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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

IN THE MATTER OF THE)
RECALL OF:)
) Cause No. 16-2-03395-9
DAVID CONDON,)
Mayor of the City of)
Spokane.)
)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 13th day of
September, 2016, the above-entitled cause came on for
hearing before the Honorable Blaine G. Gibson, Judge, from
the Yakima County Superior Court, sitting in the Spokane
County Superior Court.

A P P E A R A N C E S

FOR THE RECALL DAVID
CONDON COMMITTEE: DAVID GREEN, PRO SE
 Post Office Box 3973
 Spokane, Washington 99220-3973

FOR DAVID CONDON: JAMES B. KING, ESQ.
 MARKUS W. LOUVIER, ESQ.
 Evans, Craven & Lackie, P.S.
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 818 West Riverside Avenue
 Spokane, Washington 99201

1 AFTERNOON SESSION

2 (September 13, 2016; 1:30 p.m.)

3
4 THE BAILIFF: All rise. Court is now in session.

5 THE COURT: Please be seated. Good afternoon.

6 MR. KING: Afternoon, Your Honor.

7 THE COURT: Give me a moment here to get situated.

8 This is the Matter of the Recall of David Condon,
9 16-2-03395-9. And you would be Mr. Green?

10 MR. GREEN: Yes, Your Honor.

11 THE COURT: Who do I have that's going to be arguing
12 on behalf of the mayor?

13 MR. KING: May it please the Court. I'm Jim King, and
14 I'll be arguing. Also in court unless needed to respond to
15 the Court's questions, will not be arguing, is Mr. Louvier
16 from my office, who is my law partner.

17 THE COURT: Okay. Let me start with a few preliminary
18 remarks just so the public knows where we are on this.

19 The Statement of Charges in Support of Recall was
20 filed by Mr. Green on August 16. The prosecutor reviewed
21 those materials and filed them with the Superior Court on
22 August 29 along with the proposed ballot synopsis.

23 Within 15 days after the filing by the prosecutor, the
24 law requires the Superior Court to hold a hearing and
25 determine the sufficiency of the statement of charges.

1 Elected officials in Washington may be recalled for
2 malfeasance, misfeasance and violation of oath of office.
3 The court acts as a gateway to ensure that only charges
4 that are factually and legally sufficient are placed before
5 the voters. The court does not evaluate the truthfulness
6 of those charges. The requirement of factual sufficiency
7 assures that charges, although adequate on their face, do
8 not constitute grounds for recall unless supportable by
9 identifiable facts.

10 The requirement of legal sufficiency protects an
11 elected official from being subjected to the financial and
12 personal burden of a recall election grounded on false or
13 frivolous charges. To be factually sufficient the charges
14 must state the act or acts complained of in concise
15 language, give a detailed description including the
16 approximate date, location and the nature of each act
17 complained of, be signed by the person or persons making
18 the charge, give the respective post office addresses, and
19 be verified under oath that the person or persons believe
20 the charge or charges to be true and have knowledge of the
21 alleged facts upon which the stated grounds for recall are
22 based.

23 The petition must describe the charges with sufficient
24 precision and detail to enable the electorate and the
25 challenged official to make informed decisions in the

1 recall process. Charges are factually sufficient to
2 justify recall when taken as a whole they state sufficient
3 facts to identify to the electors and to the official being
4 recalled acts or failures to act which without
5 justification could constitute a prima facie showing of
6 misfeasance.

7 In the recall context the words or the term "prima
8 facie" means that accepting the allegations as true, the
9 charges on its face support the conclusion that the
10 official committed misfeasance, malfeasance or a violation
11 of the oath of office.

12 For the purposes of recall efforts, "misfeasance" or
13 "malfeasance" in office means any wrongful conduct that
14 affects, interrupts, or interferes with the performance of
15 official duty. Additionally, "misfeasance" in office means
16 the performance of a duty in an improper manner; and,
17 additionally "malfeasance" in office means the commission
18 of an unlawful act. "Violation of the oath of office"
19 means the neglect or knowing failure of an elective public
20 officer to perform faithfully a duty imposed by law.

21 "Legal sufficiency" means that a petition must
22 specifically state substantial conduct clearly amounting to
23 misfeasance, malfeasance or violation of the oath of
24 office. However, it has been held that a charge is not
25 legally sufficient if the conduct is insubstantial or if

1 the elected official acted with a legal justification.

2 Additionally, discretionary acts of a public official
3 are not a basis of recall insofar as those acts are an
4 appropriate exercise of the discretion by the official in
5 the performance of his or her duties. When an official is
6 charged with violating the law, there must be evidence
7 presented that leads to the conclusion that the public
8 official intended to commit an unlawful act.

9 Now let me -- I tried to summarize the ground rules
10 that we're operating under here. I want to know if anybody
11 feels I have in any way misstated those rules.

12 Mr. Green?

13 MR. GREEN: Your Honor, the only potential issue I had
14 was the subject of a filing. Unfortunately, yesterday
15 morning with respect to the change in law in 2003 by the
16 state legislature with respect to violation of oath of
17 office where the definition of violation of oath of office
18 was changed from "willful neglect and failure" to simply
19 "neglect and knowing failure." To the best of my knowledge
20 the Supreme Court has not addressed the issue of what the
21 removal of the word "willful" means that intent is no
22 longer not required with respect to the violation of the
23 oath of office.

24 I agree that intent is required with misfeasance and
25 malfeasance.

1 THE COURT: I'm aware of that. I reviewed those
2 materials.

3 Mr. King?

4 MR. KING: I think the Court has correctly outlined
5 the law that applies to the matter.

6 THE COURT: Okay. This hearing is solely for the
7 purpose of evaluating the factual and legal sufficiency of
8 the petition. It is not a trial. The court is not to
9 weigh the evidence or make any factual determination. Both
10 sides have had an opportunity to brief the issues. I
11 operate under the assumption that in their briefs they have
12 made all of the arguments they intend to make. For this
13 reason, I might not ask for comment or argument from the
14 parties on some issues.

15 We have a preliminary issue, and that is the objection
16 filed on behalf of the mayor to the materials Mr. Green
17 filed yesterday, which I received about five minutes to
18 noon yesterday. I think it is clear those, to the extent
19 those materials sought to add anything to the petition, the
20 filing is untimely. In a case like this the moving party
21 must file the materials he intends to rely upon with the
22 Statement of Charges. He cannot bring them in at the last
23 minute when neither the opposing parties or the Court has
24 had any fair opportunity to review them.

25 As far as the case law that Mr. Green had cited, that

1 is -- I'd already read those cases before he sent them to
2 me anyway. It doesn't make any difference. So the
3 objection is sustained. And to that -- as I said -- to the
4 extent those materials Mr. Green submitted yesterday
5 contained any additional supporting materials for the
6 petition, I will not consider them.

7 MR. GREEN: Your Honor, may I ask a question?

8 THE COURT: Go ahead.

9 MR. GREEN: To the extent that the recall petition
10 made reference to materials that were submitted in detail,
11 for example, if it was a statute or something like that
12 where the materials were -- the statute was submitted
13 yesterday morning -- if the recall petition made reference
14 to that statute, is it permissible to refer to that statute
15 if it was in the recall petition itself?

16 THE COURT: Mr. King?

17 MR. KING: Your Honor, our position is obviously the
18 court is deemed to be aware of, and I'm sure this Court is
19 aware of the applicable statutes and case law that apply to
20 this matter. So that isn't our objection; we're mindful of
21 the Court's ruling.

22 The only thing I would add for the record is that the
23 issue of counsel -- or Mr. Green's explanation for the late
24 filing should not go without remark. His excuse for the
25 late filing was he got a letter too late. He -- in a total

1 lack of candor to this tribunal, he fails to advise the
2 tribunal or counsel in his papers that he was specifically
3 notified by the court administrator's office on September
4 8th when his materials were due and voiced no objection to
5 that deadline, and then made up an excuse when he filed
6 late on Monday.

7 That mendacity, that lack of candor, should not go
8 unremarked.

9 THE COURT: As I said, the principle here is that the
10 person who files the charges has to include in with the
11 charges the -- at least the factual materials upon which
12 the party intends to rely. As far as the legal materials,
13 the statutes, so on, again, I don't have a problem with
14 that because I'd already read the statutes before I
15 received the filing anyway. But it is the factual
16 materials that I'm concerned about.

17 So --

18 MR. GREEN: Your Honor?

19 THE COURT: Yes.

20 MR. GREEN: I did in my letter of yesterday apologize
21 to the Court as well as counsel. As I am not licensed to
22 practice law in Washington State, I did not fully
23 understand that the Friday 4:00 p.m. deadline applied to
24 the petitioner as well as the respondent. It was simply my
25 understanding that it was the deadline for the respondent.

1 I don't believe there is mendacity involved. I do
2 believe there's a simple misunderstanding. And I was truly
3 surprised when the letter indicated that I could provide
4 additional documentation. So I do apologize to the Court.

5 THE COURT: All right.

6 The first issue involves public records requests. The
7 City of Spokane received a public records request on
8 August 18, 2015, and six additional public records requests
9 between September 5, 2015 and October 20, 2015 for public
10 records related to Frank Straub and Monique Cotton.

11 The question is whether Mayor Condon violated the
12 Public Records Act by personally withholding certain public
13 records until after the mayor's re-election.

14 Mr. Green, let me ask you, this charge is based --
15 entirely on the Seabold Reports, is it not?

16 MR. GREEN: Yes, Your Honor.

17 THE COURT: Okay. And when you filed the charge, did
18 it include -- did what you filed include the appendices and
19 exhibits and transcripts that are referred to in the
20 Seabold Report?

21 There is a number of citations throughout the report
22 to certain exhibits or certain pages of transcripts. Were
23 those included in what you filed?

24 MR. GREEN: What I filed, Your Honor, was the
25 Seabold -- my understanding was what we're referring to as

1 the Seabold Reports are in fact summary reports, although
2 at 126 pages long it is hard to imagine they are a summary.

3 But my petition was focusing on the 126-page report as
4 well as the appendices that were included with the recall
5 petition. I did not intend at the time to incorporate by
6 reference all the underlying documents that were referred
7 to.

8 THE COURT: By "appendices" you're referring to --

9 MR. GREEN: I was referring to the petitioner's
10 appendices, A through Z.

11 THE COURT: Those would be the media articles --

12 MR. GREEN: The contemporaneous news articles, the
13 publication from the organization that specializes in the
14 Public Records Act, and other such materials, which I had
15 read contemporaneously.

16 THE COURT: Well, Mr. Green, clearly you had no
17 personal knowledge of the events in question on this issue.
18 So really the issue is whether you can rely on the Seabold
19 Report to support your request for a recall election.

20 Factual sufficiency requires the recall petitioner to
21 have more than a simple belief that the charges are true.
22 So we get to the Seabold Report and Ms. Cappell, the author
23 of the report, also had no personal knowledge of the
24 pertinent events. She drew conclusions from interviewing
25 witnesses and examining documents.

1 She also refers to the report as being "a summary."
2 And I looked at that and my first -- I first wondered, does
3 this mean there is a longer report someplace and this is a
4 summary of that report? As I reread things, my
5 understanding of her use of the term, as much as I could
6 glean it from the report, was that she meant -- when she
7 used the term "summary" she meant it was a summary of the
8 information that she had gathered in the course of her
9 investigation. And that information would be contained in
10 the various documents that she had reviewed and the
11 transcripts of the witness interviews, and so on.

12 But that -- that is where there is a problem.
13 Because, again, the Court is to determine the sufficiency
14 of the petition as it was filed. The petition did not
15 include the transcripts, the exhibits and appendices
16 referred to in the report.

17 Of particular interest would be Appendix B which was
18 referred to by Ms. Cappell, she referred to it as many of
19 the key documents. I don't know what those key documents
20 were.

21 What we're left with, here, Mr. Green, is you believe
22 the charge is true because Ms. Cappell believes it is true,
23 at least that is what she said in her first version of the
24 report.

25 Without the documents and the transcripts that would

1 support Ms. Cappell's beliefs, nobody reading the petition
2 can know how reasonable her conclusions are because they
3 don't have any more information than you had as a person
4 charging the -- filing the charge.

5 So I think the -- with regard to this issue the
6 petition fails because it is factually insufficient. It
7 does not contain the information that the electorate and
8 the elected official would need to know specifically how
9 the conclusion was reached that the mayor had intentionally
10 withheld documents from the public records request.

11 So I find this charge is factually insufficient.

12 I want to make it clear I am not making any decision
13 on whether or not the petition would have been factually
14 sufficient if the appendices and the exhibits and the
15 transcripts would have been included with the petition in
16 the filing.

17 All right. Issue number two is the one about the
18 question answered by the mayor. Another way to state it
19 is, did Mayor Condon violate the Spokane Code of Ethics
20 when he said "no" at the September 22, 2015 press
21 conference in the response to the question: "Were there
22 any sexual harassment complaints lodged against Frank?"
23 The answer to that question: "No."

24 So, Mr. Green, is there a difference between lodging a
25 complaint and making a complaint or complaining?

1 MR. GREEN: Your Honor, the question -- my
2 understanding of the question that was asked of the mayor
3 at the time was were there any complaints that were
4 associated with the -- with Ms. Cotton and Police Chief
5 Straub. And so the word "any" doesn't matter whether it is
6 formal or informal. And the mayor responded to that
7 question "no."

8 THE COURT: Well, my understanding of the question as
9 it was quoted in the materials was, "Were there any sexual
10 harassment complaints lodged." And it is the word "lodged"
11 that I'm concerned about; not made, but lodged. I'm trying
12 to ascertain whether there is a substantive difference
13 between lodging a complaint and making a complaint.

14 MR. GREEN: Certainly their record indicates in the
15 Cappell report that complaints had been filed, and there
16 were significant meetings having gone on in April 2015 with
17 respect to the mayor and his team and Chief Straub and
18 Monique Cotton and her attorney.

19 So I equate the word "lodge" to not be filed in a
20 formal sense, but in the word made or raised.

21 THE COURT: All right. But the issue here is --

22 First of all let me make sure, am I correct that the
23 actual question that was asked was about complaints having
24 been lodged?

25 MR. GREEN: Yes, Your Honor. As reflected in the

1 Cappell report, the word "lodged" was used.

2 THE COURT: All right. Well, again, the problem is
3 one of semantics.

4 I think that most people would understand the words --
5 the word "lodged" to refer to something more formal than
6 simply complaining. And my understanding is that the only
7 complaint at that point that had been made was by
8 Ms. Cotton, and that was made orally; correct?

9 MR. GREEN: Yes, Your Honor.

10 THE COURT: Okay. So it is a question of whether at
11 the time he answered the question, would it be dishonest of
12 him to say no if he's asked --

13 Let me rephrase the question.

14 Had he been asked had Ms. Cotton lodged a complaint
15 against Frank Straub, should the mayor have understood that
16 to mean had she complained about Frank Straub or should the
17 mayor have understood that to mean had she made some kind
18 of formal complaint or -- again, we get back to the word
19 what does "lodge" mean.

20 MR. GREEN: Yes, Your Honor. It may be helpful to
21 understand in the transcripts or in the materials from the
22 Cappell report it was clear towards roughly pages 95
23 towards the end is where the sexual harassment claims were
24 discussed, the investigator took considerable pains to talk
25 with Heather Lowe, who is the HR person for the City, and

1 another HR person for the City, where they said it was
2 common there would be more informal complaints than formal,
3 and that sometimes those informal complaints were simply
4 someone stopping by and talking to somebody at a desk, and
5 the City regarded that as a complaint and acted upon it.

6 So -- so when the word "lodged" is used, is it in the
7 sense of did someone come forth and cause a complaint,
8 whether it be verbal, informal, formal or written.

9 In this particular case the mayor has more indicated
10 that he did not consider that a complaint had been lodged
11 because nothing formal was filed. But the Cappell report
12 clearly indicates that significant activities, including
13 transferring Ms. Cotton at her and her attorney's request
14 to the Park Board was in response to her complaint against
15 Chief Straub.

16 THE COURT: Does it make any difference that she had
17 specifically said that she did not want to file a
18 complaint, she did not want to have an investigation made,
19 and she wanted her oral complaint to remain confidential?
20 Does that make a difference in terms of how the mayor
21 should have answered that question?

22 MR. GREEN: The duty of the mayor is to enforce the
23 laws of the City of Spokane as recognized in the charter
24 under Section 24J. In this particular case he's to
25 faithfully enforce the laws. And the issue -- And in

1 addition to in the transcript it was clear that in the
2 context of the press conference that from the summer of
3 2015 on, rumors were circulating throughout the police
4 department, throughout the city, investigators documented
5 those rumors with respect to a sexual -- potential sexual
6 relationship between Ms. Cotton and Chief Straub.

7 Further, the investigator documented that it was in
8 the midst of an election season. And when the police
9 chief's resignation was announced on September 22nd, I
10 believe it was unclear by Mayor Condon's comments that he
11 was afraid if he had said yes, everything would blow up
12 just before the election. Instead it blew up after the
13 election, when on November 24 the records requests that
14 were finally released indicated that there had been
15 significant HR concerns with Ms. Cotton and Chief Straub.

16 THE COURT: You are relying upon the Seabold Report.
17 Doesn't the Seabold Report specifically find that there was
18 no connection between Ms. Cotton's complaint about
19 Mr. Straub, Chief Straub, and the decision to terminate
20 him?

21 MR. GREEN: The investigator found in fact that there
22 was no evidence of sexual harassment by Chief Straub of
23 Ms. Cotton, that's correct.

24 THE COURT: Okay. So, again, we get back to this
25 question of is there a difference between the question did

1 Ms. Cotton lodge a complaint against Chief Straub versus
2 did Ms. Cotton complain about Mr. Straub.

3 That is really where we are; right?

4 MR. GREEN: Yes.

5 THE COURT: My concern about this is that I don't
6 think a recall should be based upon a dispute over
7 semantics because, again, I can certainly understand where
8 -- particularly when there is a formal process that can be
9 followed, the City -- the City's anti-harassment policy
10 specifically talks about the process of making complaint,
11 and says it can be made in writing or some other way. And
12 it is kind of vague language about exactly if it is not
13 made in writing how is it made, and it is a little unclear.

14 But given the context, I don't think it's legally
15 sufficient to say -- even assuming everything that you are
16 saying is true, that the mayor -- I don't think there is a
17 dispute about the fact the mayor said "no" in answer to the
18 question about the complaint being lodged, but the question
19 is, is that necessarily dishonest? And I don't think it
20 is, necessarily. I don't know what was going on in his
21 head.

22 MR. GREEN: Uh-huh.

23 THE COURT: But I certainly understand that many
24 people -- I think most people would treat the two questions
25 differently or understand the questions differently,

1 whether a complaint was "lodged" versus whether somebody
2 complained about somebody.

3 As I said, I don't think the recall petition should be
4 based on disagreements over semantics. So I find that
5 recall charge is insufficient.

6 MR. GREEN: Your Honor, may I -- may I be able to ask
7 a question about your conclusion with respect to question
8 number one, charge number one?

9 THE COURT: Sure.

10 MR. GREEN: I'm having difficulty reconciling the case
11 In re Recall of West, where the petitioner in that case,
12 Shannon Sullivan, read about the mayor's interaction with
13 the undercover agents in the newspaper, and the first-hand
14 knowledge that the Supreme Court of Washington indicated in
15 that particular case that first-hand knowledge was not
16 required. It was based on general knowledge of the
17 petitioner having read the transcripts in the newspaper.

18 I'm having difficulty reconciling that to the issue of
19 having knowledge of the situation with respect to charge
20 number one by reading a report that was commissioned by the
21 City of Spokane to an investigator firm who spent
22 approximately six to seven months, interviewed 43 witnesses
23 and read thousands of e-mails.

24 And I would appreciate some guidance from the Court as
25 to how In re Recall of West is differentiated from Your

1 Honor with respect to your ruling on charge number one.

2 THE COURT: My recollection of that case, wasn't that
3 a question of when the transcripts -- the record that the
4 transcripts had been read by the petitioner; right?

5 There wasn't a question about the transcripts being
6 accurate.

7 MR. GREEN: Yeah. In this case the factual basis for
8 the allegation is drawn almost entirely from the
9 transcripts of internet chats published in the newspapers.
10 Sullivan and the community are aware of the sources of the
11 allegations and far better able to judge their credibility.

12 THE COURT: The problem here is, the conclusions
13 reached by Ms. Cappell in the Seabold Report don't quote
14 necessarily from the transcripts. They refer to the
15 transcripts, but they are not quoted. And again, somebody
16 reading her report has no way of knowing exactly what the
17 witness said.

18 Whereas in the West case there wasn't any question
19 that the transcript had been accurately reported. I think
20 that case the issue was more could -- was it appropriate to
21 rely upon media reports. I think that was the particular
22 issue the court was addressing at that point.

23 Am I mistaken on that?

24 MR. GREEN: Well, there were -- it differentiated In
25 re Recall of Beaseley (phonetic) where there were unnamed

1 sources in submitted newspaper articles. In this
2 particular case there were -- with respect to West, the
3 newspaper articles quoted transcripts, but they basically
4 were a third-party account of what had happened, because I
5 don't think there was any verification that the transcripts
6 were in fact verbatim. I'm not saying that they weren't.
7 But there was -- similar to the Cappell report, you know,
8 the City commissioned a -- investigator who had 11 years of
9 legal experience, was a former federal prosecutor, as well
10 as in solo practice who had joined a respected
11 investigative firm, and I'm a little bit discomfited by
12 the fact that the City of Spokane spent over \$120,000
13 apparently on a report that apparently the Court does not
14 believe it could rely on.

15 THE COURT: Well, I didn't say I couldn't rely on the
16 report. I said I would need to see the whole report. You
17 chose not to file the appendices and other materials that
18 are referred to in the report.

19 MR. GREEN: To --

20 THE COURT: That is why I don't have them.

21 MR. GREEN: To the best of my knowledge, Your Honor,
22 they were not readily available to the public. I do not
23 know if under the records request they were, but I did not
24 see them readily available.

25 THE COURT: I know nothing about that because it is

1 not in the filing. I assume -- I just assumed when there
2 is a report that is referring to appendices, that the
3 appendices would have been included in the report that was
4 filed with the City. Maybe I shouldn't have made that
5 assumption.

6 But in the West case there was a report, but -- and
7 there was certainly some reliance on that report. The
8 issue of whether the report was complete as to whether it
9 included the appendices, transcripts, so on that were
10 referred to the report, wasn't addressed in the case.

11 So, again, I don't know what happened in that case,
12 whether that report was complete as it was filed with the
13 petition, and that is the problem I have is that there
14 clearly were materials that Ms. -- is it pronounced
15 Cappell?

16 MR. GREEN: I do not know, Your Honor. Perhaps
17 someone else does.

18 THE COURT: Again, I assume those materials were filed
19 with the report and would be available and could have been
20 filed with the petition. And that would be then -- make it
21 possible for the court, the electorate, the mayor, to find
22 out where the information came from that she was relying
23 upon in reaching her conclusion.

24 And I think that is particularly important with regard
25 to that first issue because of the fact that she filed one

1 report where she concluded that the mayor had withheld
2 materials until after the election. Then the next day she
3 files her report withdrawing those contentions. Again,
4 there is an issue about her understanding of proof by a
5 preponderance of the evidence and her understanding of
6 circumstantial evidence and validity of it.

7 But without seeing the supporting materials, one
8 cannot know why she may have changed her mind. Again, I
9 think that further complicates the matter. And it could
10 have been cleared up by simply filing the materials. I
11 think that is --

12 MR. GREEN: Thank you, Your Honor.

13 To the best of my knowledge the only portion of the
14 report that was released for public consumption was the 126
15 pages that were submitted with the petition.

16 THE COURT: Again, that is the first I have heard of
17 that.

18 Issue number three has to do with Craig Meidl. Am I
19 pronouncing that correctly, Meidl?

20 MR. KING: You are, Your Honor.

21 THE COURT: Issue three: On August 1, 2016 Mayor
22 Condon announced Craig Meidl's appointment as chief of
23 police. The issue is whether Mayor Condon violated the
24 Spokane Municipal Code by not submitting the appointment of
25 Craig Meidl to the Spokane city council.

1 Mr. Green, it appeared to me, and you correct me if
2 I'm wrong, that your charge in this case is based solely on
3 the media articles that you attached to your petition.

4 Is that correct?

5 MR. GREEN: Your Honor, my first-hand knowledge comes
6 from what was reported in the press, that is correct.

7 THE COURT: Okay. And is there a municipal code or
8 charter provision that specifies whether the approval by
9 the city council has to come before the appointment is
10 effective, after.

11 What is the process that is specified in the code?

12 MR. GREEN: The process simply is that under the
13 Spokane Municipal Code and the charter that the mayor
14 nominates and the city council must approve. There is,
15 unfortunately, no reference to time frame in there. I
16 believe there is an ordinance pending as a result of this
17 matter that would discuss that.

18 My concern as petitioner with respect to this issue,
19 Your Honor, is a -- some type of hypothetical fact patterns
20 with respect to if the mayor withholds the nomination and
21 the city council disapproves -- if the mayor withholds
22 forwarding the nomination and the city council disapproves,
23 does the mayor then say, well, I never submitted the
24 nomination, and therefore you have nothing to disapprove.
25 Those were the type of issues that caused the problem

1 charge created and placed in there.

2 THE COURT: You used the word "nominate." I didn't
3 see the word "nominate" in the ordinance. It says
4 appoints, that the mayor appoints. And then --

5 MR. GREEN: Yes, that's correct. Appoints, subject to
6 city council approval.

7 THE COURT: Right. But is there anyplace in the code
8 that says anything else? Because, again, I didn't see
9 anything that said -- that used the word "nominate."

10 MR. GREEN: Nominate was an incorrect word, Your
11 Honor. It was an appointment.

12 THE COURT: Okay. All right.

13 Well, first of all, the Supreme Court has generally
14 held that media articles do not form a basis for personal
15 knowledge required by law to support a recall charge. So
16 there is an issue about that. Although, again, the West
17 case says -- seems to indicate under some circumstances
18 media articles can be used.

19 Even considering the media articles that you have
20 attached to your petition, it is not clear what they show.
21 At least one of the articles quotes the mayor as saying
22 that Craig Meidl "will be moved into the position of full
23 chief." Is that an appointment? Is that a statement that
24 he's going to appoint him? You know, that is not clear
25 what that means.

1 Another article says that Meidl's salary has not been
2 finalized. If his salary hasn't been finalized, clearly he
3 is not finally in the position. So the article seems to
4 indicate that the appointment process, at least at that
5 time, because the first article is dated August 1, and then
6 August 16 you filed your petition. So we have basically 16
7 days there. The article seem to indicate the appointment
8 process has not been completed.

9 One article quotes council involvement is saying that
10 the municipal code gives the council authority to confirm
11 the appointment. If the council's understanding is that
12 the appointment is made and then they confirm it, then that
13 would seem to anticipate that the mayor would first make an
14 appointment and then it would be confirmed. It is a
15 two-step process.

16 So, again, the problem is -- I can certainly
17 understand why the City might want to modify their
18 ordinance on this issue because it is not clear what the
19 process is. If the process is supposed to be that the
20 mayor nominates someone and then that person does not take
21 office until approved by the city council, then they need
22 to make an ordinance that says that. But currently that is
23 not what the ordinance says.

24 And an elected official can't be condemned and
25 recalled from office for not following a procedure that has

1 not yet been adopted by the municipality.

2 As a matter of fact, one of the articles dated
3 August 4 says the city council will vote -- will vote on
4 Meidl's appointment. So within three days it appears from
5 that article that the City had started a process of
6 reviewing the appointment to decide whether or not to
7 confirm it or so -- so, again, the process is not specified
8 in the ordinance.

9 It appears, at least from the news articles that
10 Mr. Green is relying upon, that it may be an acceptable
11 procedure to have the mayor at least announce the person
12 that he wants to appoint or is appointing or, again, I'm
13 not sure exactly what the language should be, because the
14 only language in the ordinance says the mayor makes the
15 appointment and the appointment is subject to the approval
16 of the -- it seems so me if that is the only two options he
17 has to make an appointment, and then it is approved or not
18 approved, that would anticipate he has to make the
19 appointment first and then they would either approve it or
20 they don't approve it.

21 So given the fact the municipal code is not clear on
22 the procedure, there is no timeline specified in the
23 ordinance, for these reasons I find the charge to be both
24 factually and legally insufficient.

25 Issue number four: Beginning in April 2015 did Mayor

1 Condon fail to follow the City of Spokane's and Spokane
2 Police Department policies with respect to the sexual
3 harassment claim by Monique Cotton resulting in direct
4 financial loss to the taxpayers and the citizens of
5 Spokane.

6 Here again, Mr. Green, you are relying on the Seabold
7 Report and the media articles you attached; right?

8 MR. GREEN: Yes, Your Honor.

9 THE COURT: Again, am I correct that Ms. Cotton never
10 made what might be considered to be a formal complaint; she
11 never made a written complaint, is that correct?

12 MR. GREEN: She never made a written complaint, Your
13 Honor. But this is the area in the charge that has to do
14 with the impact of the violation of the oath of office.

15 I believe it was Footnote 92 of the report indicates
16 that neither Mayor Condon nor Theresa Sanders consulted or
17 even thought about the required -- the City policies that
18 are in place. The City policies that the City of Spokane
19 has codified policies with respect to sexual harassment and
20 the neglect of an elected official to perform his duty
21 faithfully imposed by law would mean that the mayor was at
22 least obligated to consider what city policies might apply
23 before acting.

24 In this particular case I believe that -- I don't
25 think there is misfeasance or malfeasance after having

1 drafted the petition back on August 16th -- but I do
2 believe there is a violation of the oath of office because
3 of the neglect issue that the investigator believed that
4 the mayor nor Theresa Sanders had consulted the policy
5 which the mayor -- that policy covers all city departments
6 except the police department, which has its own policy.

7 THE COURT: So what is it you are saying, that --
8 Are you saying that the mayor failed to consider the
9 policy or consult the policy, is that what you are saying?

10 MR. GREEN: If the mayor had consulted the policy and
11 then chose not to do it would be a discretionary act which
12 is not recallable. However, the investigator found and
13 wrote in I believe it was Footnote 92 that neither the
14 mayor nor Ms. Sanders even considered -- neither considered
15 nor consulted the policy. That policy is a mandatory
16 process for the City of Spokane. Therefore it was a
17 neglect of an elected official to perform a duty faithfully
18 imposed by law.

19 THE COURT: What happens if the elected official
20 doesn't consider the policy but the elected official's acts
21 actually conforms to the policy; would that still be a
22 violation of the oath of office?

23 MR. GREEN: I don't believe there would be a problem
24 in that particular case if their acts conformed to policy.

25 In this particular case it does not appear as

1 though -- I believe the investigator found that the end
2 result was correct, but the path on how the City got to
3 that end result did not follow city policy.

4 I am not questioning the -- whether or not the City
5 handled Ms. Cotton's particular facts and circumstances
6 correctly. The recall petition is focusing on the fact
7 that the mayor had an affirmative duty under the city code
8 to -- under the city policies -- to at least consider city
9 policies before going down the path.

10 Had he consider those policies and then not followed
11 them, then I believe there would have to be intent involved
12 in order for it to be a recallable situation. But in this
13 particular case the statutory authority appears to have
14 taken the concept of intent away through the 2003
15 legislation, and therefore by not even considering the
16 policies, he has violated his oath of office.

17 THE COURT: What did the mayor do or fail to do that
18 was contrary to the policies?

19 MR. GREEN: The policies, I think the investigator
20 found, were not well written to say the least, and
21 recommended that significant changes occur to bring them up
22 to a better situation where they would be more easily
23 understood and followed.

24 The policies appear to have required a written
25 complaint before a process started. Midway through there

1 there is a suggestion that if a supervisor becomes aware of
2 a sexual harassment issue, the supervisor -- the word
3 "shall" is used. I'm not sure that that -- in this
4 particular case that is applicable because the formal
5 written complaint was never filed. But I think the
6 citizens of Spokane should have an understanding that their
7 elected officials, if there are city policies in place
8 which are published and available for citizens to be able
9 to review, that the citizens of the city of Spokane should
10 be in a position where they will understand that their
11 elected officials will actually take a look at those
12 policies before acting.

13 THE COURT: Well, but you just said that according to
14 the investigator, the policies didn't kick into effect
15 until there was a written complaint; right?

16 MR. GREEN: In this particular case not only did --
17 not only is it not clear that the policy was effective, but
18 it is clear, at least from Footnote 92, that the mayor did
19 not even consider whether a policy applied.

20 THE COURT: Again, if it turns out the policy didn't
21 apply, can somebody be held to a -- violated their oath of
22 office by not considering a policy that didn't apply in the
23 first place?

24 MR. GREEN: The policy is entitled Sexual Harassment.
25 The claim informally was sexual harassment. Any employer

1 for a for-profit organization, any individual that has
2 responsibility especially for a for-profit organization,
3 knows that sexual harassment is exceedingly important in
4 today's workplace, and that any written policies should be
5 considered before a path is moved forward.

6 I am not arguing that the end result was bad. I'm
7 arguing that the process was not followed, nor was it even
8 considered, which is a violation based on the neglect
9 portion of the statutes.

10 THE COURT: Did the mayor say he had never read the
11 policy and didn't know anything about it? Or is he saying
12 that after he received the oral complaint from Ms. Cotton
13 he didn't go then look up the policy?

14 MR. GREEN: Footnote 92 refers to neither considered
15 nor consulted the policy. I don't know what the mayor did
16 or did not do. I'm relying on the findings of the
17 investigator in this particular case to faithfully report.
18 It was presumably based on in the news.

19 The mayor interviewed with the investigator, and
20 Ms. Sanders interviewed with the investigator. I am
21 presuming that it is reflected in those particular
22 transcripts.

23 THE COURT: How do you know that he didn't know that
24 the policy didn't apply since there was no written
25 complaint? He may have read the policy previously --

1 He's been the mayor for a while. I assume he has had
2 some other dealings with the policy.

3 MR. GREEN: I believe there have been plenty of other
4 situations where he may have been --

5 THE COURT: So each complaint that he's aware of, does
6 he have to go then re-read the policy or the procedure
7 manual and so on, or if he's already familiar with it, can
8 he go ahead and address the issue without, as you say,
9 consulting the policy?

10 MR. GREEN: The investigator also noted that he did
11 not consult with HR, and that the mayor and Ms. Sanders
12 went directly to their attorneys, which I'm presuming are
13 the City's attorneys. I do not know for sure.

14 THE COURT: But my question was, assuming the mayor --

15 You say there have been previous sexual harassment
16 issues. If he's already familiar with the policy, if he
17 knows that it doesn't apply where there is no written
18 complaint, then how can it be a violation of his oath of
19 office not to consult the policy -- or the actual written
20 document, when he may very well know it doesn't apply?

21 MR. GREEN: Under that hypothetical if he was aware of
22 the policy and he knew that the policy did not apply, then
23 there could not be a violation.

24 The Seabold Report does not indicate that he was aware
25 of the policy, so I respectfully disagree with your

1 hypothetical.

2 THE COURT: Did anybody ask him that question?

3 MR. GREEN: I do not know, Your Honor.

4 THE COURT: So if we had the transcripts of his
5 interview by Ms. Cappell, we might know the answer to that
6 question.

7 MR. GREEN: If they were publicly available, perhaps,
8 yes.

9 THE COURT: All right. Mr. King, your response on
10 this issue?

11 MR. KING: Your Honor, in the first instance,
12 Mr. Green has failed to specify what policy should have
13 been consulted or considered, but then goes on to say if he
14 considered or consulted a policy and then decided to do
15 something different, that would be an act of discretion and
16 not actionable under the recall statute.

17 What he's put before you, contrary to what the recall
18 statute requires, is a hypothetical on what he might have
19 done or might have thought about, which is insubstantial
20 and not the type of conduct that gives rise to the ability
21 to assert the right of recall under the statute.

22 We also have pointed out in our materials factually
23 that the mayor consulted with the city attorney's office
24 after receiving Ms. Cotton's complaint of misbehavior by
25 Chief Straub at the March 31st meeting, and that the city

1 attorney's office was aware of her express concern, and
2 that the city attorney's office conducted an investigation
3 involving attendance at the meeting that was the subject of
4 her articulated concern to Mayor Condon, and that because
5 Ms. Cotton was represented by counsel and attorneys for the
6 City could not interview a represented party, Ms. Sanders
7 was tasked with her part of the investigation, which was
8 interviewing Ms. Cotton.

9 So we know that her complaint which was about Chief
10 Straub's behavior at the March 31st meeting was
11 investigated in a bifurcated manner because it was a
12 representation of Ms. Cotton. The allegations against him
13 by Ms. Cotton were confirmed as being inappropriate conduct
14 at that meeting. Appropriate corrective action was taken
15 against Chief Straub by Ms. Sanders and Mayor Cotton (sic).
16 And at Ms. Cotton's request she was transferred to the park
17 department, a transfer that violates no policies
18 whatsoever, and was approved by the park department or the
19 park department executive who agreed she was selected to
20 fill an existing need in the park department.

21 So there is no factual and legal sufficiency as it
22 relates to this allegation. And to construct a recall
23 petition on the basis of not following a process when the
24 city policy recommends at the first level an informal
25 resolution of concerns and complaints before a formal

1 investigation is launched, the formal investigation of
2 course being launched when it is triggered by a formal
3 written complaint, does not comply with the mandate and
4 edict of the statute.

5 So we would urge the Court to find both a dearth of
6 factual and legal sufficiency for this charge.

7 THE COURT: As I understand Mr. Green's position, he's
8 not claiming that the complaint itself was somehow
9 mishandled. He's saying that the mayor should have first
10 consulted the policy. I would assume that means read the
11 policy; right? And that failing to do so would be a
12 violation of his oath of office.

13 I think that is the complaint.

14 MR. KING: What policy? He needs to be both concise
15 and specific as to what policy the mayor should have read.

16 And to the extent that the mayor is not a HR
17 specialist, HR was not involved in this matter because of
18 an internal conflict. Ms. Lowe was the head of HR, had a
19 husband in the police department, and consistently recused
20 herself from human resources issues involving the police
21 department for that reason.

22 To suggest the mayor violated an oath of office by not
23 considering a policy, which Mr. Green can't even point out
24 to us, when he acknowledges that the complaint was in its
25 final analysis well handled, that the mayor had the

1 discretion to ignore any hypothetical policy that he would
2 have considered, and it would be discretionary and not the
3 subject of a recall, and then to concede that the matter
4 was thereafter handled appropriately with a good outcome,
5 and to make that the subject of a recall, we think borders
6 on -- we think it would be an absurd outcome, Your Honor.

7 THE COURT: Okay. Mr. Green, anything else?

8 MR. GREEN: Your Honor, the policy is identifiable.
9 It was in the Seabold Report. Counsel is well aware of it.
10 It is City of Spokane Policy Admin 0620-05-35. And it is
11 applicable to all City divisions and departments. It does
12 not apply to the police department, which has its own
13 policy.

14 THE COURT: I think that to say that an elected
15 official violated the oath of office by not consulting the
16 policy, which by its terms didn't apply to the situation,
17 hypothetically I suppose that might be said to be a
18 violation of the oath of office. But it is so ephemeral,
19 it is -- a charge to support a recall has to be
20 substantial. I don't think anybody would consider it
21 substantial, the claim that the mayor violated the oath of
22 office by not going to re-read a policy which he may very
23 well have been familiar with already, the policy which did
24 not apply to the situation, and give that --

25 It's -- it's reasonable to assume that he was aware

1 that the policy, as Mr. King said, specifies in it that
2 it -- ideally claims would be resolved at the lowest
3 appropriate level informally and effectively. Which is
4 exactly what happened.

5 So the mayor took care of the problem informally and
6 effectively, which is following the policy. So I just --

7 And I'm not aware of any case, and certainly,
8 Mr. Green, you haven't cited any case to me where an
9 elected official effectively followed a policy and yet was
10 found to somehow have breached a duty by not reading the
11 policy before following it.

12 MR. GREEN: Your Honor, all the cases that I have
13 read, the courts have appeared to apply an intent statute
14 to the violation of the oath of office, therefore that
15 issue would not have come up. It is only as a result of
16 the law change in 2003 where "willful" was taken out where
17 I believe there is an argument that can be made that simply
18 neglect would be a violation of oath of office.

19 THE COURT: Well, again, there is no authority to
20 support that argument. In addition, I think that there
21 still has to be a substantial claim here. And I -- again,
22 I think that that type of claim to say that the mayor had a
23 duty to consult a policy that did not even apply to that
24 situation is -- would not be a substantial claim.

25 So I am finding that issue number four is both

1 factually and legally insufficient.

2 I have found that all of the charges are either
3 factually or legally insufficient, and I am dismissing the
4 case.

5 So, I will just fill out the order.

6

7 (Matter adjourned at 2:30 p.m.)

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1 STATE OF WASHINGTON)
2 : ss: REPORTER'S CERTIFICATE
3 COUNTY OF SPOKANE)

4 I, Kenneth J. Wittstock, a notary
5 public in and for the State of Washington, do hereby
6 certify:

7 That I am a Certified and Official
8 Court Reporter for Spokane County Superior Court,
9 Department No. 8, at Spokane, Washington;

10 That the foregoing hearing was taken
11 on the date and at the time and place as shown on Page 1
12 hereto;

13 That the foregoing is a true and
14 correct transcription of my shorthand notes of the
15 requested hearing transcribed by me or under my
16 direction, including any changes made by the trial judge
17 reviewing the transcript;

18 That I am in no way related to or
19 employed by any party or counsel in this matter;

20 That I have no financial interest in the
21 outcome of said litigation.

22 WITNESS my hand and seal this
23 24th day of September, 2016.

24 KENNETH J. WITTSTOCK,
25 CSR No. WI-TT-SK-J409NK
Notary Public in and for the
State of Washington, residing
at Spokane.
My commission expires 4-22-20.

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 39