STATE OF ALASKA

DEPARTMENT OF LAW

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July 19, 2007

Whitney H. Brewster
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Re: Review of Applications for Recall of Irene Paul, Shelly Wilson, and Edward Gamble, Sr.
A.G. file no.: 663-07-0197

Dear Ms. Brewster:

You have asked for our opinion regarding the applications for petition for recall of three members of the Chatham School District (REAA # 18) regional school board. Those members are: Irene Paul, Shelly Wilson and Edward Gamble, Sr.

Regional school board members are subject to recall under AS 14.08.081, which adopts by reference the recall procedures of AS 29.26.240 – .360. 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. In our opinion, the applications satisfy the requirements of AS 29.26.260, therefore we recommend that you prepare the recall petitions.

I. BACKGROUND

On June 22, 2007, a group of Chatham School District residents filed applications for the recall of Irene Paul, Shelly Wilson and Edward Gamble, Sr. The applications provided the following summaries of the grounds for recall (verbatim):

Irene Paul:

She has exhibited misconduct in office, incompetence, and failure to perform prescribed duties by:

1. Hiring personnel for 2006-07 who were unqualified as school administrators because they do not hold Type B teacher certificates.

   a. on 5/16/06 approving the hire of Katherine Carl, assigned to administer the Special Education program in violation of AS14.30.255, 4AAC12.350.[1]

   b. on 4/11/06 approving the hire of Rita Ellen Robinson, contracted as administrator in violation of 4AAC12.325.

2. During 2006-07 violating AS14.20.149(b)(7) by failing to implement an evaluation system for district teachers and administrators which provided an opportunity for students, parents, community members, teachers, and administrators to provide information on the performance of the certified employee.

3. Violating the Open Meeting Act by participating in illegal executive sessions:

   a. on 2/13/07 in which Tenakee employee(s) were discussed without being given notice or the option to make the discussion public.

   b. on 12/5/06, 2/13/07, 3/13/07, 4/18/07, and 5/8/07 in which the specific subject of the executive session was not included in the motion as required by AS44.62.310.

4. Failing to adequately supervise the superintendent who misused district resources in 2006-07 by allowing rent-free use of district housing in Tenakee that should have been rented.

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[1] We read statutory and regulatory citations as one word, so it is unnecessary to eliminate the spaces in such citations in order to meet the 200 word limitation.

Shelly Wilson:

She has exhibited misconduct in office, incompetence, and failure to perform prescribed duties by:

1. Hiring personnel for 2006-07 who were unqualified as school administrators because they do not hold Type B teacher certificates: on 5/16/06 hiring Katherine Carl, assigned to administer the Special Education program in violation of AS14.30.0255, 4AAC12.350.

2. During 2006-07 violating AS14.20.149(b)(7) by failing to implement an evaluation system for district teachers and administrators which provided an opportunity for students, parents, community members, teachers, and administrators to provide information on the performance of certified employees.

3. Violating the Open Meeting Act by participating in illegal executive sessions:

   a. on 2/13/06 in which Tenakee employee(s) were discussed without being given notice or the option to make the discussion public.

   b. on 12/5/06, 2/13/07, 3/13/07, 4/18/07, and 5/8/07 in which the specific subject of the executive session was not included in the motion as required by AS44.62.310.

4. Failing to adequately supervise the superintendent who misused district resources in 2006-07 by allowing rent-free use of Tenakee that should have been rented.

5. Without first consulting classroom teacher Testarmata, requesting head teacher Zemanek change Wilson's oldest daughter's assignments in March 2007, violating school board policy (BP1312.1).

Edward Gamble, Sr.:

He has exhibited misconduct in office, incompetence, and failure to perform prescribed duties by:

1. Hiring personnel for 2006-07 who were unqualified as school administrators because they do not hold Type B teacher certificates.

    a. on 5/16/06 approving the hire of Katherine Carl, assigned to administer the Special Education program in violation of AS14.30.255, 4AAC12.350.

    b. on 4/11/06 approving the hire of Rita Ellen Robinson, contracted as administrator in violation of 4AAC12.325.

2. During 2006-07 violating AS14.20.149(b)(7) by failing to implement an evaluation system for district teachers and administrators which provided an opportunity for students, parents, community members, teachers, and administrators to provide information on the performance of the certified employee.

3. Violating the Open Meeting Act by participating in illegal executive sessions on 12/5/06, 3/13/07, 4/18/07, and 5/8/07 in which the specific subject of the executive session was not included in the motion as required by AS 44.62.310.

4. Failing to adequately supervise the superintendent who misused district resources in 2006-07 by allowing rent-free use of district housing in Tenakee that should have been rented.

The applications were also accompanied by: (1) the signatures and residence addresses of 10 persons (each application actually had more than 10 signatures), and (2) the name and address of a contact person and an alternate.

We shall review these applications under applicable Alaska law, which we summarize next.

II. APPLICABLE LAW

The director for the division of elections is tasked with review of the application to determine whether it satisfies the requirements of AS 29.26.260. This 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 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.

AS 29.26.260. There are three grounds for recall of a regional school board member: (1) misconduct in office, (2) incompetence, and (3) failure to perform prescribed duties. AS 29.26.250. The statute does not specify a timeframe in which this application review process is to take place.

There are several cases in Alaska on the subject of recall as well as several opinions from this office. We have recently had occasion to discuss this body of authority at length and incorporate that discussion by reference. *See* 2006 Inf. Op. Att'y Gen. 4-5 (Jan. 17; 663-06-0096) (recall of Alaska Gateway school board members); 2005 Inf. Op. Att'y Gen. 6-13 (Sept. 7; 663-06-0036) (recall of state senator).

For purposes of this opinion, we will confine our discussion to the published court decisions. The seminal case on recall is *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984). *Meiners* involved an attempt to recall an entire REAA school board. 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'" *Id.* at 296 (citations omitted). The court concluded 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." *Id.*

In applying the recall statute, the *Meiners* court emphasized that it was not proper to determine the truth of the recall allegations. Rather, the court assumes that the alleged facts are true and rules upon the sufficiency of the grounds similar to a court ruling on a motion to dismiss for failure to state a claim. *Id.* at 300 n.18. The court reviewed two of

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. *Id.* at 298-302.

In the first ground, the recall committee claimed that the board failed to control the district 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 this ground sufficiently stated a claim for failure to perform prescribed duties. *Id.* at 300.

In the second ground, the recall committee 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. *Id.* at 301-02. 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." *Id.* at 301.

In *Von Stauffenberg v. Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995), 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. *Id.* at 1057. 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 cannot be a ground for recall. *Id.* at 1060. 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. *Id.* at 1060.

From these two cases, we conclude that courts do not require recall committees to perfectly articulate the grounds for recall. But they do require a sufficient amount of detail so that the basis for recall is understandable—that is, the grounds must be factually sufficient. Moreover, an allegation of 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 these applications, which we turn to next.

III. ANALYSIS

AS 29.26.260(a) sets forth three requirements for a recall application. We discuss each in turn and conclude that each is satisfied, with the caveat that we cannot make a determination as to the validity of signatures.

A. Signatures and Residence Addresses

AS 29.26.260(a)(1) requires the signatures and residence addresses of at least 10 municipal voters. This requirement appears to be satisfied in each of the three applications, though counsel for the Chatham School District has advised this office that some of the signatures do not appear to be authentic. We do not have the capability to determine the authenticity of signatures, and so do not express an opinion on this matter. We further understand that the Division does not have the capability to determine the authenticity of signatures—nor does it have the legal responsibility to do so. The signatures on a recall petition are entitled to the presumption of validity. *See* 42 Am. Jur. 2d *Initiative and Referendum* §28 (2000). The determination of signature authenticity is a matter for the superior court in the context of a legal challenge to the petition.

B. Contact and Alternate

AS 29.26.260(a)(2) requires the name and address of a contact person and an alternate (note that this portion of the statute does not require a residence address). The applications provide these items and therefore this requirement appears to be satisfied.

C. Statement of Grounds

AS 29.26.260(a)(c) requires that the grounds for recall be stated with particularity in 200 words or less. According to our count of the words, each statement of grounds is less than 200 words. We next consider the sufficiency of the grounds.

As noted above, there are three 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. The Division does not determine the factual accuracy of allegations. *Meiners*, 687 P.2d at 300 n.18.

The allegations with respect to each of the three school board members are very similar. Accordingly, we consider them together. Where there are differences they will

be noted. The grounds allege a number of incidents and the sponsors contend that each constitutes misconduct in office, incompetence, and failure to perform prescribed duties.

1. Hiring of Katherine Carl

Each of the three school board members are alleged to have taken part in the hiring of Katherine Carl. This allegation contends that the hiring of Katherine Carl as an administrator of the special education program was improper because she did not possess a Type B teacher certificate in violation of AS 14.30.255 and 4 AAC 12.350. AS 14.30.255 requires that a "person may not be employed as a teacher of children with disabilities unless that person possesses a valid teacher certificate and, in addition, the training that the department requires by regulation." 4 AAC 12.350 requires that:

> Each person employed solely to administer a special education program must possess
>
> (1) both a Type B certificate issued under 4 AAC 12.345 and a teacher certificate issued under 4 AAC 12.305 endorsed for special education or for a related services specialty; or
>
> (2) a Type B certificate issued under 4 AAC 12.345 endorsed for special education or a related services specialty.

Thus, Alaska law requires that special education administrators possess a Type B certificate. This allegation identifies a specific violation of Alaska law, therefore it is both factually and legally sufficient.

2. Hiring of Rita Ellen Robinson

Only Irene Paul and Edward Gamble Sr. are alleged to have taken part in the hiring of Rita Ellen Robinson. This allegation contends that the hiring of Rita Ellen Robinson as an administrator was improper because she did not possess a Type B teacher certificate in violation of 4 AAC 12.325. This regulation requires that administrators who have primary responsibility for certain administrative functions must possess an administrative certificate. An "administrative certificate" is defined as a "Type B" certificate. 4 AAC 12.325. In other words, Alaska law requires that administrators possess a Type B certificate. The allegation identifies a specific violation of Alaska law, therefore it is both factually and legally sufficient.

3. Violation of AS 14.20.149(b)(7)

Each of the three school board members are alleged to have violated AS 14.20.149(b)(7) by failing to implement an evaluation system for district teachers and administrators. Alaska Statute 14.20.149(a) requires a school board to adopt a certificated employee evaluation system for the evaluation and improvement of the performance of the district's teachers and administrators. Alaska Statute 14.20.149(b)(7) requires that the evaluation system "provide an opportunity for students, parents, community members, teachers, and administrators to provide information on the performance" of teachers and administrators. The allegation identifies a specific violation of Alaska law, therefore it is both factually and legally sufficient.

4. Open Meetings Act Violations

There are two allegations of open meetings act violations. Irene Paul and Shelly Wilson are alleged to have participated in an illegal executive session in which Tenakee employees "were discussed without being given notice or the option to make the discussion public." We note that the applications identify two different dates of this meeting, but we do not judge the factual accuracy of the allegations. An allegation of an open meetings act violation in the REAA context was found to be sufficient in *Meiners. See Meiners,* 687 P.2d at 301-02.

Alaska Statute 44.62.310(c) identifies the list of subjects that may be taken up in executive session. Subsection (c)(2) provides that "subjects that tend to prejudice the reputation and character of any person" may be discussed in executive session but the person is entitled to "request a public discussion." The Alaska Supreme Court has held that consideration of personnel matters in executive session falls under AS 44.62.310(c)(2). *See University of Alaska v. Geistauts,* 666 P.2d 424, 429 (Alaska 1983). Accordingly, discussion of personnel matters in executive session triggers the subject of the executive session's right to request a public discussion. Since a public discussion was not offered, a violation of Alaska law has been adequately alleged. Therefore, we think this first open meetings act allegation is factually and legally sufficient.

The second allegation of an open meeting act violation pertains to all three board members, though the dates vary. In this allegation, the claim is that the board members violated the open meetings act by not identifying the specific subject of the executive session as required by AS 44.62.310. This statute provides:

> The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session unless auxiliary to the main question.

AS 44.62.310(b). Thus, the allegation correctly states the law on executive sessions. This allegation identifies a number of meetings where the subject of the executive session was allegedly not stated, therefore it is both factually and legally sufficient.

5. Failure to Adequately Supervise

Each of the three school board members are alleged to have failed to adequately supervise the district superintendent who misused district resources by allowing rent-free use of district housing in Tenakee. We note that failure to adequately supervise a superintendent was found to be sufficient in *Meiners*. *See Meiners,* 687 P.2d at 300.

The recall committee does not cite a policy that prohibits the use of district housing on a rent-free basis. It may be possible that providing free housing is a sound approach to attracting and retaining teachers and district personnel in rural areas.[2] This seems to be a close question. While there appears to be a lack of a legal basis for this particular grounds, the superintendent is charged with proper management of the school district, which may include collecting rent for district housing. In accord with the deferential standard, we find this allegation factually and legally sufficient.

6. Requesting Change in Daughter's School Assignments

The last allegation applies only to Shelly Wilson. Here, the recall committee contends that Ms. Wilson violated school policy by requesting the head teacher that her daughter's school assignments be changed without consulting the classroom teacher. The allegation cites board policy 1312.1. This policy governs public complaints concerning school personnel and prescribes a procedure for resolving such complaints. Complaints should first be lodged with the person to whom the complaint pertains, but written

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[2] The allegation does not state whether the rent-free housing was used for the purpose of attracting and retaining teachers. An article in the Juneau Empire alleged that the rent-free housing was used to house a local minister and six children. The article did not state whether the minister was an employee of the school district. Juneau Empire, "Allegations Fly in School Board Recall Process" (July 8, 2007). But we do not determine the facts at this stage.

complaints must be filed with the Head Teacher or immediate supervisor. Unresolved written complaints must then be resolved up the chain of command in the school district. The policy also provides that "[p]arents/guardians are encouraged to attempt to orally resolve concerns with the staff person personally."

While the allegation does not state that Ms. Wilson had a complaint regarding the classroom teacher, we may infer that the sponsors are alleging that a complaint existed and that Ms. Wilson failed to comply with the board's policy regarding complaint resolution. The allegation does not state whether the complaint was verbal or written. The board policy requires written complaints to be lodged with the head teacher and appears to encourage, but not require, that verbal complaints to be addressed directly with the subject of the complaint.

We cannot conclude as a matter of law that this allegation is legally sufficient. If the complaint was written, then under the policy Ms. Wilson was correct to file it with the head teacher. If the complaint was verbal, the policy only encourages, but does not require, that the complaint be addressed directly with the subject of the complaint. Moreover, we cannot conclude as a matter of law that a parent who merely seeks a change in a child's assignments necessarily has a complaint with a teacher that must be subject to the district's complaint resolution procedure. Accordingly, we do not think that this allegation is legally sufficient to form a basis for recall. We recommend that this allegation be deleted from the grounds.[3]

IV. CONCLUSION

As set forth above, the three requirements of AS 29.26.260 appear to be met. There are at least ten signatures (though we do not opine on the authenticity of the signatures), the name and address of the contact person and alternate are provided, and with one exception, we find the summaries of grounds against Irene Paul, Shelly Wilson and Edward Gamble, Sr. to be sufficient. Accordingly, we recommend that you prepare petitions for recall.

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[3] The *Meiners* Court authorized the Division of Elections to delete "severable individual charges" if they do not satisfy the requirements for recall. *Meiners,* 687 P.2d at 303.

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

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
Michael Barnhill
Senior Assistant Attorney General

MAB/ajh