Firehouse Lawyer

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The Law of Recall in Washington:

Recently, I have been involved heavily again in a recall matter. Under Washington law, a citizen may file with the county auditor a charge or charges, calling for the recall of a certain elected official, for misfeasance, malfeasance, or violation of the oath of office. Since fire district commissioners are elected officials of a Washington municipal corporation, they are subject to the right of recall and might be interested in how this area of the law works. In my very first recall case in 1990, I represented two fire commissioners, but since then I have represented many other elected officials. They have included a county auditor, county prosecutor, county sheriff, a district court judge, and now a county assessor. Superior Court (and higher court) judges are not subject to the recall statute at all.

The current statute defines "misfeasance" and "malfeasance" as "any wrongful conduct that affects, interrupts or interferes with the performance of official duty". Additionally, "misfeasance" means the performance of a duty in an improper manner. Finally "malfeasance" also includes the commission of an unlawful act. Violation of the oath of office is defined as "the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law."

The statute on recall was amended in a major way in 1983, so starting in 1984 the State Supreme Court began handing down a series of opinions, which quite clearly have made it more difficult to recall an elected official subject to the statute. While the recall right is founded upon the State Constitution, the statutes and case law are critical to understanding why recall is so difficult for the petitioner. The Supreme Court interprets the 1983 legislative changes to the law as intended to make it difficult to compel a recall election. In Chandler v. Otto, 103 Wn. 2d 268, 693 P. 2d 71 (1984) the Supreme Court held that recall is only allowed for good cause. Holding that the legislative amendments mean that a recall must be both factually and legally sufficient, the Court said legislative intent was "to allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations."

To be factually sufficient, a recall charge must concisely state the act or

acts complained of and must give a detailed description of each act, including the approximate date, location, and nature of each act. The charge must be verified under oath, that the petitioner believes the charge to be true and that the petitioner has knowledge of the alleged facts upon which the recall is based. RCW 29A.56.110. To be factually sufficient, the charges must be sufficiently precise to enable the electorate and the elected official to make informed decisions in the recall process. In re Shipman, 125 Wn. 2d 683, 886 P.2d 1127 (1995). Also, the charges must state facts to identify to the voters actions which, absent justification, constitute a prima facie showing of misfeasance, malfeasance or violation of the oath of office. Moreover, they must show why the acts meet that standard. In re Call, 109 Wn. 2d 954, 749 P. 2d 674 (1988).

Where a petition charges an official with violating the law (or a specific statute), the petitioner must have knowledge of facts indicating the official's intent to commit an unlawful act. See In re Recall of Pearsall-Stipek, 136 Wn. 2d 255, 961 P.2d 343 (1998) and In re Recall of Sandhaus, 134 Wn. 2d 662, 953 P.2d 82 (1998). The first case involved the Pierce County Auditor, and the second the Adams County Prosecutor, both of whom were represented by this writer. Although recall petitioners are not required to have personal knowledge and can rely upon hearsay, such intent is often very difficult to establish. Most elected officials can readily demonstrate that they did not intend to act unlawfully, even if they did make an innocent or honest mistake in performing or neglecting some duty conferred by law.

Demonstrating legal sufficiency is the second high hurdle that a recall petitioner must clear. To be legally sufficient, a charge must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or a violation of the oath of office. In other words, merely minor mistakes are not enough. See Jewett v. Hawkins, 123 Wn. 2d 446, 868 P. 2d 146 (1994). Legal sufficiency implies that any "legally cognizable justification" for the official's conduct renders the recall petition insufficient. Recall of Wade, 115 Wn.2d 544, 799 P.2d 1179 (1990).

An elected official cannot be recalled for appropriately exercising discretion. See In re McNeill, 113 Wn. 2d 302, 778 P. 2d 524 (1989). Of course, if it is shown that the official arbitrarily or unreasonably exercised their discretion, a recall may be allowed to proceed. See Cole v. Webster, 103 Wn. 2d 280, 692 P.2d 799 (1984). To show a clear abuse of discretion, the petitioner must demonstrate that the official exercised discretion in a manner that was manifestly unreasonable or exercised on untenable grounds or for untenable

reasons. Cole v. Webster at page 285.

Another defense to legal sufficiency might be referred to as "legallycognizable justification". In the leading case of Recall of Wade, 115 Wn. 2d 544 (1990), the charge was based upon the hiring of a female executive instead of a male. The affirmative action plan of the agency may well have been considered a "legally cognizable justification" for all that the elected officials did.

In Greco v. Parsons, 105 Wn. 2d 669, 717 P.2d 1368 (1986) the "legally cognizable justification" was the impossibility of implementing a new county ordinance requiring the re-drawing of voter precinct boundaries within 32 days, without any financial appropriation to do so.

In summary, for those of you readers that are serving in elective positions (whether actually elected or just appointed), you can take some solace when faced with a recall petition: it isn't that easy for the proponents to reach the election phase. The court hearing on factual and legal sufficiency (and rightfully so) is a formidable hurdle.

ADOPT A CELL PHONE POLICY:

If you are a public employer and do not have a cell phone policy, you may be exposing your corporation to potential liabilities. Legal actions are on the increase. We are starting to see some negligence actions against employers for negligent driving, while using cell phones during the course of the work day, or while using "company vehicles". Thus far, the cases I have read about have only involved private employers, but since public employees also use cell phones while on the road, it is just a matter of time before someone brings such an action.

We recommend that every public employer adopt a policy, resolution, or SOP strictly prohibiting use of cell phones (or at least those that are not hands-free) while actually driving any agency vehicle. Require the employees to pull over to the side of the road or stop the vehicle before using the cell phone. Otherwise, you may find yourself in a liability situation.

The other issue we have seen over many years of dealing with cell phones used by public employees is the common government users programs offered by the cell phone companies. They will provide a "government discount" to those employees and volunteers of a public agency, and you may allow those personnel to pay the invoices directly. However, the agency is usually the guarantor of payment to the cell phone company if the employee fails to pay. Without fail, you should have an SOP for dealing with this common situation when the employee defaults. One good method is to insist that a default fund be maintained, so that it can be used instead of looking to the employer's guarantee.

INDEPENDENT CONTRACTOR

Frequently, clients ask me to review contracts for "independent contractors" that turn out to be actually part-time employees. The Washington State Department of Labor and Industries makes it difficult for a person who does not supply any equipment or

the labor of others, but only their own personal labor, to qualify as an independent contractor. There is a six-part test based on RCW 51.08.195; the putative independent contractor must meet all six parts to qualify. Here are the six parts: (1) Free from direction and control, both by contract and in fact. In other words, if in fact the agency controls the performance of work by supervision, the person probably is not an independent contractor. (2) The service is either outside the usual course of business of the employer, or outside all places of business, or the individual is responsible for the costs of the principal place of business. (3) The individual is customarily engaged in an independently established trade or business. A business license and other customers are helpful evidence. (4) The individual is responsible for filing a schedule of expenses with the IRS. (5) The individual has established an account with all applicable state agencies. (6) The individual maintains a separate set of books and records regarding income and expenses for his/her business.

As you can see from this test, most persons whom you hire or contract with to perform personal labor only should be carried on your books as employees, not independent contractors. We realize this is somewhat cumbersome, as the agency therefore has to comply with all applicable state laws, such as workers' compensation, unemployment, etc. and also some federal laws, such as those requiring withholding if the dollar thresholds are met. Therefore, when I learn of a proposal to hire someone to perform, for example, administrative tasks for a fire district, unless they can satisfy this six-part test my likely conclusion is that the agency must make them a part-time or full time employee.

RECENT DECISIONS:

Usually here I discuss reported appellate decisions, but this month I would like to tell you about a recent Superior Court case, in which I served as co-counsel. My client decided that it would be a good idea to adopt a Workplace Violence Prevention Policy, including a prohibition of any firearms at the fire station. There is substantial evidence that, across the United States, violence in the workplace is increasing. All too often today, the news pages are filled with stories of shootings at schools, courthouses, and other public places, which also happen to be some employees' places of work. Therefore, a lot of my clients have adopted such policies in recent years.

This policy was challenged by a citizen who apparently possesses a concealed weapon permit and who, for some unknown reason, would like to bring it into the fire station, for example, during Commissioner meetings, which of course are open to the public. We said "no" and he sued, alleging that such a prohibition is pre-empted by the state law, which does pre-empt the field with respect to governmental regulations pertaining to firearms. Citing the authority of Cherry v. Metro, 116 Wn. 2d 794, 808 P.2d 746 (1991), we argued that the law in no way prohibits employers, public or private, from protecting their workers or the general public from workplace violence.

The case has been appealed, but we are confident that the trial court will be affirmed. Agencies needing a workplace violence prevention policy should feel free to contact me.

DISCLAIMER