

NO. 75921-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re:

RECALL OF CYNTHIA OLSEN, PORT COMMISSIONER
OF PORT OF TAHUYA

CYNTHIA, OLSEN, RESPONDENT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. Statement of the Case..... 1

B. Issue Presented 1

C. Argument and Authority..... 1

 1. A Recall Charge Must be Legally Sufficient 1

 2. The Recall Charge Against Commissioner Olsen is Legally Insufficient Because the Acts Alleged do not Violate the Code of Ethics for Municipal Officers 2

 3. The Recall Charge Against Commissioner Olsen is Legally Insufficient Because the Acts were Authorized by Statute and, therefore, were not Wrongful..... 6

D. Conclusion..... 14

TABLE OF AUTHORITIES

CASES

<i>Barry v. Johns</i> , 82 Wn. App. 865, 920 P.2d 222 (1996).....	3, 4, 5
<i>In re Recall of Greco</i> , 105 Wn. 2d 669, 671, 717 P.2d 1368 (1986).....	1, 7
<i>In re Recall of Kast</i> , 144 Wn.2d 807, 812, 31 P.3d 677 (2001).....	1
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756, 766, 10 P.3d 1034 (2000)	10
<i>In re Recall of Shipman</i> , 125 Wn.2d 683, 685, 886 P.2d 1127 (1995).....	9
<i>Washington Hospital Liability Insurance Fund v. Public Hospital District No. 1 of Clallam County</i> , 58 Wn. App. 896, 899, 795 P.2d 717 (1990).....	8
<i>Washington Public Utility Districts' Utility System v. Public Utility District No. 1 of Clallam County</i> , 112 Wn.2d 1, 771 P.2d 701 (1989).....	8, 9, 11

STATUTES

RCW 28A.320.100.....	8
RCW 28B.10.842.....	8
RCW 42.23.010.....	4
RCW 42.23.030.....	2, 3, 4, 5, 6 9, 11
RCW 42.23.070.....	6, 7
RCW 53.08.208.....	8, 9, 10, 11
RCW 54.16.097.....	8

OTHER AUTHORITIES

Const. Art. I, §§ 33-34.....	1
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A. STATEMENT OF THE CASE.

The parties stipulated to the facts of this case. Appellants have accurately summarized the prior proceedings.

B. ISSUE PRESENTED.

The only issue presented by this appeal is whether the recall petition against Respondent Cynthia Olsen was legally sufficient.

C. ARGUMENT AND AUTHORITY.

1. A Recall Charge Must be Legally Sufficient.

The Washington State Constitution provides that the citizens of this state may seek the removal of a public official from a duly elected office before the official's term expires through a recall election. *In re Recall of Kast*, 144 Wn.2d 807, 812, 31 P.3d 677 (2001); Const. Art. I, §§ 33-34. The court on appeal does not attempt to evaluate the truthfulness of the charges in a recall petition. Rather, the court's function is limited to evaluating the legal and factual sufficiency of the charges. *Id.* at 813. In conducting that evaluation, our courts have affirmed a commitment to uphold clear legislative intent to limit the scope of the recall right and prevent harassment of public officials. *In re Recall of Greco*, 105 Wn. 2d 669, 671, 717 P.2d 1368 (1986).

2. **The Recall Charge Against Commissioner Olsen is Legally Insufficient Because the Acts Alleged do not Violate the Code of Ethics for Municipal Officers.**

The petitioners allege that Commissioner Olsen violated RCW 42.23.030 when she and Commissioner Gilbert voted to have the Port indemnify them for this and a prior lawsuit and to have the Port retain legal counsel to represent them. Petitioners' allegations are erroneous. RCW 42.23.030 provides in pertinent part:

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

By its terms, the statute prohibits a municipal officer from having a "beneficial" interest, either directly or indirectly, in certain contracts. Here, there was a vote (1) to indemnify the commissioners against claims or judgments and (2) to have the Port retain counsel to represent the commissioners. As RCW 42.23.030 focuses on contractual relations, it is apparent that to the extent Commissioner

Gilbert voted to indemnify the commissioners being sued, no contract is implicated and RCW 42.23.030 does not come into play.

The question, then, is whether that portion of the resolution authorizing the retention of an attorney by the Port to defend the commissioners violates RCW 42.23.030. As noted, under this statute a municipal officer may not be "beneficially interested" in certain contracts. Although Chapter 42.23 RCW contains a number of definitions, the term "beneficially interested" is not defined. There is, admittedly, a monetary or financial benefit to a commissioner from having the Port provide an attorney to defend a lawsuit arising out of the performance of Port business. The question is whether the law prohibits this type of benefit.

The term "beneficially interested" has been construed in the case of *Barry v. Johns*, 82 Wn. App. 865, 920 P.2d 222 (1996). In analyzing the statute, the court noted the Legislature's declared purpose which was to regulate municipal officers' involvement in some municipal contracts from which they could benefit financially and, at the same time, enlarging a municipality's pool of potential office holders:

It is the purpose and intent of this chapter to revise and make uniform the laws of this state concerning the transaction of business by municipal officers, as defined in chapter 268, Laws of 1961, in conflict with the proper performance of their

duties in the public interest; and to promote the efficiency of local government by prohibiting certain instances and areas of conflict while at the same time sanctioning, under sufficient controls, certain other instances and areas of conflict wherein the private interest of the municipal officer is deemed to be only remote, to the end that, without sacrificing necessary public responsibility and enforceability in areas of significant and clearly conflicting interests, the selection of municipal officers may be made from a wider group of responsible citizens of the communities which they are called upon to serve.

RCW 42.23.010.

In *Barry v. Johns*, the court considered a situation very similar to the one at bar. Two city council members were simultaneously serving as members of the board of a non-profit organization that provided services to at-risk youth. The City and a school district provided some initial funding and apparently took part in the organization. An agreement was drawn up setting forth the various participants' roles in the operation. One of the provisions of that agreement limited the liability of the organization's board, thus benefiting the two city council members. 82 Wn. App. at 867. A third city council member challenged the arrangement, charging that the two council members were "beneficially interested" in violation of RCW 42.23.030 because the City's contract with the

nonprofit organization limited their liability. 82 Wn. App. at 868.

The court rejected this reading of the statute:

Although the code (of municipal ethics) does not define a beneficial interest, its list of the types of beneficial interest that are not prohibited by the code is instructive. These exceptions include contracts for utilities services, publication of legal notices required by law and employment contracts for school bus drivers and other school district employees. *See* RCW 42.23.030(1)-(10). Because the exceptions to the general rule prohibiting a municipal officer from having a beneficial interest in certain municipal contracts, all involved business transactions or employment matters, we conclude the legislature intended the term beneficial interest under the general rule to encompass the same thing. We conclude, therefore, that RCW 42.23.030 applies only to municipal contracts involving business transactions, employment matters and other financial interests and cannot be read to apply to the contract here, which conferred no financial benefit on Johns or Cordova [the council members].

82 Wn. App. at 868.

As in *Barry v. Johns*, the type of contract involved here, that being the retention of an attorney by the Port to defend the commissioners, does not fall within the ambit of this statute. The contract retaining an attorney is one that does not involve personal business or financial matters that are extraneous to the Port's business. Rather, the need to retain an attorney stems

directly from the service of the commissioners as Port officers. As the benefit received by the commissioners is provided directly by the municipality itself, such a benefit is not a business or private interest that contravenes the Code of Ethics for Municipal Officers. In fact, the Code contemplates this type of situation.

No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source *except the employing municipality*, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

RCW 42.23.070(2) (emphasis added). Thus, officers may receive financial benefits of various types from a municipality itself without fear of being accused of an ethical violation. The benefits of indemnification and the services of an attorney are provided "for a matter connected with or related to the officer's services as such an officer...." The Code of Ethics for Municipal Officers has not been violated and, therefore, the recall charges are legally insufficient.

3. **The Recall Charge Against Commissioner Olsen is Legally Insufficient Because the Acts Alleged were Authorized by Statute and, therefore, were not Wrongful.**

Even if it is assumed, for the sake of argument, that the vote to have the Port retain an attorney to defend its commissioners falls within the prohibitions of RCW 42.23.030 and falls outside the

actions permitted by RCW 42.23.070(2), the recall charge is still legally insufficient because Commissioner Olsen's actions were otherwise authorized by law and legally justified.

The threshold inquiry is whether the charge is legally sufficient. To be legally sufficient, the petition must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. Implicit in this statement is the principle that if a legally cognizable justification for an official's conduct exists, that justification renders a recall petition legally insufficient.

In re Recall of Greco, 105 Wn. 2d 669, 671, 717 P.2d 1368 (1986).

The power to authorize the Port to indemnify and retain a lawyer to defend a commissioner was specifically authorized by statute:

Whenever any action, claim or proceeding is instituted against any person who is or was an officer, employee, or agent of a port district established under this title arising out of the performance or failure of performance of duties for, or employment with, any such district, the commission of the district may grant a request by such person that the attorney of the district's choosing be authorized to defend said claim, suit or proceeding, and the cost of defense, attorney's fees, and any obligation for payment arising from such action may be paid from the district's funds: PROVIDED, that costs of defense and/or judgment or settlement against such person shall not be paid in

any case where the court has found that such person was not acting in good faith or within the scope of his employment with or duties for the district.

RCW 53.08.208. A number of municipal corporations have similar statutes. *See*, RCW 54.16.097; RCW 28A.320.100; RCW 28B.10.842. Municipalities also have the common-law authority to indemnify their officers for legal fees and other losses incurred in the good faith discharge of their duties. *Washington Hospital Liability Insurance Fund v. Public Hospital District No. 1 of Clallam County*, 58 Wn. App. 896, 899, 795 P.2d 717 (1990).

Indemnification statutes were enacted shortly after the abrogation of municipal corporation sovereign immunity in 1967. *Washington Public Utility Districts' Utility System v. Public Utility District No. 1 of Clallam County*, 112 Wn.2d 1, 7-8, 771 P.2d 701 (1989).

The purpose of such statutes has been described as follows:

Without regard to who brings a claim against the public officer, the obvious purpose of the statutes in question is to allow protection against loss associated with public officials' good faith efforts.

Id. at 9. Moreover, indemnification provisions promote the public interest:

Precluding coverage for indemnification against such a loss as a matter of law will not serve the needs of the public body or its officers and employees. It may make it more difficult for municipal corporations

to attract and retain talented individuals and it will discourage those individuals from taking good faith risks that benefit the district and its ratepayers.

Id. at 10.

As RCW 53.08.208 contains an express statutory authorization for a port district to retain an attorney to defend claims, suits, or proceedings against current officers and to indemnify them for legal costs, this specific statutory authorization overrides any potentially conflicting general provisions of the Code of Ethics for Municipal Officers, Chapter 42.23 RCW. Even petitioners acknowledge that 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 to defend and indemnify its Port Commissioners.” Brief of Appellants at 7.

Moreover, RCW 53.08.208 provides that the commission of the district “may grant a request” to retain an attorney of the district’s choosing to defend any claim, suit, or proceeding. Because of the use of the term “may,” RCW 53.08.208 is a permissive and, therefore, discretionary statute. *See, Washington Public Utility Districts’ Utility System*, 112 Wn.2d at 9. Elected officials generally may not be recalled for decisions that are lawfully within their discretion. *In re Recall of Shipman*, 125 Wn.2d 683, 685, 886 P.2d 1127 (1995). If, as here, a discretionary act is involved, an officer may not

be recalled for that discretionary act absent manifest abuse of discretion. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 766, 10 P.3d 1034 (2000). A legally cognizable justification for an official's conduct renders a recall charge insufficient. *Id.*

Such a showing has been made here. It is evident that there is a need to protect private citizens willing to serve a small municipality from the financial impact of defending a lawsuit arising from their public service. The authorization for the Port to retain an attorney to defend the lawsuit was reasonable on its face. Moreover, to the extent that there is a risk that the commissioners may be found by a court of competent jurisdiction to have acted in bad faith, RCW 53.08.208 specifically provides that the "costs of defense and/or judgment or settlement against such person shall not be paid in any case where the court has found that such person was not acting in good faith or within the scope of his employment with or duties for the district." This good faith requirement is a significant limitation on the right of indemnification. In construing the indemnification statute for public utility districts (which is virtually identical to that for port districts), the Supreme Court noted that this good faith clause has the following effect:

Finally, the coverage described in the statute is limited to the good faith exercise of an officer's duties; consequently, there is no possibility that providing coverage

will eliminate the threat of personal liability as a deterrent to aberrant behavior.

Washington Public Utility Districts' Utility System, 112 Wn.2d at 10.

As noted above, petitioners concede that the statutory authority granted to have the Port retain an attorney to defend a suit against one of the commissioners creates an exception to RCW 42.23.030. Nonetheless, they argue that Commissioner Olsen should have recused herself on the vote to retain such an attorney. Petitioners rely upon the final paragraph of RCW 42.23.030 to support this argument. This statutory clause is simply not applicable.

The final paragraph of RCW 42.23.030 references those situations when a municipal officer may not vote on a particular matter. That bar is tied to the "exemptions allowing the awarding of such a contract" that are set forth in RCW 42.23.030(1)-(11). None of those exemptions are applicable to the decision to retain an attorney under RCW 53.08.208 and, therefore, the final paragraph of RCW 42.23.030 simply does not apply.

The practical impediments created by petitioners' arguments cannot be overlooked. Petitioners suggest that when a proposal to retain an attorney for one commissioner is voted upon, that that commissioner should recuse him or herself and let the other two

commissioners vote. Such a decision is a recipe for disaster, as the following scenarios illustrate.

In the first scenario, assume that all of the commissioners have been sued. Under the rule of law advocated by petitioners, the commissioners would not be able to vote to have the port retain an attorney to defend them because each would be "beneficially interested" in the contract with the attorney. Because the commissioners have a commonality of interest, having the others vote in turn to ratify the contract does not eliminate their beneficial interest in the contract. In fact, if the commissioners took turns voting and there were votes to indemnify only two out of the three commissioners, the third commissioner would readily be able to demonstrate that that decision was arbitrary and capricious because the commissioners had all been sued on the same basis.

In the second scenario, assume that two of the three commissioners are sued and the third is a "political" enemy of the other two who belongs to the same group suing the other two commissioners. This is, in fact, the situation in the case at bar. RP at 12; CP at 25; 26. Under such facts, a majority vote to retain an attorney could never be obtained under the recusal rule advocated by petitioners. One person would be in control of the actions of the entire three-member board.

In the third scenario, assume that the politically adverse third commissioner recognizes a conflict of interest and recuses him or herself. (This is what should have happened in this instance because Commissioner Christian was a member of the group suing Commissioners Gilbert and Olsen.) Or, in the alternative, that commissioner just chooses to abstain from voting for any reason whatsoever. If the other two so-called “beneficially interested” commissioners cannot vote on a motion to retain an attorney, no quorum could ever be achieved. Again, one person would be in control of the actions of the entire three-member board.

It is worth noting that petitioners’ rule would be applicable any time that commissioners were to vote on any district policy that provided them a monetary “benefit,” be it indemnification, a change in per diem, or even routine approval of vouchers reimbursing commissioners for an out of pocket expense incurred while conducting district business. Petitioners’ reading of the law is impractical and makes no sense. In the words of the court below:

The one commissioner—I think it’s Commissioner Christen—and the petitioners for recall would have me in effect rule that he, as a plaintiff in the litigation that this is all about, the litigation that the Citizen Group vs. Olsen, he, as a plaintiff with one hat, a plaintiff in that litigation, another hat as commissioner of the port, would have control over whether the defense and

indemnification resolution should pass.
And I, I just cannot accept that the laws
that have been enacted would condone
that.


RP at 21-22.

D CONCLUSION

Petitioners' reading of the Code of Ethics for Municipal Officers is strained and illogical. If their petitioners' position were to become law, it would provide the perfect vehicle for obstructionist constituents to burden public officials with expensive litigation and drive them from office. This is contrary to the underlying purpose of both the Code of Municipal Ethics and statutes authorizing indemnification for costs of defense. For the reasons stated above, therefore, the decision of the court below should be affirmed.

Respectfully submitted this 27th day of December 2004.

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CERTIFICATE OF SERVICE

I certify on penalty of perjury under the laws of the State of Washington that on this date I caused the original of the foregoing Brief of Respondent to be filed with the Washington State Supreme Court by U.S. Mail, first-class postage affixed, and also caused a true, correct and complete copy of the foregoing Brief of Respondent to be served by U.S. Mail, first-class postage affixed, on the following counsel of record:

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Margarete L. Schaefer