

No. 77300-9

SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Recall of:

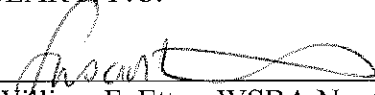
James E. West,

Mayor of the City of Spokane, Appellant

APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF

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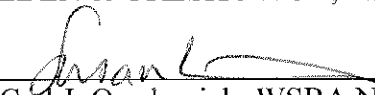
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I. SUMMARY OF ARGUMENT

Pursuant to RAP 10.3(f), Mayor West has attempted to limit this brief to address “new matters raised in the brief of amicus curiae.” First, RCW 29A.56.140 does not require the court to proactively advocate on behalf of a recall petitioner or remedy factual deficiencies in a recall charge, as argued by Mr. Hodgson and Mr. Stevens. (*Amicus Curiae Brief submitted by Mark D. Hodgson and Brant L. Stevens* (hereinafter “Hodgson Brief”), at 10.) Second, and contrary to arguments advanced in both amicus curiae briefs, whether there is a “factual basis” for a charge and whether a charge is “factually sufficient” are separate (albeit related) determinations. (*See Hodgson Brief*, at 5-7; *Amicus Curiae Brief submitted on behalf of the Neighborhood Alliance of Spokane County* (hereinafter “NASC Brief”), at 7.) Third, Mayor West addresses the attempt by amicus curiae to improperly expand *and* restrict this Court’s scope of review. (*See NASC Brief*, at 3, 9, 15-17, 19-20; *Hodgson Brief*, at 5.) Fourth, amicus curiae misrepresent or misinterpret the record and improperly submit multiple newspaper articles that are not part of the record. Finally, the briefs submitted by amicus curiae exemplify the danger of allegations founded on insinuation and innuendo, and illustrate the rationale for requiring a detailed description of alleged misfeasance. This Court should

hold newspaper stories, without additional corroborating evidence, are not a reliable source of “facts” to support a recall election.

II. ARGUMENT

A. Statutory Construction

1. RCW 29A.56.140 does not require the court to proactively advocate on behalf of a recall petitioner or remedy factual deficiencies in a recall charge.

The terms “charge” and “ballot synopsis” refer to separate documents which are prepared by different individuals at distinct stages in the recall process. The terms are not interchangeable. Under RCW 29A.56.110, a “legal voter” may “prepare a typewritten charge.” Under RCW 29A.56.130(1), the prosecuting attorney “shall formulate a ballot synopsis of the charge.”

Likewise, the terms “sufficiency” and “adequacy” are not interchangeable. RCW 29A.56.140 obligates the superior court to make two separate determinations: (1) “whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed” (i.e., the sufficiency of an emphasis recall charge), “and (2) the adequacy of the ballot synopsis.” (Emphasis added). The distinction between these two determinations is critical.

RCW 29A.56.110 specifies the criteria for evaluation of the sufficiency of a recall charge. “The charge shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or person making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.” RCW 29A.56.110. Under RCW 29A.56.140, the superior court evaluates the sufficiency of the charges.

RCW 29A.56.130(2) specifies the content of the ballot synopsis prepared by the prosecuting attorney. “The synopsis shall set forth the name of the person charged, the title of the office, and a concise statement of the elements of the charge.” Under RCW 29A.56.140, the superior court “shall correct any ballot synopsis it deems inadequate.” (Emphasis added). Amicus contends this means the court must “ensure that a ballot synopsis [] properly reflect[s] the factual record” and “meet[s] statutory requirements.” (*Hodgson Brief*, at 10.) Amicus cites no authority in support of this contention.

The position advanced by amicus would require the court to proactively advocate on behalf of recall petitioners (as Judge Matheson

did in this case). The fallacy of this position is evidenced by the many cases rejecting charges as insufficient. If courts had an affirmative duty to remedy all “procedural errors, substantive errors, insufficient facts [and] other mistakes” as amicus argues, charges would not be rejected but would be re-written. The legislature did not intend to impose such an affirmative obligation on the courts.

To the contrary, the “1976 and 1984 amendments to the recall statute [] clearly disclose an intent by the Legislature to limit the scope of the recall right to recall for cause” *Cole v. Webster*, 103 Wn.2d, 280, 283, 692 P.2d 799 (1984). Prior to the amendments, “a narrow scope of review based on the court’s traditional role of nonintervention in political controversies ... allowed the court to uphold nearly every recall petition.” *Chandler v. Otto*, 103 Wn.2d 268, 271, 693 P.2d 71 (1984). The amendments broadened the court’s scope of review thereby allowing courts to reject charges lacking a factual basis. *Id.*

RCW 29A.56.140 does not require courts to remedy factual deficiencies as amicus contends. (*See Hodgson Brief*, at 7-8.) Nor does the statute require the court to consider “the context, intent and legal inexperience of the petitioner when determining the adequacy of a ballot synopsis.” (*Id.* at 12.) This Court need not adopt the definitions and interpretations advanced by amicus to protect the voters’ right of recall for

cause. Ms. Sullivan and the voters in the City of Spokane will not be denied “legitimate remedies” if this Court defines “correct” to mean something less than wholesale re-writing. (*See Hodgson Brief*, at 11-13.) In fact, Ms. Sullivan (or any other voter in Spokane) may file another petition at any time.

2. Whether there is a “factual basis” for a charge and whether a charge is “factually sufficient” are separate, but related, determinations.

RCW 29A.56.110 specifies the criteria for evaluation of the sufficiency of a recall charge. “The charge shall state the act or acts complained of in concise language, [and] give a detailed description including the approximate date, location, and nature of each act complained of” (Emphasis added). To be “factually sufficient,” a charge must satisfy these specificity requirements. *In re Recall of Ackerson*, 143 Wn.2d 366, 374, 20 P.3d 930 (2001). The “factual sufficiency” of a charge must be determined from its face. *In re Recall of Carey*, 132 Wn.2d 525, 527, 939 P.2d 1221 (1997) (“the sufficiency of a recall petition must be determined from its face”); *Teaford v. Howard*, 104 Wn.2d 580, 586, 707 P.2d 1327 (1985) (“the charge must on its face show the official acted wrongfully”).

In addition, RCW 29A.56.110 requires that a charge “be signed by the person or person making the charge, . . . and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.” “Although there is no requirement that the petitioner have firsthand knowledge of the facts, 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 (2003). To satisfy this knowledge requirement, there must be a “factual basis” for the charge. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 766, 10 P.3d 1034 (2000); *In re Recall of Anderson*, 131 Wn.2d 92, 96, 929 P.2d 410 (1997).

Whether there is a “factual basis” for a charge and whether a charge is “sufficient” are separate, but related, determinations. The former relates to the knowledge requirement, while the latter relates to the specificity requirement. While the court may go beyond the petition “for the purpose of determining whether there is any factual basis for the charges,” *In re Recall of Beasley*, 128 Wn.2d 419, 427, 908 P.2d 878 (1996), the “sufficiency” of a charge must be determined from its face. *Carey*, 132 Wn.2d at 527. See RCW 29A.56.140 (superior court shall determine “whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed” and may “hear arguments as to

the sufficiency of the charges”). (Emphasis added). Put another way, the court may consider affidavits and/or testimony to determine whether the petitioner has knowledge of “identifiable facts” that support the charges, *Pearsall-Stipek*, 141 Wn.2d at 765, but the charge itself must “give a detailed description including the approximate date, location and nature of each act complained of.” RCW 29A.56.110.

Amicus argue this Court should disregard the unambiguous language of the statute. (*NASC Brief*, at 7 citing *In re Recall of Kast*, 144 Wn.2d 807, 814, 31 P.3d 677 (2001), *Ackerson*, 143 Wn.2d at 373, and *In re Recall of Feetham*, 149 Wn.2d 860, 872-73, 72 P.3d 741 (2003)); (*Hodgson Brief*, at 5-7.) Neither *Ackerson* nor *Feetham* are on point. The *Ackerson* court rejected the petitioner’s argument that an “alleged admission” was a “sufficient context from which to infer unlawful intent.” *Ackerson*, 143 Wn.2d at 373. The *Feetham* court denied a motion for leave to submit additional evidence on review because “[a]ny evidence ... that may rebut the charges is not helpful in determining whether the charges are valid on their face.” *Feetham*, 149 Wn.2d at 873.

In *Kast*, this Court stated “a petition should not fail for a mere technical violation of [RCW 29A.56.110] if the electorate has sufficient information to evaluate the charge” *Kast*, 144 Wn.2d at 814 (emphasis added). This Court also stated: “Moreover, we may look to

supporting affidavits to determine whether a petition is factually sufficient.” *Id. citing Beasley*, 128 Wn.2d at 427. The latter statement is correct because the “factually sufficiency” test incorporates the knowledge requirement. *Carey*, 132 Wn.2d at 527 (“Generally, to be factually sufficient, the petition must state in detail the acts complained of, and the petitioner must have knowledge of identifiable facts which support the charges.”) (Emphasis added). The *Kast* court’s second statement should not be read as conflicting with the unambiguous language of RCW 29A.56.110.

In this case, the superior court erred by going beyond the petition for a purpose other than determining whether Ms. Sullivan has knowledge of identifiable facts supporting her charges. While the court has authority to determine whether there is a “factual basis” for a charge, it does not have the authority to solicit or consider new information for the purpose of re-writing the charge.

B. Scope of Review

This Court’s primary task is to evaluate the legal and factual sufficiency of Charge II in light of the statutory criteria. Charge II reads: “James E. West, Mayor of the City of Spokane, committed acts of misfeasance in that: He solicited internships for his own personal uses.” Charge II mirrors one of the allegations in the Sullivan Petition: “[Mayor

West] admitted soliciting internships for young men for his own personal uses.”

The threshold issue before this court is whether these words satisfy the statutory criteria. (*Appellant’s Brief*, at 1 (Assignment of Error 1)). NASC essentially concedes that they do not. At page 12 of its brief, NASC comments on the “weakness in the initial petition.” At page 2, NASC asserts: “The petition submitted by Shannon Sullivan, supported by attachments and court-admitted exhibits, is factually and legally sufficient” (Emphasis added). Likewise, Mr. Hodgson and Mr. Stevens concede “the original ballot synopsis as drafted by the prosecutor failed to include certain facts” (*Hodgson Brief*, at 3.) Amicus curiae do not argue that Charge II (or the underlying allegation in the Sullivan Petition) is sufficient. Instead, they focus on Charge I (which has been dismissed) and the Judge’s Charge. (*See, e.g., Hodgson Brief*, at 4-5; *NASC Brief*, at 11-13.)

1. The superior court’s disposition of Charge I is not at issue.

Mayor West appealed the superior court’s determination that Charge II of the Prosecutor’s Ballot Synopsis was factually and legally sufficient. (*See Notice of Appeal and Appellant’s Brief*, at 1 (Assignment of Error 1)). Ms. Sullivan did not appeal the superior court’s decision to dismiss Charges I and III of the Prosecutor’s Ballot Synopsis. (*See*

Respondent's Brief, at 1) (“Respondent finds no assignment of error”). The only issues before this Court pertain to Mayor West’s appeal and assignments of error.

Because Ms. Sullivan did not cross appeal, NASC’s attempt to resurrect allegations incorporated in Charge I is improper. NASC has no authority to appeal the superior court’s decision or to raise issues not raised by the parties. *See* RAP 3.1 and 10.6(b). Nonetheless, NASC repeatedly refers to the Sullivan Petition in its entirety. For example, at page 3 of its brief, NASC argues that the Sullivan Petition “alleged that the mayor had admitted to multiple dates of computer misconduct.” This allegation was incorporated in Charge I of the Prosecutor’s Ballot Synopsis, was dismissed by the superior court, and is not at issue on appeal. At page 9 of its brief, NASC again refers to “several dates that Mayor West had allegedly admitted to abuse of his city computer privileges with young men” No dates or admissions are referenced in Charge II, the only Charge on appeal.

Charge I was dismissed because Ms. Sullivan had no factual support for the allegation that Mayor West admitted “he abused his computer privileges on a City owned computer to interact with young men on a gay web site.” (RP 45:3-17). In fact, there is no evidence supporting the allegation, and Mayor West has repeatedly denied such accusations.

(See *Appellant's Reply*, at 15; CP 69-71.) NASC's ploy to expand the scope of review to include allegations in Charge I should be rejected.

2. The Judge's Charge is insufficient.¹

Amicus curiae erroneously assert Mayor West did not challenge the sufficiency of the Judge's Charge. (*Hodgson Brief*, at 5.) To the contrary, at a minimum, Assignment of Error 5 and Issues Pertaining to Assignments of Error 2, 4, 6, and 11, relate to the sufficiency of the Judge's Charge. (See *Appellant's Brief*, at 1-3.) Mayor West's arguments with respect to these issues will not be repeated here. In addition, the Judge's Charge is insufficient for the following reasons.

First, the Judge's Charge fails to comply with statutory requirements because it does not "recite" that Mayor West committed an act of misfeasance in office. RCW 29A.56.110. Moreover, as recognized by NASC, the Judge's Charge "does not specifically refer to a statutory rule violated by Mayor West" (*NASC Brief*, at 15.)

Second, the Judge's Charge states: "Mayor West admits these conversations" referring to internet conversations during which Mayor West allegedly "sent a photograph of himself to [the consultant], raised

¹ Mayor West contends the superior court exceeded its authority by drafting a new charge incorporating new information after the sufficiency hearing. (See *Appellant's Brief*, at 26-28; *Appellant's Reply*, at 5-7. If this Court agrees, then the content or sufficiency of the Judge's Charge is not at issue.

issues of sex, discussed dating, and urged [the consultant] to keep [his] identity a secret.” (CP 89.) There is no factual basis for the alleged admission in the record. (See CP 11) (“West acknowledged he’d recently begun to seek out young men on the Internet”); (CP 81) (“West ... admitted his online relationships with the 18-year old and Moto Brock.”) Thus, there is no “factual basis” for the alleged admission.

Third, even if there were such an admission, it would not constitute an “admission of wrongdoing” as NASC asserts. (*NASC Brief*, at 13.) While Mayor West’s alleged conduct may be offensive to some, there is nothing illegal or wrongful about internet dialogue between consenting adults. NASC’s assertion that Mayor West’s purported admission proves “a prima facie case of the mayor’s intent to violate the law” is untenable.

3. No violation of the Spokane Municipal Code has been alleged.

NASC’s attempt to inject the Spokane Municipal Code into these proceedings is improper. (*NASC’s Brief*, at 15-17, 19-20.) The Code was not mentioned in the Sullivan Petition, the Prosecutor’s Ballot Synopsis or the Judge’s Charge. Moreover, NASC’s argument that Mayor West violated the Code is unpersuasive.

The plain language of SMC § 36 evidences Spokane’s intent that officers of the city refrain from having financial conflicts of interest with the city, whereby they stand to profit personally from city contracts of

which they are a participant. NASC's singling out the words "benefit" and "service" and argument that the terms mean personal benefit from a relationship, or sexual benefit, is improper under the doctrine of *noscitur a sociis*. Under SMC § 36 (b), an officer shall not "have or acquire any interest *in* such contract or transaction, or ... have solicited, accepted or granted a present or future *gift, favor, service or other thing of value* from or to any person involved in a contract or transaction with the City of Spokane." SMC § 36 (b) (emphasis added). This section clearly refers to financial interests in city contracts, and the term "service" must be read in conjunction with "gift, favor, or other thing of value," all of which refer to financial or proprietary interests.

NASC again attempts to read out of context the phrase "free from all influence or benefit to" in SMC § 36(c). The next sentence in that section reads: "[t]his shall apply to the solicitation or receiving of any *pay, commission, money or other thing of value, or any benefit, profit or advantage, directly or indirectly...* ." SMC § 36 (c). Again, this section focuses on financial and proprietary interests. Nothing within SMC § 36 prevents a public official from suggesting to an individual that they should apply for an internship, so long as the public official does not stand to receive any financial or proprietary benefit.

NASC argues that the “contract or transaction” in question is the potential employment contract between the City of Spokane and the fictional Spokesman Review employee passing himself off as a high school student. However, no contract was entered into, or even considered, since the fictional high school student never actually applied for an internship. Further, as noted by Mayor West’s e-mail, he merely referred the individual to the person responsible for hiring interns. NASC’s assertion that Mayor West clearly violated ethical standards is pure hyperbole.

C. The Record

1. The newspaper stories submitted by NASC are not part of the record.

NASC’s attempt to broaden and/or confuse the issues by submission of multiple newspaper articles is improper. The materials submitted in NASC’s brief at Appendix B are not part of the record on review and should be disregarded. RAP 10.3(a)(7). This Court should reject NASC’s argument based on the newly submitted materials.

This Court should also reject NASC’s suggestion that the statutory specificity requirements may be relaxed in cases involving “extensive media coverage.” (*NASC Brief*, at 10.) According to NASC, Mayor West

would have been “sufficiently informed” if he had read “the contemporaneous reporting in the *Spokesman Review* at Appendix B.” (*Id.*) Obviously, Mayor West is not required to wade through “deluge of media coverage” (*Id.*, at 11) to determine the nature of the charges against him.

2. NASC misrepresents or misinterprets the record.

NASC’s recitation of the “facts” at pages 17 and 18 is inaccurate and improperly incorporates information not in the record. (*NASC Brief*, at 17-18.) For example, NASC implies Mayor West offered “Moto Brock” gifts immediately “following a discussion of appropriate timing for initial sexual relationships,” citing CP 73-76. (*Id.* at 17-18.) In fact, the record shows Moto Brock had just informed Mayor West of his upcoming 18th birthday.² According to the *Spokesman-Review* summary of the transcript,³ Mayor West “wishes him happy birthday and says he wants to send a present of his choosing.” (CP 74.)

² The assumed age of Moto Brock (i.e., the *Spokesman-Review* consultant) was part of the newspaper’s ploy to entrap Mayor West. (CP 81) (“Once in the chat room, which has a policy that all participants be 18, the consultant changed his age to 17 because the newspaper wanted to know whether West was using the Web to meet underage children.”)

³ Mayor West cautions the Court to distinguish between actual transcripts of online conversations, and the *Spokesman-Review*’s editorial summations. Ms. Sullivan and amicus fail to do so.

NASC claims Mayor West asked Moto Brock if he had applied for an internship and assured him he would get it, citing CP 79-81. (*NASC Brief*, at 18.) The referenced clerk’s papers include no such conversation. NASC mistakenly states the March 21st email was dated April 29th. (*Id.*) NASC discusses alleged incidents of “mutual online masturbation,” citing CP 79-81. The record does not include the attributed quote. (CP 81.) Yet, according to NASC, the public may “infer” Mayor West sought “to receive a benefit for his own personal uses” from these “facts.” (*NASC Brief*, at 19.)

3. Hodgson and Stevens misrepresent or misinterpret the record.

The ambiguous nature of the allegations in Charge II and supporting record is demonstrated by the various interpretations of amicus curiae. According to Mr. Hodgson and Mr. Stevens, “[t]he allegations in the ballot synopsis ... charge Mayor West with drafting a letter of recommendation for an intern in an effort to obtain personal gratification through his relationship with the teenager.” (*Hodgson Brief*, at 3.) At page 16 of their brief, Hodgson and Stevens state: “The Amended Ballot Synopsis alleges ... Mayor West offered the letter of recommendation in his official capacity for personal (sexual gratification)”. (*Id.*, at 16.) Hodgson and Stevens’ interpretation of the Judge’s Charge (as well as Charge II) has no factual basis. There is no “letter of recommendation” in

the record. No letter of recommendation was offered in exchange for “sexual gratification.”

D. Insinuation and Innuendo

Hodgson and Stevens’ factually unsupported and conclusory allegation that Mayor West offered a nonexistent “letter of recommendation” for “sexual gratification” exemplifies the danger of allegations founded on insinuation and innuendo, and illustrates the rationale for requiring a detailed description of the alleged misfeasance.

This Court has held that in respect to the recall process, a petitioner’s “information sources” must be “sufficiently reliable to meet the statutory requirement” and “support a recall demand.” *In re Recall of Zufelt*, 112 Wn.2d 906, 908-909, 774 P.2d 1223 (1989). The Court has also previously acknowledged that purported “information sources”, such as rumor and insinuation, are not sufficient to meet reliability requirements. Simply stated, if a recall petitioner’s information sources aren’t sufficiently reliable, the recall petition is insufficient.

The information source for Ms. Sullivan’s recall petition is primarily (if not exclusively) articles published by the Spokesman-Review, which reported and editorialized on the events and conduct it contrived and created. To permit a recall election based on the Spokesman-Review stories would be to accept and incorporate into law,

journalistic tactics and techniques widely criticized within the journalism profession. The Spokesman-Review itself acknowledges this criticism but defends its techniques on the basis that subterfuge and artifice was justified by the exceptional circumstances involved in its investigation.

This Court, however, should not permit information derived from newspaper stories (based on alleged conduct contrived and created by a newspaper straw man) to satisfy reliability standards required by statute and case law. While there are no cases in Washington addressing whether newspaper stories based on the reports of an unidentified consultant constitute a sufficient factual basis for a recall election, the cases clearly suggest that newspaper articles are insufficient. *See In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990) (charge held factually and legally insufficient where petitioner “based the charges largely on newspaper articles and letters to the editor”); *Beasley*, 128 Wn.2d 419 (refusing to permit recall election based on comments reported in newspaper stories). This Court should hold newspaper stories, without additional corroborating evidence, are not a reliable source of “facts” to support a recall election.

Dated this 17th day of August 2005.

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I hereby certify that on the 19th day of August, 2005, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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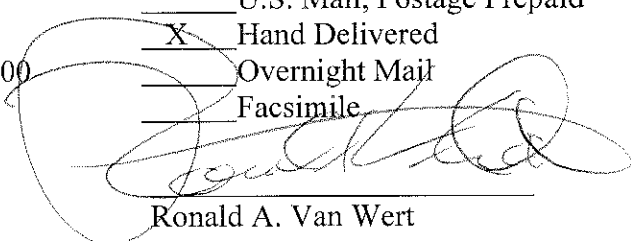
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