

NO. 75921-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

APPELLANTS

Appellants,

vs.

RECALL OF CYNTHIA OLSEN, PORT COMMISSIONER
OF PORT OF TAHUYA,

Respondent.

BRIEF OF APPELLANTS

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

APPELLANTS,) NO. 75921-9
)
 Appellants)
)
 vs.) APPELLANTS'
) MEMORANDUM
)
 RECALL OF CYNTHIA OLSEN,)
 PORT COMMISSIONER OF PORT)
 OF TAHUYA,)
)
 Respondent)
 _____)

ASSIGNMENT OF ERROR

The trial court erred in issuing its August 13, 2004 Order Regarding Legal Sufficiency of Recall Charges determining the charges contained in the Petition for the Recall of Cynthia Olsen as Port Commissioner of the Port of Tahuya to be not legally sufficient to proceed to signature gathering and a recall election.

STATEMENT OF THE CASE

At the time of the August 9, 2004 hearing on the legal sufficiency of the recall charges

as to Cynthia Olsen, it was stipulated by counsel for Cynthia Olsen and counsel for those submitting the recall petition that the facts as stated in the Memorandum in Support of Recall Petition (CP, Doc. 6) are the facts of this case. RP 2. Those facts are as follows:

"As of July 9, 2004 Cynthia Olsen was one of the three Port Commissioners of the Port of Tahuya. At that time two of the Port Commissioners, Commissioner Olsen and Commissioner Robert Gilbert, were Defendants in a civil lawsuit brought by a local citizens Group alleging violations of the Washington Open Public Meetings Act.

The Port Commissioners had, at a previous Port Commission meeting, discussed having the Port of Tahuya, pursuant to RCW 53.08.208, pay the cost to indemnify and defend Commissioners Olsen and Gilbert in the Open Public Meetings Act litigation. The third Commissioner, Commissioner Jim Christen, had made it known that he opposed having the Port of Tahuya bear those expenses.

A special meeting of the Port of Tahuya was called for July 9, 2004 on short notice. At the meeting the only items of business which were

considered were motions for the Port of Tahuya to provide a Defense to Commissioners Olsen and Gilbert in existing and future lawsuits and indemnify them against claims or judgments in those lawsuits.

Commissioner Christen objected to adoption of the various motions and stated his belief that it was a conflict of interest for Commissioners Olsen and Gilbert to vote on motions for their own defense and indemnity. Commissioners Olsen and Gilbert, nevertheless, each voted on each of the motions. Each motion carried by a 2-1 majority.

Immediately following the adoption of the motions, Commissioner Gilbert submitted his resignation as a Port Commissioner. The citizen's group which had brought the prior legal action against Commissioner Olsen filed a Petition for the Recall of Commissioner Olsen."

Following the August 9, 2004 hearing Judge David R. Draper ruled, in his August 13, 2004 Order Regarding Legal Sufficiency of Recall Charges that the charges contained in the Petition were legally insufficient. On August 24, 2004 Appellants herein served and filed their Notice

of Appeal of that decision.

DISCUSSION

1. STANDARD OF REVIEW.

The Supreme Court reviews the question of the legal sufficiency of a recall pursuant to the same criteria as the superior court. In **Re Shipman**, 125 Wash. 2D 683, 886 p.2D 1127 (1995); **Matter of Amend** 128 Wash. 2d 836, 912 P.2d 492 (1996). **Jewett v. Hawkins**, 123 Wash. 2d 446, 868 P.2d 146 (1994).

2. PORT COMMISSIONERS CAN BE RECALLED BASED ON THEIR MALFEASANCE IN OFFICE.

Pursuant to RCW 29A.56.110 a public officer can be recalled for an act of malfeasance in office. Malfeasance is defined in RCW 29A.56.110 (1)(b) and includes the commission of an unlawful act. A violation of RCW 42.23.030, which prohibits municipal officers from voting in the authorization of contracts in which they are beneficially interested, would be such an

unlawful act. In this case it is particularly clear that violation of RCW 42.23.030 is grounds for a recall because RCW 42.23.050 provides that:

"In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office."

3. RCW 42.23.030 SPECIFICALLY PROHIBITS A MUNICIPAL OFFICER FROM VOTING FOR THE AUTHORIZATION OF A CONTRACT IN WHICH SHE IS BENEFICIALLY INTERESTED.

RCW 42.23.030, a part of the municipal officers code of ethics, prohibits municipal officers from being beneficially interested in a number of municipal contracts but specifically permits other types of contracts. RCW 42.23.030 makes it clear, however, that even with respect to legitimate and lawful contracts permitted by statute, municipal officers cannot vote on a matter in which they are beneficially interested.

"A municipal officer may not vote in the authorization, approval or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies." RCW 42.23.030

The actions taken by the Port of Tahuya on July 9, 2004 centered around hiring a lawyer to defend Commissioner Olsen personally in existing litigation and in any future litigation arising from her actions as a Port Commissioner.

Commissioner Olsen was very directly beneficially interested in that contract.

Absent the Port hiring such an attorney, she was faced with the prospect of hiring and paying an attorney on her own to defend the action.

RCW 53.08.208 permits but does not require the Port Commission of a Port District to grant a request to defend and indemnify a Port Commissioner from lawsuits arising out of the performance of duties for the Port District.

Such defense and indemnification is not

automatic. It requires a decision by the Port Commission. RCW 42.23.030 generally prohibits municipal officers from being beneficially interested in contracts made by the Port District or receiving any compensation, gratuity or reward in connection with such contract. The terms of RCW 53.08.208 create an obvious exception to the limitations of RCW 42.23.030 allowing the Port Commission to vote the defend and indemnify its Port Commissioners. RCW 53.08.030 does not, however, create any exception to the rule of RCW 42.23.030 that a municipal officer cannot vote on a matter in which she is beneficially interested.

Commissioner Olsen violated that provision of RCW 42.23.030 when she voted for her own defense and indemnification. She did so specifically because she knew that without her vote, the Port Commission would be equally divided on the question, and a motion to defend

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and indemnify her would fail for lack of a majority vote in favor.

4. PORT COMMISSIONERS CAN VOTE TO DEFEND AND INDEMNIFY OTHER PORT COMMISSIONERS.

There are easy and obvious ways for a three member Port Commission to implement RCW 53.08.208 without violating the code of ethics for municipal officers. If all three Commissioners are sued, each of the three can vote on the question of whether to defend and indemnify the other two Commissioners. By the adoption of three separate resolutions, with the affected Commissioner abstaining on the vote affecting her, the Commissioners could take the necessary actions without violating the law.

The only reason that procedure was not followed here was that the two Commissioners who wanted a defense and indemnification knew that the third Commissioner objected to and would not vote for such resolutions. They knew that

without their own votes, there would not be a majority of Commissioners in favor of the resolutions. They therefore deliberately violated RCW 42.23.030 for their own benefit.

**5. THE MUNICIPAL ACTIONS IN THIS CASE
CONFERRED A DIRECT FINANCIAL BENEFIT
ON COMMISSIONER OLSEN AND THEREFORE
THE CASE OF BARRY V. JOHNS IS NOT
DETERMINATIVE IN THIS CASE.**

The trial court relied on the case of **Barry v. Johns**, 82 Wn. App. 865, 920 P.2d 222 (1996) in its conclusion that the recall charges in this case were insufficient. In fact that case makes it clear that the statute is applicable in this case.

In **Barry v. Johns, supra**, the court was dealing with a contract with a non-profit corporation on which a City Councilman served as a Director. The contract contained a provision which limited the potential liability of Directors of the non-profit corporation to the City. In the **Barry v. Johns, supra** case, court

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ruled that was a contract "which conferred no financial benefit on Johns or Cordova". It held that because existing state law protected the municipal officers from liability, the agreement did not even confer a potential financial benefit on the officers. On that basis the court refused to apply RCW 42.23.030 to the situation. The court made it clear that the key factor in its ruling was the absence of any direct financial benefit to the municipal officers in question.

In this case the resolutions on which Commissioner Olsen voted conferred on her a direct and immediate financial benefit. One of the resolutions authorized and directed the Port to immediately hire and a particular attorney to defend Cynthia Olsen in an existing lawsuit. It is hard to imagine a more immediate or direct financial benefit which a municipal officer could receive.

time of the **Barry v. Johns** case that even when a municipal officer can receive a direct financial benefit under state law, that municipal officer cannot vote to create that financial benefit.

**7. COMMISSIONER OLSEN'S ARGUMENTS
IGNORE THE REQUIREMENTS OF STATE LAW
AND BASIC PRINCIPLES OF DEMOCRACY.**

Commissioner Olsen's arguments regarding her need to vote amount to complaints about the need to have a majority vote in order for the Port to act. If a lawsuit is brought against all of the members of a three-member Port Commission, any two Commissioners can vote to implement RCW 53.08.208 the benefit the other Commissioner. A problem only arises if one or more of the Commissioners disagrees with the proposed action. In that case no majority exists to take the proposed action. Democracy can be and is frequently inconvenient. That is not a good reason to knowingly violate state ethics laws which prevent municipal officers from

I certify under penalty of perjury under the laws of the State of Washington that on this day I deposited in the mails of the United States of America, a properly stamped and addressed envelope containing a copy of the document to which this Declaration is attached, directed to:

Mr. Blair B. Burroughs
Lawler, Burroughs & Baker, P. C.
1001 Fourth Avenue Plaza, Suite 4300
Seattle, Washington 98154

DATED at Silverdale, Washington, on October 19,
2004.

A handwritten signature in cursive script, appearing to read "Belinda Riddle", is written over a horizontal line.

BELINDA RIDDLE