



Municipality of Anchorage
Office of the Municipal Attorney
Memorandum

DATE: November 5, 2020

TO: **BARBARA A. JONES, MUNICIPAL CLERK**
ERIKA MCCONNELL, DEPUTY CLERK – ELECTIONS

THRU: **KATHRYN R. VOGEL, MUNICIPAL ATTORNEY** /s/ KRV

FROM: **JESSICA WILLOUGHBY, ASSISTANT MUNICIPAL ATTORNEY** /s/ JW

SUBJECT: **RECALL APPLICATION 2020-04**
Law Matter No. 20-1792

QUESTION PRESENTED

Does Recall Application 2020-04, seeking to recall Anchorage Assembly Chair Felix Rivera, satisfy the statutory requirements for issuing a recall petition?

BRIEF ANSWER

Recall Application 2020-04 only partially satisfies the statutory requirements for legal sufficiency. We recommend that Application 2020-04 be granted in part and denied in part, and a petition prepared only as to the allegation regarding “failure to perform prescribed duties.”

THE RECALL APPLICATION

On September 28, 2020, the Clerk’s Office received an application for recall of Assembly Chair Felix Rivera based on misconduct in office and failure to perform prescribed duties (Recall Application 2020-04, redacted and attached). Recall Application 2020-04 provided the following statements as grounds for recall (verbatim):

Assembly chair Felix Rivera committed misconduct in office on August 11, 2020 by violating EO-15, an emergency order intended to protect the health and safety of Anchorage citizens, issued by the Mayor of Anchorage pursuant to AMC 3.80.060(H) by: 1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a

meeting of the Anchorage Assembly after being specifically informed of the violation. Assembly chair Rivera failed to perform prescribed duties as chair of the Assembly by allowing the August 11 meeting he was presiding over to continue in violation of EO-15 after the violation was brought to his attention by a point of order. Of all citizens in Anchorage the chair of the Anchorage Assembly should have been scrupulous in obeying the gathering limitation established by paragraph 4 of EO-15. His failure to do so needlessly endangered the lives of Anchorage citizens, encouraged the spread of COVID-19 throughout the community, and merits recall from office.

APPLICABLE LAW

The Municipal Clerk is tasked with reviewing recall applications to determine whether the requirements of Alaska Statute 29.26.260 are satisfied.¹ The statute does not specify a timeframe in which the application review process must take place. The Clerk's Office has asked the Municipal Attorney's Office to provide an opinion on the sufficiency of the petition.

Alaska law places both procedural and substantive limitations on the right to recall. AS 29.26.260(a) requires each application to include: "(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." Recall is permitted only for cause, and there are three substantive statutory grounds for recall of a municipal official: "misconduct in office, incompetence, or failure to perform prescribed duties."²

The seminal case on recall in Alaska is *Meiners v. Bering Strait School District*,³ where a recall petition was filed against all eleven members of the Bering Strait School Board. The *Meiners* court held that statutes relating to recall "should be liberally construed so that the people [are] permitted to vote and express their will."⁴ The court did not want to create

¹ AS 29.26.270(a).

² AS 29.26.250.

³ 687 P.2d 287 (Alaska 1984).

⁴ *Id.* at 296 (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974))

“artificial technical hurdles” blocking exercise of the recall power, noting that “the recall process is fundamentally a part of the political process.”⁵

At issue in *Meiners* was whether the asserted grounds for recall were sufficient to meet the statutory requirements. The court emphasized that it was up to the voters and not the court or certifying officer to assess the validity of the petition’s allegations.⁶ Instead, the sufficiency reviewer must determine whether the allegations, if true, are sufficient to meet one of the three grounds for recall under AS 29.26.250.⁷

The court additionally held that inaccurate legal statements or lack of statutory citation would not invalidate the application.⁸ 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.”⁹ If an assertion in the application were untrue, the court reasoned that the targeted school board member could address the charge in their rebuttal, which would be placed on the ballot.¹⁰

The *Meiners* court also addressed how to submit a petition to voters where not all allegations are found sufficient. The court first rejected several approaches. It rejected the State’s proposed approach, rewriting the petition to make it legally and factually sufficient. It rejected printing a petition in its entirety when only one allegation is found sufficient. It also rejected the converse, finding that denying an entire petition when one allegation is found insufficient would frustrate the purpose of the statute and increase costs for all parties. The court ultimately held that “the certifying officer may delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute. But those charges which are sufficient to meet the statute must be set forth on the ballot in full, as contained in the petition, without revision.”¹¹

(alteration in original)).

⁵ *Meiners*, 687 P.2d at 296.

⁶ *Id.* at 300 n.18.

⁷ *Id.*

⁸ *Id.* at 301.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 303.

In *von Stauffenberg v. Committee for an Honest and Ethical School Board*,¹² another school board recall case, again the issue before the court was whether the asserted grounds for recall were sufficient to meet the statutory requirements. There, petitioners alleged that school board members had committed “misconduct in office” and “failure to perform prescribed duties.”¹³ The court did not define either term. However, it did conclude that because the actions alleged (moving into executive session to consider a personnel matter) were a legally allowed exercise of discretion, the standards for recall were not met.¹⁴

From these two cases, we conclude that a recall petition need not be perfectly asserted, but still must be legally sufficient. Petitions must also be factually sufficient: articulate enough that the grounds for recall are understandable and that the elected official may appropriately respond in 200 words.

SUFFICIENCY ANALYSIS

- (1) Signature and residence addresses.**
- (2) Contact and alternate.**

The Clerk’s Office reviews the application to determine whether these statutory requirements—names, identifying information, and signatures of two sponsors and ten additional qualified voters—have been satisfied.

- (3) Statement of grounds.**

The third statutory requirement for a recall petition is that it must contain “a statement in 200 words or less of the grounds for recall stated with particularity.”¹⁵

Applicants’ statement regarding Assembly Chair Rivera is 173 words and alleges both “misconduct in office” and “failure to perform prescribed duties.” As discussed above, this office does not weigh in on the factual accuracy of the petition’s allegations. Rather, assuming that the allegations are true, this office must determine whether the statement is factually and legally sufficient.

¹² 903 P.2d 1055 (Alaska 1995).

¹³ *Id.* at 1060.

¹⁴ *Id.*

¹⁵ AS 29.26.260(a)(3).

A. Factual Sufficiency: Misconduct in Office and Failure to Perform Prescribed Duties

The applicants allege that Chair Rivera committed misconduct in office by “1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a meeting of the Anchorage Assembly after being specifically informed of the violation.”¹⁶ They allege that Chair Rivera failed to perform his prescribed duties as Chair of the Assembly by “allowing the August 11 meeting he was presiding over to continue in violation of EO-15 after the violation was brought to his attention by a point of order.”¹⁷

By way of background, Emergency Order 15 was issued by Mayor Ethan Berkowitz on July 31, 2020, pursuant to AMC 3.80.060H. An emergency public health order aimed at curbing transmission of the COVID-19 virus, the order directed, in part, that “[a]ll indoor gatherings with more than 15 people are prohibited—this includes business, cultural, political and religious gatherings.” This emergency order was in effect from August 3, 2020, to August 30, 2020. Assembly meetings were closed to in-person participation by the public during the length of EO-15.¹⁸

As discussed above, this office is not tasked with determining whether there were, in fact, more than fifteen people in chambers on August 11 or exactly what transpired during the meeting, because, pursuant to the Supreme Court’s requirement in *Meiners*,¹⁹ for purposes of this factual sufficiency analysis, we assume that the alleged facts are true. We do note

¹⁶ Recall Petition 2020-04.

¹⁷ *Id.*

¹⁸ See Assembly Press Release: *Assembly Aligns Meeting Participation With Mayor’s Latest Emergency Order, EO-14*, (July 22, 2020), available at <https://www.muni.org/departments/assembly/pressreleases/siteassets/pages/default/20200722%20assembly%20aligns%20meeting%20participation%20with%20mayor%27s%20latest%20emergency%20order,%20eo-14.pdf> (last accessed November 5, 2020); see also Assembly Press Release: *Anchorage Assembly Chambers Reopening Plan*, (July 31, 2020), available at <https://www.muni.org/departments/assembly/pressreleases/siteassets/pages/default/anchorage%20assembly%20chambers%20reopening%20plan%20-%20august%2031,%202020.pdf> (last accessed November 5, 2020).

¹⁹ *Meiners*, 687 P.2d at 300 n.18.

that recordings of the proceedings are public records that are available online;²⁰ the recording shows that at one point during the August 11 meeting, an assembly member commented that seventeen people were present in the Assembly Chambers.²¹

We conclude that the grounds for recall Application 2020-04 are factually sufficient as to both misconduct in office and failure to perform prescribed duties. The allegations include a specific date of a meeting and articulate how the alleged conduct, if true, violated local law. The application is sufficiently particular to allow the reader to understand the factual allegations, as well as permit the accused to respond in 200 words.

B. Legal Sufficiency.

We evaluate the legal sufficiency of each asserted ground in turn.

1. Misconduct in Office.

The first allegation is that Chair Rivera committed “misconduct in office.” The first issue in determining whether this allegation is legally sufficient is whether violating Emergency Order 15, standing alone, would constitute a prima facie showing of “misconduct in office.”²² This analysis is challenging, “misconduct in office” is not defined in Alaska Statute or Anchorage Municipal Code. Further, while caselaw is clear that legal discretion to perform the act means the act does not qualify as misconduct for recall purposes,²³ it does not indicate the opposite—that any alleged illegality is enough to satisfy the standard.

Black’s Law Dictionary does not define “misconduct in office” directly, but it refers to “official misconduct,” which is defined as “1. A public officer’s *corrupt* violation of assigned duties by malfeasance, misfeasance, or nonfeasance. 2. Abuse of public office.”²⁴ The phrase “malfeasance, misfeasance, and nonfeasance” includes acts or omissions that

²⁰ Recordings of Anchorage Assembly meetings, *available at* <http://www.muni.org/Residents/Pages/MuniMeetings.aspx> (last accessed November 5, 2020).

²¹ August 11, 2020 Anchorage Assembly Meeting at 2:52:40, available at https://youtu.be/_znV4j8JKY?t=10350 (last accessed November 5, 2020).

²² *von Stauffenberg*, 903 P.2d at 1059-60.

²³ *Id.*

²⁴ Official Misconduct definition, *Black’s Law Dictionary* (11th ed. 2019) *available on Westlaw* (emphasis added).

are wrong or unlawful.²⁵ But the first portion of “misconduct in office” requires “corruption”—more than a showing of mere wrongdoing. Black’s defines corruption as “[h]aving unlawful or depraved motives; given to dishonest practices, such as bribery.”²⁶ Abuse of public office similarly is “[a] public servant’s tortious or criminal use of governmental position for private gain.” These definitions describe conduct of a more serious and nefarious nature than that alleged here.²⁷

Taken together, these definitions lead to an understanding that “misconduct in office” requires some component of dishonesty, private gain, or improper motive—which is not alleged within Recall Application 2020-04. Rather, the grounds for recall are that Chair Rivera participated in a too-large gathering, violating the emergency order.²⁸ The petition does not allege the extent of the gathering-size overage, although, as discussed above,

²⁵ Malfeasance, Misfeasance, and Nonfeasance definitions, *Black’s Law Dictionary* (11th ed. 2019) available on Westlaw.

²⁶ Corrupt definition, *Black’s Law Dictionary* (11th ed. 2019) available on Westlaw. The definition for corruption also includes an archaic second definition, “(Of a person) subject to corruption of blood,” which is not relevant here.

²⁷ The constitutional and statutory history of Alaska’s recall provisions bolster this conclusion. In its review of constitutional and legislative history, the *Meiners* court noted that, before statehood, the territorial statutory grounds for removal from office were “malfeasance, misfeasance, or nonfeasance.” *Meiners*, 687 P.2d at 294. At the Constitutional Convention, delegates considered naming specific grounds of recall (including the formulation “malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude”) in the constitution, before ultimately deferring to the legislature to articulate what grounds would be adequate for recall. *Id.* at 295. Mirroring the territorial language, the legislature initially adopted “malfeasance, misfeasance or nonfeasance in office, failure to uphold one’s oath of office, dishonest practices, and incompetency” as grounds for recall. *Id.* Ultimately, however, the legislature abandoned the historic territorial standard in favor of the current and narrower language: “misconduct in office, incompetence, or failure to perform prescribed duties.” *Id.* (describing current statute as “less liberal” than prior version).

²⁸ The applicants allege that Chair Rivera committed misconduct in office by “1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a meeting of the Anchorage Assembly after being specifically informed of the violation.”

assembly meetings during EO-15 were closed to the public and had far fewer people in attendance than normal. The allegations do not explain why the applicants believe that participating in a too-large gathering and violating the emergency order constitutes “misconduct in office.”

Even “liberally construing” the statutory language as the Alaska Supreme Court instructs, we do not see that the alleged conduct of merely “participating” in a meeting with a number of persons exceeding what is allowed by law, constitutes “misconduct in office” for the purposes of legal sufficiency of a recall application. We conclude that participating in a public meeting that allegedly violated the gathering restrictions of Emergency Order 15, without more, does not constitute the type of corrupt or abusive behavior that the Legislature encapsulated under “misconduct in office.”

For these reasons, we recommend denying as legally insufficient the portion of Application 2020-04 that seeks to recall Chair Rivera for misconduct in office.

2. Failure to Perform Prescribed Duties.

Although it is a close call, we reach a different conclusion with respect to the legal sufficiency of the allegation that Chair Rivera failed to perform prescribed duties. The applicants’ second allegation is that Assembly Chair Rivera failed to perform prescribed duties as Chair of the Assembly by allowing the August 11 meeting to proceed in violation of Emergency Order 15 after the violation was brought to his attention. The application says that as Chair of the Assembly, Chair Rivera “should have been scrupulous in obeying [EO-15’s] gathering limitation.” The application does not explain why this conduct constitutes “failure to perform prescribed duties,” nor does it define or discuss Chair Rivera’s legal obligations as chair, but a recall petition need not be perfectly asserted.²⁹

We look to the Anchorage Municipal Charter and Municipal Code to determine the “prescribed duties” of the Chair of the Assembly. Charter Section 4.04 provides that the Chair shall be elected from within the body, and shall be the presiding officer over the Assembly.³⁰ The Charter requires the Assembly to meet in regular session at least twice a month and also allows for special meetings; to enact procedures and rules through ordinance; and to maintain a journal of its proceedings and record all votes. Additional direction about the Chair’s duties are contained within AMC 2.30, Rules of Procedure for

²⁹ *Meiners*, 687 P.2d at 301.

³⁰ *See also* AMC 2.30.030A.

Assembly: the Assembly Chair is the presiding officer of the Assembly;³¹ serves as a member of the Assembly with all the powers and duties of that office;³² shall offer an Assembly Chair’s report as part of the order of business at regular meetings of the Assembly;³³ shall consult with the municipal clerk regarding requests to appear before the Assembly;³⁴ shall announce vote tallies and results;³⁵ shall choose which Assembly member to recognize if there are simultaneous requests to speak;³⁶ shall instruct testifying members of the public to be concise and limit their testimony to three minutes, with the Chair maintaining discretion to extend;³⁷ and shall approve absences by Assembly members.³⁸ In presiding over meetings, the chair may also utilize a sign-up sheet for members of the public wishing to testify;³⁹ and ask members of the public to give their names and where they live.⁴⁰

Anchorage Municipal Code 2.30.080 (Conduct of debate and discussion) further enumerates the duties of the Chair with respect to conducting Assembly meetings, providing that the Chair is “charged with the responsibility of maintaining order and decorum at all times” and requiring the Chair to “make such rulings as deemed necessary concerning points of order or concerning spectators.” “Order and decorum” is not defined in the Code. Black’s Law Dictionary defines “decorum” as “1. Conduct that befits the dignity of a place or an occasion, esp. a formal one; propriety in speech, manner, conduct, and dress. 2. *Parliamentary law*. The customs of formality and courtesy observed by the members and chair in conducting business.”⁴¹ The Code also adopts Robert’s Rules of Order, Newly Revised, to govern procedural matters that are not otherwise addressed in

31 *Id.*

32 AMC 2.30.020D.

33 AMC 2.30.035A.6.

34 AMC 3.30.040C.

35 AMC 2.30.070C.

36 AMC 2.30.080C.

37 *Id.*

38 AMC 2.30.075A.

39 AMC 2.30.055A.

40 AMC 2.30.055D.1.

41 Decorum definition, *Black’s Law Dictionary* (11th ed. 2019), available on Westlaw.

the Code.⁴² The question here, then, is whether the enforcement of the gathering requirement in EO-15 was an aspect of decorum that the Assembly Chair was required to enforce in a municipal assembly meeting.

Maintaining decorum in the municipal assembly context does not normally encompass law enforcement, and the Code does not specifically place any law or emergency order enforcement responsibility on the Assembly Chair. And the Assembly Chair faces competing challenges in light of emergency restraints on indoor gatherings, the need to efficiently conduct Assembly meetings to allow the people's business to be decided, and the needs of public access. Under AMC 2.30.030A., the Assembly is required to meet twice monthly at Assembly Chambers. The code was amended in March 2020 to allow the Assembly to establish a quorum with members both physically and telephonically present during a declared emergency,⁴³ but it is not clear that it is technologically feasible or legally permitted by code to meet for regular assembly meetings without having some individuals physically present at Assembly Chambers. In practice, staff and some assembly members have been present to facilitate voting, coordination between the clerk's office and the chair, and public access. During meetings, individuals sometimes move in and out of the assembly chambers to troubleshoot technological problems, film proceedings for television broadcast, and respond to questions or present on an agenda item. Thus, an Assembly Chair attempting to adhere to a strict numerical limit during the course of a meeting may be in the middle of conducting a vote or hearing telephonic testimony when the number of people in attendance fluctuates, giving rise to competing obligations.

A narrow reading of the Chair's enumerated powers and duties would lead to the conclusion that the allegations against Chair Rivera do not fall within the category of "failure to perform prescribed duties." After all, none of these enumerated mandatory duties include enforcement of emergency public health orders, and nor do the Charter, Code, or EO-15 specifically direct the Assembly Chair to enforce EO-15's gathering-size limitation in the Assembly Chambers as a part of his job as Chair of the Assembly.⁴⁴ However, the Alaska Supreme Court's decision in *Meiners* requires us to take a broader view of the Chair's duties.

In *Meiners*, the court examined the statutory job duties of a regional school board to

⁴² AMC 2.30.080I.

⁴³ AO No. 2020-31, § 1, 3-20-20.

⁴⁴ EO-15 requires all citizens within the Municipality to avoid gatherings of more than 15 people, but does not place any special enforcement duties upon the Assembly Chair.

determine whether a recall petition adequately alleged “failure to perform prescribed duties.”⁴⁵ The sponsors claimed that the school board failed “to control the administrative practices” of the school superintendent and alleged that some of the superintendent’s actions were “unlawful, and [] that the board members should have taken action to prevent such conduct.”⁴⁶ There were ten mandatory statutory duties for school board members, but none of them required the board to exercise “control” over an administrator, only to “employ” one.⁴⁷ Thus, the district argued that exercising “control” over the superintendent was discretionary rather than a “prescribed duty,” and the board could not be recalled on that basis.⁴⁸

The Alaska Supreme Court rejected this argument, finding that the duty to employ a superintendent necessarily incorporated related responsibilities: “Implicit in the board’s duty to ‘employ’ a superintendent are duties such as the following: to determine what the duties of the position of superintendent shall be, to advise the superintendent on the manner in which it wishes him to perform his duties, to evaluate his performance, and to determine from time to time whether he should be retained or whether they should ‘employ’ someone else.”⁴⁹ The *Meiners* court also read the statutory scheme as a whole to impose a general duty on the school board to lawfully exercise its power: “The board members’ duties include the duty to comply with statutes of general application relating to education. When the board undertakes to exercise one of its powers specified in section 101, it must do so in accordance with the law, even though it had no obligation to exercise that particular power at all. Its exercise of the power in an unlawful manner could constitute a failure to perform a prescribed duty, one prescribed by the statute of general application.”⁵⁰ Thus, the court concluded that the petition was legally sufficient.

We read this language to require us to adopt a broader reading of Chair Rivera’s prescribed powers, one that looks to not just the letter of the prescribed mandatory duties, but also the implicit related duties, and to keep in mind the precept that exercising a discretionary power “in an unlawful manner could constitute a failure to perform a prescribed duty, one

⁴⁵ *Meiners*, 687 P.2d at 299.

⁴⁶ *Id.*

⁴⁷ *Id.* at 299-300 (citing AS 14.08.011).

⁴⁸ *Id.* at 300.

⁴⁹ *Id.*

⁵⁰ *Id.*

prescribed by the statute of general application.”⁵¹ The Chair has the authority to stop proceedings and eject individuals from chambers, the duty to maintain order and decorum, and must exercise his discretionary responsibilities lawfully. Robert’s Rules of Order, incorporated into the Anchorage Municipal Code, also may have obligated Chair Rivera to acknowledge and rule upon a properly-asserted point of order raised during Assembly debate.⁵² With this frame of reference, although it is a close call, we conclude that Chair Rivera’s duty to “maintain order and decorum at all times” is broad enough to encompass a duty to conduct Assembly meetings in accordance with the law, including EO-15.

While we believe this conclusion is correct under current law, we are also troubled by the law’s application in this case. The State recently argued—unsuccessfully—that a *de minimis* exception should apply in the recall context, to prevent recall petitions from going forward on allegations of unsubstantial technical violations of a duty.⁵³ Such an exception would be in keeping with the constitutional convention delegates’ intent to avoid allowing recall for “petty grounds.”⁵⁴ And other jurisdictions do require repeated, substantial, or material acts to qualify an official for recall.⁵⁵ If Alaska’s Legislature or Supreme Court

⁵¹ *Id.*

⁵² AMC 2.30.080I. (incorporating Robert’s Rules of Order, Newly Revised); Robert’s Rules of Order, Newly Revised, Art. IV, § 21 (Questions of Order and Appeal) (“It is the duty of the presiding officer to enforce the rules and orders of the assembly, without debate or delay. It is also the right of every member who notices the breach of a rule, to insist upon its enforcement. In such a case he rises from his seat and says. ‘Mr. Chairman, I rise to a point of order.’ The speaker immediately takes his seat, and the chairman requests the member to state his point of order, which he does and resumes his seat. The chair decides the point . . .”), available at <http://www.rulesonline.com/rror-04.htm#21> (last accessed November 4, 2020).

⁵³ Gail Fenumiai, 2019 WL 5866609, at *14 (2019).

⁵⁴ 2 Proceedings of the Alaska Constitutional Convention at 1238-39.

⁵⁵ *See In re Proposed Petition to Recall Hatch*, 628 N.W.2d 125, 128 (Minn. 2001) (“Under the nonfeasance provision of the recall statute the petition must allege facts that if true, constitute a *repeated* failure to act. . . . The legislature did not intend an official to be subject to recall for a single failure to perform a required duty.”) (emphasis in original); *Chandler v. Otto*, 693 P.2d 71, 74-75 (Wash. 1984) (En Banc) (“To be legally sufficient, the petition must state with specificity *substantial* conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.”) (emphasis added); Va. Code Ann. § 24.2-233 (2014) (permitting recall for “neglect of duty, misuse of office, or incompetence in the performance of duties” only when that conduct “has a material

had adopted a similar requirement it would likely have protected Chair Rivera from recall here because there is no allegation of repeated or substantial wrongdoing. As discussed above, the Assembly Chambers were closed to in-person public participation during EO-15, and there are no allegations that there was a huge crowd in Assembly Chambers or that it remained open to the public for in-person participation despite EO-15's gathering limitation. Instead, the record reflects that an assembly member commented that there were two extra people present in the chamber at one point in the meeting: seventeen, rather than fifteen.⁵⁶

But Alaska has not adopted a *de minimis* analysis, and the Alaska Supreme Court has directed that the recall statutes "should be liberally construed so that the people [are] permitted to vote and express their will."⁵⁷ Chair Rivera was allegedly alerted to a violation of the emergency order, and he had enough authority over the meeting to stop and determine if the number of persons actually in Chambers violated EO-15; he could then have stopped proceedings to bring Chambers to order and/or requested the assistance of the Administration to bring the meeting back into compliance with the gathering limitation. And Robert's Rules of Order may have obligated him to resolve a properly-asserted point of order. Accordingly, we conclude that the applicants have sufficiently alleged a failure to perform the chair's prescribed duties of maintaining order and decorum, which includes the duties implicit within the order and decorum requirement, and the duty to exercise his discretion in a lawful manner.

In sum, while we do not find Application 2020-04's "misconduct in office" allegations to be legally sufficient, we do find Application 2020-04's "failure to perform prescribe duties" allegations to be legally sufficient.

PETITION CONTENT

We follow the Supreme Court's guidance that the Clerk may delete severable individual charges from the recall petition rather than wholly deny the petition.⁵⁸ The Clerk's Office should delete the allegations of misconduct in office, because those charges do not come

adverse effect upon the conduct of the office.").

⁵⁶ August 11, 2020 Anchorage Assembly Meeting at 2:52:40 out of 7:24:29, https://youtu.be/_znV4j8JKY (last accessed November 4, 2020).

⁵⁷ *Meiners*, 687 P.2d at 296 (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (alteration in original)).

⁵⁸ *Id.* at 303.

within the grounds specified by statute. But it should set forth on the ballot in full and without revision the applicants' legally sufficient allegations that Chair Rivera failed to perform prescribed duties, as follows:

Assembly chair Felix Rivera [~~COMMITTED MISCONDUCT IN OFFICE~~] on August 11, 2020 [~~BY VIOLATING~~] violated EO-15, an emergency order intended to protect the health and safety of Anchorage citizens, issued by the Mayor of Anchorage pursuant to AMC 3.80.060(H) by: 1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a meeting of the Anchorage Assembly after being specifically informed of the violation. Assembly chair Rivera failed to perform prescribed duties as chair of the Assembly by allowing the August 11 meeting he was presiding over to continue in violation of EO-15 after the violation was brought to his attention by a point of order. Of all citizens in Anchorage the chair of the Anchorage Assembly should have been scrupulous in obeying the gathering limitation established by paragraph 4 of EO-15. His failure to do so needlessly endangered the lives of Anchorage citizens, encouraged the spread of COVID-19 throughout the community, and merits recall from office.

CONCLUSION

The Clerk should certify the Recall Application 2020-04 only as to failure to perform prescribed duties, as directed above, and prepare a petition.



Municipality of Anchorage

#: 2020 - 04

Office of the Municipal Clerk

632 West Sixth Avenue Anchorage, Alaska 99501 Suite 250
Mailing Address: P.O. Box 196650 Anchorage, AK 99519-6650

Phone: 343-4311 Fax: 343-4313

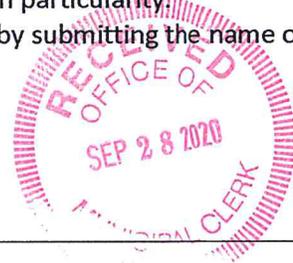
Municipal Clerk: Barbara A. Jones

Recall Application

Anchorage Charter: Section 3.03 ~ Anchorage Municipal Code: Chapter 2.50 ~ Alaska State Statute 29.26.240-29.26.360

Alaska State Statute: 29.26.260 Application for a recall petition

- (a) An application for a recall petition shall be filed with the municipal clerk and must contain
 - (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.
- (b) An additional sponsor may be added at any time before the petition is filed by submitting the name of the sponsor to the clerk.



Recall Petition Sponsor

Print Name: Russell Biggs

Phone Number: 907 727-1665 Email Address: russellbiggs@gmail.com

Residence Address: 3910 Geneva Place, Anchorage, AK 99508

Mailing Address: same as above

Identifier: [Redacted]

(Voter #, Social Security #, or Date of Birth)

Signature: [Redacted] Date: 9-15-20

Alternate Petition Sponsor

Print Name: Julie Brophy

Phone Number: 907 727-9265 Email Address: juliedbrophy@gmail.com

Residence Address: 3909 Geneva Place, Anchorage, AK 99508

Mailing Address: same as above

Identifier: [Redacted]

(Voter #, Social Security #, or Date of Birth)

Signature: [Redacted] Date: 9/25/2020

Unsworn falsification in the second degree. (a) A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true...(2) on a form bearing notice, authorized by law, that false statements made in it are punishable. (b) Unsworn falsification in the second degree is a class A misdemeanor." AS 11.56.210



Municipality of Anchorage

2020 - 04

Office of the Municipal Clerk

632 West Sixth Avenue Anchorage, Alaska 99501 Suite 250
Mailing Address: P.O. Box 196650 Anchorage, AK 99519-6650

Phone: 343-4311 Fax: 343-4313

Municipal Clerk: Barbara A. Jones

Recall Application

Anchorage Charter: Section 3.03 ~ Anchorage Municipal Code: Chapter 2.50 ~ Alaska State Statute 29.26.240-29.26.360

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 - (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.
- (b) An additional sponsor may be added at any time before the petition is filed by submitting the name of the sponsor to the clerk.



Recall Statement

Assembly chair Felix Rivera committed misconduct in office on August 11, 2020 by violating EO-15, an emergency order intended to protect the health and safety of Anchorage citizens, issued by the Mayor of Anchorage pursuant to AMC 3.80.060(H) by: 1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a meeting of the Anchorage Assembly after being specifically informed of the violation. Assembly chair Rivera failed to perform prescribed duties a chair of the Assembly by allowing the August 11 meeting he was presiding over to continue in violation of EO-15 after the violation was brought to his attention by a point of order. Of all citizens in Anchorage the chair of the Anchorage Assembly should have been scrupulous in obeying the gathering limitations established by paragraph 4 of EO-15. His failure to do so needlessly endangered the lives of Anchorage citizens, encouraged the spread of COVID 19 throughout the community, and merits recall from office.

Unsworn falsification in the second degree. "(a) A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true...(2) on a form bearing notice, authorized by law, that false statements made in it are punishable. (b) Unsworn falsification in the second degree is a class A misdemeanor." AS 11.56.210



Municipality of Anchorage

2020 04

Recall Application

Anchorage Charter: Section 3.03 ~ Anchorage Municipal Code: Chapter 2.50
and Alaska State Statute 29.26.240-29.26.360

Phone: 343-4311 Fax: 343-4313

Municipal Clerk: Barbara A. Jones

Alaska State Statute: 29.26.260 Application for a recall petition

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Ten Qualified Voters

Printed Name	Residence Address	Mailing Address	*Identifier: Voter#, Social, or DOB	Signature	Date
Karen Biggs	3910 Geneva Pl., Anchorage, AK 99508				9-25-20
JAMES BROPHY	3909 Geneva Pl. Anch, AK. 99508				9-25-20
Jimmie A. Russell	3909 Geneva Pl. Anchorage AK. 99508				9-25-20
William Moseley	3936 Geneva Pl	Anchorage, AK 99508			9-25-20
MIKE FORSLAND	1247 Matterhorn Way	Anch, AK 99508			9-25-20
Paula Ferguson	3926 Geneva Pl	Anchorage AK 99508			9/28/20
James L. Ferguson	3926 Geneva Pl	Anch AK 99508			9/28/20
Ruth Boga	1311 ST. Gotthard	Anch AK 99508			9-26-20
JAMES HOBSON	1861 E TUDOR RD, #D101	Anchorage, AK 99507			9/24/20
Elouise Andresen	1331 Matterhorn Way	Anchorage, AK 99508			9-26-20
Ruth Louser	3801 Helvetia Dr	Anchorage, AK 99508			9/24/20
Megan Biggs	3910 Geneva Pl. Anchorage A,	99508			9/26/20



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2020 - 04

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