STATE OF ALASKA

Sean Parnell, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Labor & State Affairs Section
P.O. BOX 110300
123 4TH ST., DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2539

October 3, 2011

Gail Fenumiai
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Re: Review of Application for Recall of House Representative Kyle Johansen
A.G. File No. JU2011200574

Dear Ms. Fenumiai:

You have asked for our opinion regarding the application for recall of House Representative Kyle Johansen. Alaska Statute 15.45.540 requires the director of the Division of Elections to review the application and either certify it or notify the recall committee of the grounds of refusal.

The application's statement of grounds for recall does not satisfy the legal standard for recall required by AS 15.45.510, in that the alleged facts, even assuming they are true, are insufficient to state a claim of incompetence or neglect of duties – the two statutory grounds for recall stated in the summary. Therefore, the application is not substantially in the form required by AS 15.45.550(1). We recommend that the application be denied.

I. BACKGROUND

On August 29, 2011, Richard L. Coose filed a petition for the recall of Representative Kyle Johansen, last elected from State House District 1 in 2010. The application provided the following summary of the grounds for recall:

> During the House Majority's November 2010 organizational meeting, Rep. Kyle Johansen was re-elected Majority Leader. He then tried to force his colleagues into electing another representative to the Finance Committee. The caucus refused. Rep. Johansen then offered to forfeit his leadership position to win another committee assignment for that representative. The caucus refused. **Rep.**

> **Johansen walked out of the organizational meeting.** The caucus elected a new Majority Leader. **Rep. Johansen has never been welcomed back into the caucus.**
>
> **The coveted leadership position Rep. Johansen once enjoyed is gone.**
>
> **Rep. Johansen demonstrated incompetence and lack of integrity:**
> - Sacrificed his leadership position and ability to represent his constituents.
> - Expulsion from the caucus was the result of personal decisions, actions and poor judgment.
>
> **Rep. Johansen has neglected his duties:**
> - He has not returned to Ketchikan to hold published public meetings since session began.
> - For the past year, he has been noticeably absent from District 1 and unavailable to his constituents.
>
> District 1 has been embarrassed by his irresponsible, juvenile behavior and has lost the trust and confidence of his constituency. Rep. Johansen has refused to apologize or accept responsibility for his actions. **District 1 has no meaningful voice in the state legislature.**[1]

We review this application under applicable Alaska law.

II. APPLICABLE LAW

The law of recall in Alaska consists of the Alaska Constitution, the statutes implementing recall, and court decisions from both the supreme and superior courts. In addition, there are several Attorney General Opinions that offer guidance.

A. The Alaska Constitution

Article XI, section 8 of the Alaska Constitution provides: "All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature."

---

[1] All emphasis and formatting occurs in the original summary.

B. The Recall Statutes

The statutory provisions regarding the recall of legislators are set out in Title 15 of the Alaska Statutes.[2]

Currently, a valid application for recall of a state official under AS 15.45 must comply with the following provisions:

a. It must seek the recall of the governor, lieutenant governor, or a member of the state legislature.[3]

b. It must be accompanied by a $100 deposit.[4]

c. It must be filed after the first 120 days of the term and at least 180 days before the termination of the term of office of any official subject to recall.[5]

d. It must be in the proper form. Proper form requires:

i. the name and office of the person to be recalled;

ii. the grounds for recall described in particular in not more than 200 words;

iii. the printed name, the signature, the address, and a numerical identifier of qualified voters equal in number to 10 percent of those who voted in the preceding general election in the state or in the senate or house district of the official sought to be recalled, 100 of whom will serve as sponsors;

iv. each signature page must include a statement that the qualified voters signed the application with the name and

---

[2] Certain provisions of these recall statutes have changed since this office last advised the Division on an application for the recall of a state official. *See infra* note 61.

[3] AS 15.45.470.

[4] AS 15.45.480.

[5] AS 15.45.490; AS 15.45.550(2).

office of the person to be recalled and the statement of grounds for recall attached;

v. the designation of a recall committee consisting of three qualified voters who subscribed to the application and shall represent all sponsors and subscribers in matters relating to the recall; and

vi. the designation of the recall committee must include the name, mailing address, and signature of each committee member.[6]

e. It must articulate at least one of the four grounds for recall: (1) lack of fitness; (2) incompetence; (3) neglect of duties; or (4) corruption.[7]

As director of the Division, you must review the application and either certify it or notify the recall committee of the grounds for refusal to certify.[8] There are four grounds for denial of certification:

a. the application is not substantially in the required form;

b. the application was filed during the first 120 days of the term of office of the official subject to recall or within less than 180 days of the termination of the term of office of any official subject to recall;

c. the person named in the application is not subject to recall; or

d. there is an insufficient number of qualified subscribers.[9]

The statute does not specify a required time frame for this review process.

---

6 AS 15.45.500.

7 AS 15.45.510.

8 AS 15.45.540.

9 AS 15.45.550.

C. Summary of Alaska Recall Cases

1. Alaska Supreme Court Cases

a. Meiners v. Bering Strait School District

The leading Alaska case addressing recall petitions is *Meiners v. Bering Strait School District*,[10] which involved the attempted recall of an entire Regional Education Attendance Area ("REAA") school board.[11] The *Meiners* court reviewed the spectrum of perspectives on recall, ranging from a legalistic recall process that construes recall grounds and procedures narrowly in favor of the office holder to a political recall process in which there are no grounds required for recall and all doubts are resolved in favor of placing the recall question before the voters. The *Meiners* court suggested that, historically, Alaska "appears" to have fallen in the middle of this spectrum.[12]

In the context of the recall of a local official, the court was mindful of the possibility that recalls could be initiated in remote parts of the state by voters with limited access to legal resources. Accordingly, the court was reluctant to interpret the recall statutes too strictly. Thus, the court held that recall statutes, like initiative and referendum statutes, "should be liberally construed so that 'the people [are] permitted to vote and express their will.'"[13] The court held that "the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute."[14]

Because the applicable statute required the grounds for recall to be stated with particularity, the *Meiners* court reviewed two of the asserted grounds for sufficiency.

---

10 687 P.2d 287 (Alaska 1984).

11 As such, the case involved a different set of recall statutes related to the recall of local officials. *See* AS 14.08.081; AS 29.28.130-.250 (1985). The current statutes governing local recall are set out in AS 29.26.240-.360. The local recall statutes have a slightly different list of grounds for recall: misconduct in office, incompetence, or failure to perform prescribed duties. *See* AS 29.26.250.

12 687 P.2d at 294.

13 *Id.* at 296 (citations omitted).

14 *Id.*

The court found that the appropriate standard of review was to assume the alleged facts are true, and rule upon them similar to a court ruling on a motion to dismiss for failure to state a claim.[15] The court reviewed the asserted grounds to determine whether they sufficiently stated a claim for "failure to perform prescribed duties," one of the specified grounds in the recall statute.

Ultimately, the court found that the recall committee stated a claim for failure to perform prescribed duties when the board, which by statute "employed" the district superintendent, allegedly failed to control the superintendent's expenditures on non-district purposes and violated various provisions of law related to open meetings.[16] The court additionally held that 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."[17]

The court then considered whether any of the grounds should be deleted. The court held that the Division of Elections could not rewrite the allegations of the petition, but concluded that insufficient grounds should be deleted to avoid "abuse" and "the drafting of recall petitions with little regard for the statutory grounds for recall."[18] The court authorized the Division to "delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute."[19]

b. von Stauffenberg v. Committee for an Honest and Ethical Sch. Bd.

In *von Stauffenberg v. Committee for an Honest and Ethical School Board*,[20] the recall committee alleged that local school 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. The court concluded that since the Alaska Open Meetings Act permitted consideration in executive session of "subjects that

---

15 *Id.* at 300-01 n.18.

16 *Id.* at 300-01.

17 *Id.* at 301.

18 *Id.* at 302.

19 *Id.* at 303.

20 903 P.2d 1055 (Alaska 1995).

tend to prejudice the reputation or character" of a person, the targeted board members were properly exercising the discretion granted to them by law when they went into executive session. The recall petition, therefore, failed to contain sufficient statements of grounds for recall. Moreover, because the allegations failed to state why going into executive session violated Alaska law, the court held that the allegations also were not sufficiently particular.[21]

2. Alaska Superior Court Cases

There are three superior court decisions on recall applications targeting state officials under AS 15.45.

a. Coghill v. Rollins

Coghill v. Rollins[22] involved a recall application targeting Lieutenant Governor Coghill. Judge Savell applied the *Meiners* standard for reviewing the two alleged grounds for recall: incompetence and lack of fitness. The recall committee alleged that Lieutenant Governor Coghill should be recalled on the ground of "incompetence" because he had not read the election laws and had made contradictory statements regarding the recall process. In reviewing this allegation for sufficiency, Judge Savell found that "incompetence"—under a liberal construction and commonsense meaning of the term—"must relate to a lack of ability to perform the official's required duties."[23] He found that knowledge of election laws is directly related to the statutory duties of the lieutenant governor. As such, Judge Savell concluded that the allegation regarding failure to read the election laws was legally sufficient. With respect to the allegation regarding contradictory statements, however, Judge Savell concluded that the allegation was insufficient standing alone, but could remain because it supported the allegation regarding failure to read the election laws. Thus, Judge Savell sustained the entire accusation of incompetence.[24]

In the second ground, the recall committee alleged that Lieutenant Governor Coghill was unfit for office because he made unfounded public accusations of criminal

---

21 *Id.* at 1060.

22 No. 4FA-92-1728 CI (Alaska Super., Nov. 1, 1993) (order granting summary judgment in part). The recall attempt ultimately was not completed.

23 *Id.* at 20-21.

24 *Id.* at 22-23.

activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election. Judge Savell concluded that this allegation was both factually and legally insufficient because it contained no details about the accusations and did not describe how the lieutenant governor had used his office to intimidate others.[25]

b. Valley Residents for a Citizen Legislature v. State of Alaska

Valley Residents for a Citizen Legislature v. State of Alaska[26] involved an application to recall Senator Scott Ogan. One of the grounds alleged by the recall committee was that Senator Ogan neglected his duties by promoting his employer in legislative committee and by failing to recognize an obvious conflict between his respective duties to his employer and to his constituents. Judge Gleason defined "neglect of duty" as "the nonperformance of a duty of office established by applicable law."[27] Because the recall petition stated a violation of the Legislative Ethics Act, Judge Gleason concluded that the recall committee had stated a legally sufficient allegation of neglect of duty.[28]

c. Citizens for an Ethical Government v. State of Alaska

In *Citizens for an Ethical Government v. State of Alaska*,[29] the superior court found that the Division correctly refused to certify the application for recall of Senator Ben Stevens.[30] Ruling from the bench, Judge Stowers held, in relevant part, that the petition failed to allege with sufficient particularity facts regarding Senator Stevens' conduct in office. Judge Stowers found that the application must allege "specific facts related to the recall target's conduct in office," not the official's conduct generally. Judge Stowers elaborated on this principle, stating:

---

25 *Id.* at 23-24.

26 No. 3AN-04-6827 CI (Alaska Super., Aug. 24, 2004) (order granting summary judgment).

27 *Id.* at 9.

28 *Id.* at 9-10.

29 No. 3AN-05-12133 CI (Alaska Super., Jan. 4, 2006) (order on record granting summary judgment).

30 *See* 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036).

> In essence, as you analyze statements in a [recall] petition, if you have a statement that says something to the effect of "A did B," or "A did B for C reason," those are statements of fact . . . [that] go to the voters to determine whether those are true or not and whether the voters want to rely on those allegations to recall a particular office holder. On the other hand . . . if there is a statement in the form of "X is illegal" . . . those are statements of law, and that's appropriate for the court . . . to evaluate those and to determine whether or not those are true and accurate statements of law. If they are not, I think, under the *von Stauffenberg* case and under the *Meiners* case, it's my duty to conclude that those do not in and of themselves assert valid legal grounds and at the least those should be stricken. To the extent that there are mixed questions of fact and law: "A did B, which is illegal," then the validity of that statement in part turns on whether the statement of law is valid or not, and if it's not, it is stricken. And it also depends in part on whether the facts as alleged are specific enough or particular enough to create a statement that is sufficient to go to the voters. It's not my role as the court to, with a hyper-critical analysis, determine whether or not particular statements of fact are sufficient or not. But on the other hand, if the statutes that I have previously referred to and if the supreme court in *Meiners* and *von Stauffenberg* mean anything . . . a court is required to make at least a threshold determination as to whether what has been alleged is factually specific enough.[31]

Ultimately, Judge Stowers found that no sufficient factual allegations or unlawful activity regarding Senator Stevens' conduct in office had been alleged. Therefore, the court held that the petition was not substantially in its proper form and the Division had correctly refused to certify the application. The recall committee appealed to the supreme court, but declined to pursue the appeal to completion.[32]

---

[31] No. 3AN-05-12133 CI (Alaska Super., Jan. 4, 2006) (order on record granting summary judgment).

[32] Supreme Court No. S-12208. On May 30, 2006, the recall committee moved to dismiss its appeal on mootness grounds because Senator Stevens' term was soon to expire.

D. Attorney General Opinions Regarding Recall Elections

This office has issued many opinions on recalls.[33] These opinions have often recommended that the Division reject allegations that fail to allege particular grounds and provide a level of detail that gives the recall target a meaningful opportunity to respond and the voters something more than a vague idea of the reasons for the recall. Further, this office also has recommended that the Division reject allegations that merely allege proper or lawful conduct. Such allegations fail to state a claim for recall and are legally insufficient.

The following are examples of allegations that we advised were factually and legally sufficient. The examples in bold are those pertaining to the recall of a state official under Title 15:

- Holding closed and unnoticed school board meetings (misconduct).[34]
- Prohibiting a motion by shouting "shut up" at a meeting (incompetence).[35]
- Forcing a board member to vote against his wishes (incompetence).[36]
- Contracting to pay for a decertified superintendent (misconduct and failure to perform prescribed duties).[37]
- Becoming involved in personnel matters related to a family member (misconduct).[38]
- Threats against employees and school board members related to family members (misconduct).[39]

---

[33] But only one such opinion addresses the recall of a state official under Title 15. *See* 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036). In addition, a letter from contracted independent counsel recommended certification of the recall petition for Senator Ogan. *See* Letter from Sedor to Glaiser (April 8, 2004; 663-04-0126).

[34] 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

[35] 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

[36] *Id.*

[37] *Id.*

[38] 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

[39] *Id.*

- Refusing to take oath of office (failure to perform prescribed duties).[40]
- **Actively promoting employer in legislative office (corruption and neglect of duties).**[41]
- Hiring unqualified personnel, violating Open Meetings Act, failing to supervise superintendent, and violating school board policy (misconduct, incompetence, failure to perform prescribed duties).[42]

The following are examples of allegations that we advised were not sufficient:

- Not intending to vote as the public preferred (not unlawful).[43]
- Defending a superintendent in an investigation (not unlawful).[44]
- Unspecified abuse to audience members (not particular).[45]
- Unwillingness to work with district employees and administration and unspecified shortfall re: ethics code and board policy (not particular).[46]
- Unspecified use of position for personal gain (not particular).[47]
- Involvement in negotiations without regard for the board's position (not unlawful).[48]
- Calling a board meeting while certain administrators were out of town (not unlawful).[49]

---

40 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

41 Letter from Sedor to Glaiser (April 8, 2004; 663-04-0126).

42 2007 Op. Alaska Att'y Gen. (July 19).

43 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

44 1988 Inf. Op. Att'y Gen. (April 22; 663-88-0462).

45 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

46 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

47 *Id.*

48 *Id.*

49 1989 Inf. Op. Att'y Gen. (Sept. 26; 663-90-0102).

- School board members entering a district office and reviewing district financial records without authorization from superintendent (not unlawful).[50]
- Changing the wording of a letter in an effort to be misleading (not particular).[51]
- Making false and damaging statements about an administrator (not particular).[52]
- Failure to have full and open communication (not particular).[53]
- Unspecified harassment, lack of judgment, abuse of travel privileges (not particular).[54]
- **Payment from private company for advice and loyalty while serving as a senator even where company was one potentially affected by the actions of the legislature (corruption, lack of fitness).**[55]
- Conflict of interest in school board member also being shooters club coach (not unlawful).[56]
- Improper voting in violation of procedural rules and conflict of interest (not unlawful and not particular).[57]
- No statutory grounds for recall referenced (not unlawful).[58]

With the foregoing law and principles in mind, we now turn to the application for the recall of Representative Kyle Johansen.

---

50 *Id.*

51 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

52 *Id.*

53 1993 Inf. Op. Att'y Gen. (July 26; 663-93-0419).

54 *Id.*

55 2005 Inf. Op. Att'y Gen. (Sept. 7; 663-06-0036).

56 2005 Inf. Op. Att'y Gen. (Nov. 22; 663-06-0075).

57 2006 Inf. Op. Att'y Gen. (Jan. 17; 663-06-0096).

58 2010 Op. Att'y Gen. (June 7).

III. ANALYSIS

AS 15.45.550 sets forth four bases for denying certification of an application:

1. the application is not substantially in the required form;

2. the application was filed during the first 120 days of the term of office or within less than 180 days of the end of the term of office of the official subject to recall;

3. the person named is not subject to recall; and

4. there are not enough qualified subscribers.

A. Required Form

Whether an application is substantially in the required form involves a three-step inquiry. First, the Division must determine whether the application is technically sufficient, that is, whether the recall committee has complied with all of the ministerial requirements of a recall application. Next, the Division must determine whether the summary of grounds for recall is factually sufficient, that is, whether the factual statements are sufficiently particular or detailed. Finally, the Division must determine whether the summary of grounds is legally sufficient, that is, assuming the alleged facts to be true, whether they state a claim for one of the specified grounds for recall.

1. Technical Sufficiency

Alaska Statutes 15.45.480 - .500 set out several technical requirements that must be satisfied with respect to a recall application. We understand that the recall committee has clearly complied with all but one, and possibly two, of these requirements.[59]

The application was accompanied by a $100 deposit as required by AS 15.45.480. The application sets forth the name and office of the person to be recalled as required by AS 15.45.500(1). The application contains a summary of grounds for recall that is not more than 200 words as required by AS 15.45.500(2).[60] The application designates a

---

[59] Compliance with the sponsorship requirement is somewhat ambiguous. *See infra* note 61.

[60] Whether that summary of grounds is factually or legally sufficient is discussed in the next subsections.

recall committee consisting of three qualified voters who subscribed to the application, and includes the name, mailing address, and signature of each committee member as required by AS 15.45.500(4). The application also includes the printed name, signature, address, and a numerical identifier of qualified voters equal in number to 10 percent of those who voted in the preceding general election in House District 1, and more than 100 voters subscribed to the application as required by AS 15.45.500(3). The application also contains a statement that the qualified voters signed the application with the name and office of the person to be recalled and the statement of grounds for recall attached, as required by AS 15.45.500(3).

The application, however, violates at least one, and possibly two, elements of AS 15.45.500(3). Specifically, one signature page (containing 20 signatures) lacks the required attachment of the statement of the grounds for recall, and there is no indication that the subscribers signed the application with any awareness that they would also be sponsors to the application.[61] A signature page lacking the attached grounds for recall is

---

[61] We note that the application does not specifically "designate" 100 sponsors or include a statement that all voters are signing as sponsors, but we also believe that the current statutes are ambiguous as to this requirement. This office has previously recommended the rejection of applications where the subscribers failed to affirmatively indicate they were signing as sponsors. *See* 1998 Inf. Op. Att'y Gen. (Feb. 25; 663-98-0213); 1996 Inf. Op. Att'y Gen. (Sept. 25; 663-97-0101); 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393). But the 2005 amendments to the recall statutes modified AS 15.45.500 and added AS 15.45.515, which provides that "[t]he qualified voters who subscribe to the application in support of the recall are designated as sponsors." Since this new statute appears to automatically designate all of the qualified subscribers as sponsors, we believe that the failure to affirmatively indicate that they are signing as sponsors does not clearly violate a technical requirement of a recall application warranting rejection. However, AS 15.45.500(3) provides that "100" of the qualified voters who signed the application "will serve as sponsors." Read together, these provisions do not clarify whether the application must designate the 100 voters who will serve as sponsors, whether all qualified voters who subscribe to the application are automatically designated as sponsors if there are at least 100, or whether some affirmative statement is required to notify subscribers that they are signing as sponsors. *Compare* AS 15.45.030 (dealing with initiatives, which specifically provides that "each signature page must include a statement that the *sponsors* are qualified voters who signed the application with the proposed bill attached" (emphasis added)) *with* AS 15.45.500 (dealing with recalls, which provides that "each signature page must include a statement that the qualified voters signed the application with the name and office of the person to be recalled and the statement of grounds for recall attached"). Alaska Statute 15.45.060 also provides that the qualified voters who subscribe to an initiative application are designated as sponsors. While we believe the legislature intended to simplify the recall

deficient because the page lacks evidence that the 20 individuals who signed this page knew what they were signing. So the 20 signatures appearing on that page should not be considered in the final tally of qualified subscribers. The application need not be rejected for this reason, however, because the Division has verified that even without these 20 signatures, the application contains more than the requisite number of qualified voters equal in number to 10 percent of those who voted in the preceding general election in House District 1.

2. Factual Sufficiency

The review for factual sufficiency focuses on whether an allegation states particular or specific facts related to the recall target's conduct in office.[62]

The specific statutory grounds for recall identified by the recall committee in its petition are that **"Rep. Johansen demonstrated incompetence and lack of integrity"** and **"Rep. Johansen has neglected his duties."** Because "lack of integrity" is not one of the four grounds enumerated in AS 15.45.510, it may not be considered as a possible ground for recall. Accordingly, we evaluate whether the allegations in the petition have sufficient particularity with respect to "incompetence" under AS 15.45.510(2) and "neglect of duties" under AS 15.45.510(3). The Division does not determine the factual accuracy of the allegations, but must assume they are true.[63] Further, as Judge Stowers counseled in *Citizens for an Ethical Government v. State of Alaska*,[64] we must be mindful of not engaging in a "hyper-technical analysis" while still adhering to the principle that the factual conduct alleged be sufficiently particular and directly related to the official's conduct in office.

---

application process, we also believe it intended subscribers to be aware of the sponsorship requirement. Given this ambiguity, and the fact that subscribers unfamiliar with AS 15.45.515 would not know that they were signing on as "sponsors," we recommend that the recall committee be advised that any future application for recall should affirmatively indicate that the voters who are signing the application are also doing so as sponsors.

62 *See, e.g., Citizens for an Ethical Gov't v. State*, No. 3AN-05-12133 CI (Alaska Super., Jan. 4, 2006) (order on record granting summary judgment).

63 *Meiners*, 687 P.2d at 300 n.18.

64 No. 3AN-05-12133 CI (Alaska Super., Jan. 4, 2006) (order on record granting summary judgment).

When read collectively, many of the summary's statements describe actions taken by the House Majority caucus rather than by Representative Johansen, or are statements of argument and conclusion rather than of particular facts.

This office has previously cautioned the Division against considering the actions of third parties in the summary of grounds for recall of a state official. Descriptions of third party conduct risk confusing the voting public and putting the recall target in the untenable position of refuting a third party's actions.[65] On the other hand, insufficiently particular allegations may still remain in a summary if they lend support to a sufficient allegation.[66] Furthermore, the *Meiners* court cautioned against "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."[67] So we must analyze both whether there are sufficient allegations made against Representative Johansen and whether otherwise insufficient allegations support a sufficient allegation. Allegations that do not come within the grounds specified by statute should be deleted.[68]

In reviewing allegations for factual sufficiency, we analyze each claim in the application's summary of grounds for recall in the context of the whole statement. The summary begins:

> During the House Majority's November 2010 organizational meeting, Rep. Kyle Johansen was re-elected Majority Leader. He then tried to force his colleagues into electing another representative to the Finance Committee. The caucus refused. Rep. Johansen then offered to forfeit his leadership position to win another committee assignment for that representative. The caucus refused.

These statements make certain factual allegations regarding Representative Johansen's conduct and describe actions of a third party (the caucus). The allegations of third party conduct—the caucus' re-election of Representative Johansen and refusals—should be removed because they do not allege conduct by Representative Johansen, nor

---

65 2005 Inf. Op. Att'y Gen. at 17 (Sep. 7; 663-06-0036).

66 *Coghill v. Rollins*, No. 4FA-92-1728 CI at 22-23 (Alaska Super., Nov. 1, 1993) (order granting summary judgment in part).

67 *Meiners*, 687 P.2d at 301.

68 *Id.* at 303.

do they support another sufficient allegation made here of incompetence or neglect of duties. To avoid the "legal straitjacket" and "hyper-technical analysis" the courts have cautioned against, we construe the remaining statements in the light most favorable to the recall committee, because they allege specific and particular conduct by Representative Johansen.

> **Rep. Johansen walked out of the organizational meeting.** The caucus elected a new Majority Leader. **Rep. Johansen has never been welcomed back into the caucus.**
>
> **The coveted leadership position Rep. Johansen once enjoyed is gone.**

This portion of the summary makes only one factual allegation regarding Representative Johansen: that he walked out of the organizational meeting. The remaining statements describe actions and reactions of the caucus, state a plain observation (that Representative Johansen is no longer in a leadership position), and characterize the position as coveted. These remaining statements allege no facts at all about Representative Johansen's conduct and should be deleted from the summary.

> **Rep. Johansen demonstrated incompetence and lack of integrity:**
> - Sacrificed his leadership position and ability to represent his constituents.
> - Expulsion from the caucus was the result of personal decisions, actions, and poor judgment.

As noted above, "lack of integrity" is not a permissible ground for recall and should be deleted from the summary. The only factual allegation in this paragraph is that Representative Johansen sacrificed his leadership position, which at least alleges specific and particular conduct. While that statement should remain in the summary, the remaining content of this paragraph is conclusion, argument, and speculation unsupported by fact and focused on the motivations of a third party (the caucus) in refusing to award Representative Johansen a committee assignment. The remainder of this paragraph should be deleted.

The next portion of the summary reads:

> **Rep. Johansen has neglected his duties:**
> - He has not returned to Ketchikan to hold published public meetings since session began.
> - For the past year, he has been noticeably absent from District 1 and unavailable to his constituents.

These allegations describe specific conduct on the part of Representative Johansen that, when taken as true, make a specific factual statement that Representative Johansen neglected his duties by failing to take certain actions or engaging in particular conduct.

> District 1 has been embarrassed by his irresponsible, juvenile behavior and has lost the trust and confidence of his constituency. Rep. Johansen has refused to apologize or accept responsibility for his actions. **District 1 has no meaningful voice in the state legislature.**

The final paragraph of the summary, like the two introductory paragraphs, offers no factual allegations against Representative Johansen sufficient to state a ground for recall. The statements describe the feelings, reactions, and conclusions of the constituents of District 1. But they allege no conduct by Representative Johansen. Moreover, "refusal to apologize" and "accept responsibility for one's actions" are not particular to any statutory ground for recall. This entire paragraph should be deleted.

When the clearly insufficient factual statements are removed, what remains of the summary is as follows:

> He then tried to force his colleagues into electing another representative to the Finance Committee. Rep. Johansen then offered to forfeit his leadership position to win another committee assignment for that representative. **Rep. Johansen walked out of the organizational meeting.**
>
> **Rep. Johansen demonstrated incompetence:**
> - Sacrificed his leadership position.
>
> **Rep. Johansen has neglected his duties:**
> - He has not returned to Ketchikan to hold published public meetings since session began.
> - For the past year, he has been noticeably absent from District 1 and unavailable to his constituents.

Unlike the summary of grounds that this office analyzed in the context of the Senator Ben Stevens recall application, there is at least some degree of specificity to these remaining allegations. When viewed in the light most favorable to the recall committee, they allege specific conduct directly related to the recall target's conduct in

office and could remain in the summary if they supported one of the statutory grounds for recall.[69]

3. Legal Sufficiency

Review of legal sufficiency focuses on whether the particular alleged facts state a claim under a ground for recall.[70] In evaluating legal sufficiency, courts first look to the grounds of recall upon which the application relies. The present recall summary is based on two statutory grounds: incompetence and neglect of duties.

a. Incompetence

Only once has an Alaska court reviewed the legal sufficiency of an allegation of "incompetence" in the context of an attempt to recall a state official. In *Coghill v. Rollins*,[71] Superior Court Judge Savell concluded that the appropriate definition of "incompetence" in this context was a "lack of ability to perform the official's required duties."[72]

Here, the allegation of incompetence is that Representative Johansen sacrificed his leadership position in the legislature through a series of actions during the organizational meeting.[73] Nothing in the summary states a claim that Representative Johansen failed to perform his required duties as a state legislator.

---

69 *Meiners*, 687 P.2d at 303; *see also Citizens for Ethical Gov't v. State*, No. 3AN-05-12133 CI (Alaska Super., Jan. 4, 2006) (order on record granting summary judgment); 2005 Inf. Op. Att'y Gen. at 19 (Sept. 7; 663-06-0036).

70 2005 Inf. Op. Att'y Gen. at 11 (Sept. 7; 663-06-0036).

71 No. 4FA-92-1728 CI (Alaska Sup., Nov. 1, 1993) (order granting summary judgment in part).

72 *Id.* at 20-21.

73 As noted above, the remaining portion of the allegation claiming that Representative Johansen also sacrificed the ability to represent his constituents fails to state a factual ground for recall. It is a conclusory statement unsupported by any particular facts to indicate how or why Representative Johansen is no longer able to represent his constituents. Rather, the statement merely asks the reader to infer that loss of a House Majority leadership position automatically constitutes the sacrifice of representative ability.

Holding the position of House Majority Leader is not part of a legislator's required duties. Most legislators will never hold that position and there is no requirement that they do so. Further, based on the facts set forth in this summary, there is no provision of law that prohibits Representative Johansen from trying to force his colleagues to elect another representative to a committee, proposing to forfeit his position to secure that appointment, or walking out of a meeting. Nothing about this conduct exhibits a lack of ability on the part of Representative Johansen to perform his required duties. It is worth noting that in enacting the original recall statutes, the legislature intentionally excluded grounds such as "favoritism," "carelessness," "extravagance," "inability," "selfishness," and "no benefit to public," from the four statutory grounds for recall ultimately chosen—implying that only true and manifest malfeasance should subject a legislator to recall.[74]

In sum, Representative Johansen's sacrifice or forfeiture of a leadership position—which is not a position a legislator is required to hold in the first place—cannot be deemed an allegation of "incompetence" sufficient to state a claim under that statutory ground for recall.

b. Neglect of Duties

"Neglect of duty" has been interpreted to mean "the nonperformance of a duty of office established by applicable law."[75] The two allegations in the summary ostensibly supporting "neglect of duties" as a ground for recall are (1) that Representative Johansen "has not returned to Ketchikan to hold published public meetings since session began"; and (2) that "[f]or the past year, he has been noticeably absent from District 1 and unavailable to his constituents." But no Alaska law requires legislators to hold published public meetings in their districts or to be conspicuously present and available to their constituents. While a failure to do these things might affect a legislator's reelection, they are not legislative duties by law. Accordingly, the particular facts alleged are insufficient to state a claim for recall on the basis of "neglect of duties."

B. Required Time Frame

The application was filed on August 29, 2011. Representative Johansen's term of office began on January 18, 2011, and will end on January 15, 2013. The 120th day of his

---

74 *See* Legislative Council, *Suggested "Alaska Election Code"* at 66-67 (Jan. 20, 1960); 2005 Inf. Op. Att'y Gen. at 4-5 (Sept. 7; 663-06-0036).

75 *Valley Residents for a Citizen Legislature v. State*, No. 3AN-04-6827 CI at 9 (Alaska Super., Aug. 24, 2004) (order granting summary judgment).

term was May 18, 2011. Thus, the application was filed more than 120 days after the beginning of his term and not within 180 days of the end of the term of office. Accordingly, the application was timely filed.

C. Subject to Recall

Representative Johansen, as a state legislator, is a person subject to recall under AS 15.45.470.

D. Number of Subscribers

The Division has verified that the application contains a sufficient number of qualified subscribers as required under AS 15.45.500(3).

IV. CONCLUSION

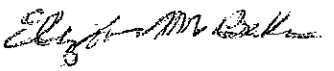
We recommend that you deny certification of the application for recall of Representative Johansen because the particular factual statements in the summary do not allege a legally sufficient ground for recall. The factual allegations support neither a claim for incompetence nor for neglect of duties under the statutes. Accordingly, the application is not substantially in the form required by AS 15.45.550(1).

If you decline to certify this application, you should advise the recall committee that it has the right to seek judicial review under AS 15.45.720 within 30 days of the date of the notice of your determination.

Please contact us if you would like further advice in this matter.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: 

Elizabeth M. Bakalar
Assistant Attorney General

EMB/jad