 2006, granting additional benefits and money to Mic
10 Dinsmore outside of his contract.

11 Commissioner Davis states the terms of the October 10, 2006, agreement she
12 signed were agreed to by Port Commissioners during one or two executive sessions
13 occurring on January 10, 2006, and or June 10, 2006. The Port of Seattle has made
14 public notes taken by Mic Dinsmore of these two executive sessions. (Attachment E)

15 Contained within the notes are sections regarding a planned and coordinated
16 public response by the Port Commission, and discussion of the severance package that
17 is part of the general employment policy in the Port of Seattle. HR-10 has according
18 to the notes of Mic Dinsmore been “liberally” applied at the Port of Seattle to outgoing
19 employees.

20 (g) To evaluate the qualifications of an applicant for public employment or to
21 review the performance of a public employee. However, subject to RCW
22 **42.30.140(4), discussion by a governing body of salaries, wages, and other
23 conditions of employment to be generally applied within the agency shall occur in
a meeting open to the public,** and when a governing body elects to take final action
hiring, setting the salary of an individual employee or class of employees, or
discharging or disciplining an employee, that action shall be taken in a meeting open
to the public; (emphasis added)

RCW 42.30.110

1 Involved or directly linked to violations of state law. None of the charges against
2 James West involved hundreds of thousands of taxpayer dollars. Few recall cases
3 involve such an overwhelming amount of documentation as this petition does.

4 This case meets the threshold set by the Supreme Court in the West case and is
5 factually similar to the Lee case in Pe Ell. Even in that case the Mayor did not sign
6 anything, all that was available to the Petitioner was hearsay evidence. In this case we
7 are overwhelmed with documents, emails, and secretive notes of executive sessions.
8 Petitioner has met his burden and the requirements of the state law to move these
9 charges and this recall forward. Pat Davis can and should argue her case to the public.

10 Dated this 15th day of May, 2007.

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