

September 30, 2014

Gail Fenumiai
Director, Division of Elections
PO Box 110017
Juneau, AK 99811-0017

Re: *Review of Application for Recall of John Atchak*
AGO No. JU2014200727

Dear Ms. Fenumiai:

You have asked for our opinion regarding the application for a petition to recall the chair of the Kashunamiut School District regional school board, John Atchak.¹ The school board is comprised of five members, including Mr. Atchak.

Regional school board members can be subject to recall under AS 14.08.081, which adopts by reference the recall procedures of AS 29.26.240-.360.² Alaska Statute 29.26.270 requires the director of the Division of Elections to review the recall application and prepare a recall petition if the application meets the requirements of AS 29.26.260.

As a preliminary matter we note four deficiencies in the recall application. First, the application does not include a statement that the voters who signed the proposed petition did so as sponsors under AS 29.26.260(a)(1). The applicants can correct this deficiency by submitting a new petition with appropriate language and a new

¹ The Kashunamiut School District is in Regional Educational Attendance Area number 22 ("REAA 22), and is located in Chevak, Alaska. Mr. Atchak's term began in October 2013 and will end in October 2016. *See* REAA 22 School Board Members (last updated Nov. 20, 2013), at http://www.elections.alaska.gov/doc/recr/current_seats/REAA22_Board.pdf.

² For an REAA recall under AS 14.08.081, the Director of the Division of Elections performs the functions of a municipal clerk set out in AS 29.26.240-360.

application.³ Second, there is no indication that the grounds for recall were attached to or otherwise circulated with the recall application's signature pages.

We recommend that each signature page include a statement that the sponsors are qualified voters who signed the application with the description of the recall grounds attached.⁴ Third, the application did not include the residence addresses of the sponsors. Any future application should contain this information. Finally, the application did not include the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent. Any future application should also contain this information.

In order to avoid further delay in the processing of any new application, we have also reviewed the allegations set out in the proposed petition to determine whether they are sufficient to state grounds for recall. In our opinion, the grounds for recall stated in the application fail to satisfy the requirements of AS 29.26.260(a)(3). Therefore, we recommend that the Division of Elections not prepare the recall petition.

I. Background.

On September 12, 2014, a group of persons purporting to be the registered voters of Chevak and the Kashunamiut School District filed an application to recall board member John Atchak. The application provided the following summary of the grounds for recall (verbatim):

(1) FAILING TO ACT in the best interests of the students, school district, and community; (2) Consistently IGNORING to address parent and community concerns; (3) Allowing changes to occur WITHOUT BOARD AND COMMUNITY APPROVAL; (4) Total disregard for school district policies and Board member code of ethics.

The application references none of the statutory grounds for recall: (1) misconduct in office; (2) incompetence; or (3) failure to perform prescribed duties.

The application was also missing the following: the residence address of voters who signed the application; any indication that they signed as sponsors; any indication that they signed with the grounds for recall attached; and the name and address of the contact person and an alternate to whom all correspondence relating to the petition may

³ See 2010 Op. Alaska Att'y Gen. at 2 (June 7).

⁴ AS 29.26.250.

be sent. The only additional material with the application was the envelope it came in and a return addressee of “Edgar Knight, Sr.” listing a P.O. Box in Chevak.

II. Applicable law.

The director of the Division of Elections is tasked with reviewing this application to determine whether it satisfies the requirements of AS 29.26.260. That statute requires: (1) the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition; (2) the name and address of a 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.

Under AS 29.26.250, there are three grounds for recall of a regional school board member; (1) misconduct in office;⁵ (2) incompetence;⁶ and (3) failure to perform prescribed duties. The statute does not specify a timeframe in which the application review process must take place.

There are several cases in Alaska on the subject of recall and several opinions from this office. We have discussed this body of authority at length in those opinions, and do not need to repeat it here.⁷ For purposes of this opinion, we confine our discussion to published court decisions.

⁵ “Misconduct in office” is not defined in the recall statutes. *Black’s Law Dictionary* 1089 (9th ed. 2009) defines “misconduct” as “[a] dereliction of duty; unlawful or improper behavior;” and “official misconduct” as “[a] public officer’s corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance.” The term “embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.” See 1988 Inf. Op. Att’y Gen. at 3 (Apr. 22; 663-88-0462) (quoting *Black’s Law Dictionary* (5th ed. 1979)) (recall of Copper River School District Board Chairman).

⁶ “Incompetence” is not defined in the recall statutes. *Black’s Law Dictionary* (5th ed. 1979) defines “incompetence” as “[t]he state or fact of being unable or unqualified to do something.”

⁷ See 2013 Op. Alaska Att’y Gen. (Dec. 6) (recall of state house representative); 2011 Op. Alaska Att’y Gen. (Oct. 3) (recall of state house representative); 2010 Op. Alaska Att’y Gen. (June 7) (recall of Annette Island School District board chair); 2007 Op. Alaska Att’y Gen. (July 19) (recall of Chatham school district board members); 2006 Inf. Op. Att’y Gen. at 4-5 (Jan. 17; 663-06-0075) (recall of Alaska Gateway school board

The seminal case on recall is *Meiners v. Bering Strait School District*, which involved an attempt to recall an entire REAA school board.⁸ The court emphasized that recall statutes, like initiative and referendum statutes, “should be liberally construed so that ‘the people [are] permitted to vote and express their will.’”⁹ The court was cautious to avoid creating artificial technical hurdles because the court concluded that “the recall process is fundamentally a part of the political process.”¹⁰

At issue was whether the asserted grounds for recall were sufficient under the recall statute. The court emphasized that it was not proper to determine the truth of the recall allegations. Rather, the court assumed that the alleged facts were true and ruled upon them similar to a court ruling on a motion to dismiss for failure to state a claim.¹¹ The court reviewed the asserted allegations to determine whether they sufficiently stated a claim for “failure to perform prescribed duties” (one of the specified grounds in the recall statute).

The recall committee in *Meiners* claimed that the board failed to control a superintendent who had allegedly spent money on non-district purposes. The court held that the board was statutorily required to “employ” the superintendent, and that this duty implied that the board would exercise a certain amount of non-discretionary control and supervision over the superintendent. Therefore, the court held that the allegation sufficiently stated a claim for failure to perform prescribed duties.¹²

The recall committee also alleged various infractions of laws relating to open meetings. The court held that these allegations also stated a claim for failure to perform prescribed duties and were sufficiently particular.¹³ The court additionally held that

members); 2005 Inf. Op. Att’y Gen. (Nov. 2; 663-06-0075) (recall of Alaska Gateway school board member); 2005 Inf. Op. Att’y Gen. (Sept. 7; 663-06-0036) (recall of state senator).

⁸ 687 P.2d 287 (Alaska 1984).

⁹ *Id.* at 296 (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)).

¹⁰ *Id.*

¹¹ *Id.* at 300 n.18.

¹² *Id.* at 300.

¹³ *Id.* at 301-02.

inaccurate legal statements or lack of legal citation would not invalidate the application. The court wanted to avoid “wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters.”¹⁴

However, the court explained that the particularity requirement served an important purpose, holding that allegations that are insufficient to state grounds should not be included in a petition because “[i]t might force the target official to expend most of his 200 words of rebuttal fending off charges, which although legally insufficient for recall, he fears may garner the voters’ attention.”¹⁵

In *Von Stauffenberg v. Committee for an Honest and Ethical School Board*,¹⁶ the court again addressed a recall attempt against several school board members. In two of the allegations, the recall committee alleged that board members committed misconduct and failed to perform prescribed duties by going into executive session to consider the continued retention of an elementary school principal. Applying the standards set forth in *Meiners*, the court concluded that it was legal to consider “sensitive personnel matters” in executive session. The court held that the legal exercise of discretion by a public official (*i.e.* deciding as a matter of discretion whether to discuss personnel matters in executive session) cannot be a ground for recall. Moreover, because the allegations did not describe why going into executive session violated the law, the court held that they were not sufficiently particular. These allegations failed to state a claim and therefore were insufficient.¹⁷

From these two cases, we conclude that courts do not require recall committees to perfectly articulate the grounds for recall. But the courts do require that a recall application include a sufficient amount of detail so that the basis for recall is understandable—that is, the grounds must be factually sufficient. Moreover, an application that alleges lawful conduct will not support a petition for recall—in other words, the grounds must also be legally sufficient. These precedents guide our analysis of this application, which we turn to next.

¹⁴ *Id.* at 301.

¹⁵ *Id.* at 302.

¹⁶ 903 P.2d 1055 (Alaska 1995).

¹⁷ *Id.* at 1060.

III. Analysis.

Alaska Statute 29.26.260(a) sets forth three requirements for a recall application. We discuss each in turn, and conclude that none is satisfied. Accordingly, there are three independent bases to reject this recall application.

A. Signatures and residence addresses.

Alaska Statute 29.26.260(a)(1) requires “the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition.”¹⁸ Although more than ten signatures appear on the application, there are no residence addresses listed, and no printed names, so it is not possible for the Division to verify the signatures. Further, when sponsor signatures are solicited, each signature page should include a statement that the sponsors are qualified voters who signed the application, as sponsors, with the description of the recall grounds attached. This information was missing, so this requirement also was not met.

B. Contact and alternate.

Alaska Statute 29.260(a)(2) requires “the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent.” The application does not contain this information. The only contact information in the application is the return name and address on the envelope in which it arrived.¹⁹

C. Statement of grounds.

Alaska Statute 29.26.260(a)(c) requires that the grounds for recall be stated with particularity in 200 words or less. The entire statement of grounds is less than 200 words. We next consider the sufficiency of the grounds.

¹⁸ We have previously recommended rejection of recall applications where the signers failed to sign as sponsors. *See* 1993 Inf. Op. Att’y Gen. (July 26; 663-93-0419); 1991 Inf. Op. Att’y Gen. (Jan. 15; 663-90-0393).

¹⁹ The return address on the envelope reads: “Edgar Knight, Sr., P.O. Box 107, Chevak, AK 99563.”

As noted above, there are three statutory grounds for recall: (1) misconduct in office; (2) incompetence; and (3) failure to perform prescribed duties. Our task is to evaluate whether the allegations are factually and legally sufficient, that is, whether they provide sufficient particulars and details to state one of the grounds for recall. However, the Division does not determine the factual accuracy of the allegations.²⁰

The recall application alleges four undated claims stated in broad and general terms that fail to mention any of the statutory grounds for recall:

1. FAILING TO ACT in the best interest of the students, school district, and community.
2. Consistently IGNORING to address parent and community concerns.
3. Allowing changes to occur WITHOUT BOARD AND COMMUNITY APPROVAL
4. Total disregard for school district policies and Board member code of ethics.

Assuming the application purports that these claims constitute misconduct in office, incompetence, or failure to perform prescribed duties, it nonetheless fails to identify specific violations of Alaska law, and is therefore both factually and legally insufficient. Moreover, none of the allegations identify a single fact or detail with respect to the specific circumstances under which Mr. Atchak has purportedly failed to act in the best interests of students, the school district, and the community; ignored parent and community concerns; allowed changes to occur without board and community approval; or disregarded school district policies—much less do the allegations indicate how these actions constitute one of the statutory grounds for recall. Factual allegations must fairly inform the electorate of the charges and allow the targeted official a reasonable opportunity to rebut the charges.²¹ The complete absence of specific facts in the above allegations prevents that from happening. Further, none of the allegations cites or even

²⁰ *Meiners*, 687 P.2d at 300 n. 18.

²¹ *See id.* at 302 (holding that the purpose of the particularity requirements in the Title 29 recall procedures is “to give the office holder the opportunity to defend his conduct in a rebuttal limited to 200 words.”). *See* 2004 Inf. Op. Att’y Gen. (April 8; 663-04-0126).

implies a single provision of Alaska law that Mr. Atchak violated as a result of the alleged conduct. Review of legal sufficiency focuses on whether a particular set of alleged facts state a claim under a statutory ground for recall.²² But because the allegations state no specific facts nor any applicable statutory ground for recall, this analysis is impossible. In short, the factual and legal predicate of this application is much too vague. There is simply not enough detail to make the basis of recall understandable. Indeed, we have recommended against certifying recall applications that cited considerably more detail than is stated here.²³ Accordingly, we recommend that the Division decline to certify the recall application.

IV. Conclusion.

The only provision of the recall statutes that this application clearly meets is the word limit on the recall summary, so we recommend that you decline to certify this application.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Elizabeth M. Bakalar
Assistant Attorney General

EMB/jrc

²² 2005 Inf. Op. Att’y Gen. at 11 (Sept. 7; 663-06-0036).

²³ See 2010 Op. Alaska Att’y Gen. (June 7) (recall of Annette Island School District board chair).