MEMORANDUM

State of Alaska
Department of Law

TO: Sandra Stout
Director of Elections
Office of the Lt. Governor

DATE: September 25, 1996

FILE NO.: 663-97-0101

TELEPHONE NO.: 465-3600

SUBJECT: Application for Petition to Recall Chair of Yukon-Koyukuk REAA Board

FROM: John B. Gaguine
Assistant Attorney General
Governmental Affairs Section - Juneau

You have asked us to review an application for a petition to recall the chair of the Yukon-Koyukuk Regional Education Attendance Area (REAA) School Board, and to determine if the application is legally sufficient to allow the beginning of the petition process. We conclude that it is not sufficient, and must be returned to the submitter.

Under AS 14.08.081, the members of an REAA school board are subject to recall in accordance with provisions of Title 29 relating to recall (AS 29.26.240--29.26.360), "except that the director of elections shall perform the functions of a municipal clerk." Under AS 29.26.270, the municipal clerk must determine whether an application meets the requirements of AS 29.26.260(a), which are

> (1) the signatures and residence address of at least 10 municipal voters who will sponsor the petition;
>
> (2) the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent; and
>
> (3) a statement in 200 words or less of the grounds for recall stated with particularity.

We conclude that the application must be rejected because it does not specify that the 11 voters who signed it are willing to act as sponsors. The cover letter sent with the application speaks of "our sponsors," presumably referring to the 11 voters. However, in our opinion the document signed by the voters must reflect the necessary willingness.

In reaching this conclusion we are following a prior opinion that we issued. In 1991 Inf. Op. Att'y Gen. 71 (Jan. 15; 663-90-0393), we wrote:

> The applicants should change the proposed petition's introductory language to indicate that the undersigned registered voters are applying for the recall petition as sponsors. Inclusion of this language will provide assurance that the voters who sign any new proposed petition do so as sponsors who assume the duties of sponsors in circulating the petition. This is important because, once an application for a recall petition is found to meet the requirements of AS 29.26.260, the recall petition that is prepared for circulation must include "a statement, with space for the sponsor's sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures to be those of the persons whose names they purport to be." AS 29.26.270(a)(6).

See also 1993 Inf. Op. Att'y Gen. 291 (July 26; 663-93-0419).

Assuming that the applicant will correct this minor technical deficiency and resubmit the application, we will also address whether the application complies with AS 29.26.260(a)(3), quoted above. We believe that this application is defective, at least in part, because it alleges legally insufficient grounds for recall.

Grounds for recall are specified, in AS 29.26.250, as "misconduct in office, incompetence, or failure to perform prescribed duties." In addition, as noted above, an application for a recall petition must contain "a statement in 200 words or less of the grounds for recall stated with particularity."

The application here gives the following statement, which meets the length requirement:

> He demonstrates unethical, sexist behavior toward woman [sic], specifically towards the only woman member of his Board:
>
> > By ignoring her attempts to provide input and removing her from a Standing Committee without her consent, against Board Policy. During the 1996 February meeting, he shut-off the tape recorder and intimidated her with profanity and physical gestures, demonstrating lack of personal integrity.
> >
> > During the 1996 April meeting, he was rude to a female parent, interrupting her testimony, showing no respect for her concerns.

> He makes Board decisions without Board approval, against Board action, and in violation of Board Policy. He doesn't meet the general qualifications as listed in policy. (1.1a)
>
> > He signed a certified personnel contract, after the Board denied that contract.
>
> He has allowed decisions to be made without regarding the will of the people:
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> > The decision to adopt the budget, closing Northwind School was made prior to public testimony, disregarding public input.
>
> He doesn't adequately perform the duties as listed in Board Policy (1.1b).
>
> He doesn't perform the duties of Chairman as listed in Board Policy (1.2c).

We believe that some of the allegations are legally sufficient, but that others are not.

The seminal case upon which we rely in reaching this conclusion is *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984). In that case, the Alaska Supreme Court determined that statutes relating to recall should be liberally construed so that the people are permitted to vote and express their will. *Id.* at 296. The court observed that because the recall process is fundamentally political the purposes of recall are not well served "if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute." *Id*. In reviewing the sufficiency of grounds for recall stated in an application, you are not required to make "significant discretionary decisions of a legal nature" [*id*.], nor are you called upon to assess the truth or falsity of the allegations made. *Id*. at 300 n.18.[1]

The form of this application is unusual, which makes it somewhat difficult to assess. As noted above, the application contains five general allegations, with specific factual allegations given in support of the first three general allegations.

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[1] In a recent municipal recall case, *Von Stauffenberg v. Committee for an Honest and Ethical School Board*, 903 P.2d 1055 (Alaska 1995), the supreme court elaborated on *Meiners*. In *Von Stauffenberg* the court ruled that officials cannot be recalled •for legally exercising the discretion granted to them by law.• *Id*. at 1060 (footnote omitted). It also ruled that allegations claiming that a school board met in executive session in violation of Alaska law, but not explaining why the executive session was illegal, failed to meet the particularity test. *Id.*

First, we believe that the last two general allegations, unsupported by specifics, do not meet the statutory "particularity" requirements. We addressed a similar situation in 1989. *See* 1989 Inf. Op. Att'y Gen. 205 (Sept. 25; 663-90-0009). Among the allegations presented by the application which was the subject of that opinion were the following:

> 2. Failure to perform the duties as prescribed to the benefit of the board rather than promote personal interest. Has demonstrated complete incompetence and unwillingness to work with school district employees and administration to gain knowledge of the prescribed duties of school board members. Has failed to live up to the standards of conduct as prescribed in the School Board Code of Ethics and board policy.
>
> 3. Has repeatedly attempted to use his position on the board for personal or family gain. Has repeatedly been involved with the teachers union in issues dealing with negotiations and personnel policy without concern for the school board's position on these issues.

We wrote that,

> Allegation 2 fails because there is no description of the conduct itself. Petitioners do not state •how• the board member has failed to perform the duties of his office or how he has failed to •live up to the standards of conduct as prescribed in the School Board Code of Ethics and board policy.• What provisions of the School Board Code of Ethics did he allegedly violate?
>
> In allegation 3, the board member is accused of having •repeatedly attempted to use his position on the board for personal or family gain.• Once again, there is no description as to •how• he has used his position in violation of law. There is not one event described. And, the allegation that he has •repeatedly been involved with the teachers union in issues dealing with negotiations and personnel policy without concern for the school board•s position on these issues,• is similarly vague. It literally indicates that the board member adheres to policies with which petitioners evidently disagree. Petitioners fail to state how the board member•s involvement with the teachers union in unlawful conduct. Did he commit an unfair labor practice? This allegation, like allegation 2, fails to state, even at a minimum, the what, where, or how of the misconduct so that the officeholder knows what conduct to defend in a rebuttal.

We believe that our observations in 1989 are applicable to the last two general allegations here.

We believe that the first three general allegations, supported by specifics, do allege sufficient grounds to warrant the issuance of petitions. Again, we are guided by our past opinions.

In 1988 Inf. Op. Att•y Gen. 255 (April 22; 663-88-0462), we reviewed another application for a petition to recall an REAA chair. Among the allegations in that petition were the following:

> B. During the March 1, 1988 CRSD meeting, a new member was questioning Board decision regarding the validity of a Principal•s rehire. Chairman [John Doe] leapt up, gavelling down the board member with a loud shout of •Shut Up!• He then displayed similar behavior to a parent in the audience objecting to initial outburst.
>
> C. During the February 2, 1988 CRSD meeting another new board member wished to abstain from voting on the Superintendent•s contract. Against accepted Board procedures, [Doe] stated the board member could not abstain, forcing the member to vote against his wishes.

We concluded that these two allegations probably were sufficient to allege incompetence, •since voters could conclude that those charges, if true, call into question the ability and fitness of the school board chairman to discharge his office.•[2]

The first allegation in this application is rather similar to allegation B addressed in our 1988 opinion, and the second allegation in this application is rather similar to allegation C (as both allege violation of board policy).[3] The third allegation here is somewhat closer, but given the liberal construction to be given to recall allegations, we believe that it too can be seen as encompassing an allegation of incompetence or failure to perform prescribed duties.

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[2] Prior to making this statement, we had set out the definition of •incompetency• from Black•s Law Dictionary:

> Lack of ability, legal qualification, or fitness to discharge the required duty. A relative term which may be employed as meaning disqualification, inability or incapacity and it can refer to lack of legal qualifications or fitness to discharge the required duty and to show want of physical or intellectual or moral fitness.

[3] However, if this application is resubmitted, the submitters should exclude the final sentence of the second general allegation, which states that •[h]e doesn•t meet the general qualifications as listed in policy.• This is not particular, and it has nothing to do with the alleged signing of the personnel contract. If this sentence is not deleted on resubmission, we will recommend that you delete it, as you are authorized to do so by *Meiners* (687 P.2d at 303).

We note that the application nowhere contains the words in AS 29.26.250; it does not contend that the chair is guilty of "misconduct in office, incompetence, or failure to perform prescribed duties." It is not clear that an application must contain these words; we would likely recommend acceptance of an application charging the recall target with a violation of a specific criminal statute (theft, for example) even if the application did not allege that this conduct constituted "misconduct in office." However, in order to avoid further delay, and a possible challenge by the recall target, it would seem preferable that a resubmitted application contain these words.

It is likely that the chair strenuously disagrees with some or all of the factual allegations contained in the application. However, as previously noted, it is not your role to assess the truth or falsity of the allegations. As the supreme court noted,

> [the] rebuttal statement is the proper forum in which the official may defend against the charges. If the petition alleges violation of totally non-existent laws, then it would not allege failure to perform prescribed duties. But that is not the case here. Where the petition merely characterizes the law in a way different than the official (or his or her attorney) would prefer, he or she has an opportunity to put his or her rebuttal before the voters, alongside the charges contained in the petition. It is not the place of the municipal clerk or the Director of Elections to decide legal questions of this kind.

Meiners, 687 P.2d at 301. *See also Von Stauffenberg*, 903 P.2d at 1060.

For the above reasons, we recommend that the application be rejected. We also recommend that you send the submitter this opinion and the opinions attached to it. [4] You should advise the submitter that there is no waiting period for the submission of a new application, so that a revised application may be submitted at any time.

JBG:jn

[4] In addition to the opinions cited in this opinion, we are enclosing 1987 Inf. Op. Att•y Gen. 347 (May 28; 663-87-0504).