MEMORANDUM

State of Alaska
Department of Law

TO: Whitney H. Brewster
Director, Division of Elections

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FILE NO.: 663-06-0096
TEL. NO.: 465-3600

FROM Michael A. Barnhill
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RE: Review of Applications for Recall of John Zabielski, Eric Hannan, and Doug Hosken

You have asked for our opinion regarding the applications for petition for recall of three members of the Alaska Gateway School District (REAA # 16) regional school board. Those members are: Eric Hannan, Doug Hosken, and John Zabielski. Regional school board members are subject to recall under AS 14.08.081, which adopts by reference the recall procedures of AS 29.26.240 – 29.26.360.

In the regional school board member context, AS 29.26.270 requires the director of the Division of Elections to review the recall petition and prepare a recall petition if the application meets the requirements of AS 29.26.260. Because the applications do not satisfy the requirements of AS 29.26.260, we recommend that you not prepare recall petitions.

We make two preliminary notes. First, normally we would consider these applications separately. In this case, however, the applications were filed together and appear to have interrelated facts. Quite frankly, it is difficult to adequately understand the recall committee's concerns unless all three are read together. Accordingly, for purposes of understanding the recall committee's concerns we consider the three summaries of grounds together.

Second, we note that John Zabielski was the subject of a recent recall application. We advised that the summary of grounds in that application was insufficient. *See* 2005 Inf. Op. Att'y Gen. (Nov. 22; 663-06-0075).

I. BACKGROUND

On December 14, 2005, a group of Alaska Gateway School District residents filed applications for the recall of Eric Hannan, Doug Hosken, and John Zabielski. The applications provided the following summaries of the grounds for recall:

Eric Hannan:

> Sec. 11.56.850. Official Misconduct.
> We believe this person has violated board policy by allowing a vote on business office overtime (Board Bylaws – BB 4372 Load/Scheduling/Hours of Employment). At [sic] a RSB member, he should have stopped the proceedings. There were only four RSB members present at the meeting. By allowing the motion to carry, only one exempt employee was offered this overtime and the financial amount exceeds $10,000. The board needed to have at least four members to vote affirmatively (Board Bylaws –BB9872 Quorum). According to the October 13, 2005 meeting only three members voted affirmatively while one abstained. The board member who abstained from the vote for his spouse automatically counts as the fourth affirmative vote needed (Board Bylaws9873 Abstention). Mr. Hannon knew that there would be a conflict of interest and still let the vote proceed. This violates BB 9871 Parliamentary Procedures. The labor laws that were violated would be the Fair Labor Standards Act 29 U.S.C. 201-216 and Department of Labor Relations 29 C.F.R. Parts 511-800.

Doug Hosken:

> Sec. 11.56.850. Official Misconduct.
> We believe Doug Hosken, RSB Chair, has violated board policy by allowing a vote on business office overtime (Board Bylaws – BB4372 Load/Scheduling/Hours of Employment). There were only four RSB members at the October 13, 2005 meeting. By allowing the motion to carry, only one employee, the spouse of the abstaining board member, was offered overtime and with the financial amount exceeding $10,000. At least four RSB members need to vote affirmatively (Board Bylaws – BB9872 – Quorum). According to the minutes only three members voted affirmatively while one abstained. The one abstaining vote automatically goes affirmative (Board Bylaws – BB9873 Abstention) giving the four votes needed. Mr. Hosken knowing about a conflict of interest (BB9920 – Conflict of Interest) let the vote proceed. This violates BB9871 – Parliamentary Procedures. Mr. Hosken was informed by the Superintendent that this would violate not only school policies, but Fair Labor Standards Act 29 U.S.C. 201-206 and Department of Labor Relations 29 C.F.R. Parts 511-800. This advice from the superintendent was ignored and the vote proceeded. AGSD is

> currently paying an exempt employee that is not by policy able to receive overtime.

John Zabielski:

> Sec. 14.08.131. Disqualification from voting for Conflict of Interest. We believe this person put his personal agenda above student education. On July 5, 2005, as per RSB minutes, Mr. Zabielski should have reclused [sic] himself for any matters that dealt with the district's multi-purpose building, as the coach for the Tok shooting team. At the beginning of the school year, the district non-retained two teachers for budgetary reasons. In a motion to restore $36,668 for the Rifle Club range in the multi-purpose building, Mr. Zabielski seconded the motion. Motion carried unanimously. Even though $36,668 is not sufficient to restore a full-time teacher, the music program would touch more students than the shooting club. His major point to keep funding for this area is that he gives out one to two scholarships per year. The shooting club currently is servicing two students while the music teacher would service approximately 200. At the October 13, 2005 RSB meeting, he abstained from voting affirmatively on overtime for the business office, this vote according to Board Bylaw BB9873 counts as an affirmative vote on an issue that affects his wife's salary. There were only four members of the RSB present.

Attached to the summaries of grounds were excerpts from the Alaska Gateway School District's policy manual and Alaska Gateway School District meeting minutes. The applications were also accompanied by: (1) the signatures and residence addresses of 10 persons, and (2) the name and address of a contact person and an alternate.

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

II. APPLICABLE LAW

There are three grounds for recall of a regional school board member: (1) misconduct in office, (2) incompetence, and (3) failure to perform prescribed duties. AS 29.26.250.

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

1. the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition;

2. the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent; and

3. a statement in 200 words or less of the grounds for recall stated with particularity.

AS 29.26.260. The statute does not specify a timeframe in which this application review process is to take place.

There are several cases in Alaska on the subject of recall as well as several opinions from this office. We have recently had occasion to discuss this body of authority at length and incorporate that discussion by reference. *See* 2005 Inf. Op. Att'y Gen. 6-13 (Sept. 7; 663-06-0036); *see also* 2005 Inf. Op. Att'y Gen. (Nov. 22; 663-06-0075).

For purposes of this opinion, we will confine our discussion to the published court decisions. The seminal case on recall is *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984). *Meiners* involved an attempt to recall an entire REAA school board. The court held that recall statutes, like initiative and referendum statutes, "should be liberally construed so that 'the people [are] permitted to vote and express their will . . . ." *Id.* at 296 (citations omitted). The court concluded that:

> the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute.

Id.

Because the recall statute required the grounds for recall to be stated with particularity, the *Meiners* court reviewed two of the asserted grounds for sufficiency. The court emphasized that it was not proper to determine the truth of the recall allegations. Rather, the court assumes that the alleged facts are true and rules upon them similar to a court ruling on a motion to dismiss for failure to state a claim. *Id.* at 300 n.18. The court reviewed the asserted grounds to determine whether they sufficiently stated a claim for "failure to perform prescribed duties," one of the specified grounds in the recall statute.

In the first ground, the recall committee claimed that the board failed to control the district superintendent who had allegedly spent money on non-district purposes. The court held that the board was statutorily required to "employ" the superintendent, and that this duty implied that the board would exercise a certain amount of non-discretionary control and supervision over the superintendent. Therefore, the court held that this ground sufficiently stated a claim for failure to perform prescribed duties. *Id.* at 300.

In the second ground, the recall committee alleged various infractions of laws relating to open meetings. The court held that these allegations also stated a claim for failure to perform prescribed duties and were sufficiently particular. *Id.* at 301-02. The court additionally held that inaccurate legal statements or lack of legal citation would not invalidate the application. The court wanted to avoid "wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters." *Id.* at 301.

In *Von Stauffenberg v. Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995), the court again addressed a recall attempt against several school board members. In two of the allegations, the recall committee alleged that board members committed misconduct and failed to perform prescribed duties by going into executive session to consider the continued retention of an elementary school principal. Applying the standards set forth in *Meiners*, the court concluded that it was legal to consider "sensitive personnel matters" in executive session. The court held that the legal exercise of discretion by a public official cannot be a ground for recall. Moreover, because the allegations did not describe why going into executive session violated the law, the court held that they were not sufficiently particular. These allegations failed to state a claim and therefore were insufficient. *Id.* at 1060.

From these two cases, we conclude that courts do not require recall committees to perfectly articulate the grounds for recall. But they do require a sufficient amount of detail so that the basis for recall is understandable. Moreover, an allegation of lawful conduct will not support a petition for recall. These precedents guide our analysis of these applications, which we turn to next.

III. ANALYSIS

A. Signatures and Residence Addresses

AS 29.26.260(a)(1) requires the signatures and residence addresses of at least 10 municipal voters. This requirement is satisfied.

B. Contact and Alternate

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

C. Statement of Grounds

As noted above, there are three grounds for recall: (1) misconduct in office, (2) incompetence, and (3) failure to perform prescribed duties. Our task is to evaluate whether the allegations are factually and legally sufficient, that is, whether they provide sufficient particulars and details to state one of the grounds for recall. The Division does not determine the factual accuracy of allegations. *Meiners*, 687 P.2d at 300 n.18.

As can be seen from the summaries set forth above, they are interrelated. All three summaries refer to a vote regarding business office overtime, albeit with varying levels of detail. The allegations regarding the multi-purpose building, however, are specific only to Mr. Zabielski. We shall start with the allegations regarding business office overtime.

1. Business Office Overtime.

From the three summaries and the minutes attached to the summaries, we are able to deduce the following. John Zabielski's wife works in the business office of the Alaska Gateway School District. We will take administrative notice of the fact that her name is Betty Zabielski, and that she is the business manager of the Alaska Gateway School District. At the school board meeting on October 13, 2005, school board member Melinda Rallo "moved to approve the business office overtime be budgeted as it is worked during the FY06 fiscal year." Eric Hannan seconded the motion. There were four members present, and three voted in favor of it: Melinda Rallo, Doug Hosken and Eric Hannen. The fourth member present, John Zabielski, abstained.[1]

The summaries further allege that the financial amount at issue in this motion exceeded $10,000. They also allege that Ms. Zabielski was the only employee impacted by this motion.

The summaries then set forth a number of legal arguments why the action of the school board was improper. In our opinion, the recall committee misses the mark for two reasons. First, the board appears to have made a procedural mistake—the motion did not carry. Second, the subject of the motion was not improper.

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[1] We believe it was appropriate for Mr. Zabielski to have abstained from voting on this motion.

a. The Board Made a Procedural Mistake.

The board policy manual requires four members for a quorum. Alaska Gateway Policy Manual BB 9872. In this case, quorum was established by the presence of four members.

Next, the board policy manual requires "at least four affirmative votes . . . to pass substantive motions defined as those dealing with policy adoption, amendments, budget revisions greater than $10,000." *Id.* The recall committee has alleged that the motion related to Ms. Zabielski's salary was a budget revision greater than $10,000. Therefore, it required four affirmative votes. It received only three affirmative votes. Therefore, the motion failed as a matter of law. The minutes attached to the applications, however, reflect that the motion carried.

The recall committee appears to assume that the board policy manual required Mr. Zabielski's abstention to count as an affirmative vote. It does not. The Board's bylaws count abstentions as concurrence with the majority. *Id.* at BB 9873. This is simply incorporation of the common law characterization of concurrences. *See* J.R. Kemper, *Abstention from Voting of Member of Municipal Council Present at Session as Affecting Requisite Voting Majority*, 63 ALR3rd 1072, 1086 (1975). An abstention, even if treated as a concurrence, is not an affirmative vote. Therefore the motion failed.

It is possible that the Board was operating under the same misunderstanding of the board's bylaw as was the recall committee. It is equally possible that the fact of the matter is that the motion did not involve a budget revision greater than $10,000. But for purposes of this analysis, we must take it as true that the motion was a budget revision in excess of $10,000.

Taken as a whole, we think the board made a procedural mistake in concluding that the motion carried. This kind of procedural mistake is probably common in the context of boards. It would not surprise us to find that many school board members may simply assume that once quorum is established any motion that has a majority vote carries. For this particular school board, of course, that assumption is wrong. But we do not think that a mistake regarding board procedure amounts to misconduct.

The recall statute does not define "misconduct." The recall committee makes reference to AS 11.56.850, which provides:

> A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant
>
> (1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; or
> (2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.

AS 11.56.850(a). We do not conclude that this definition of misconduct is necessarily the definition that must be used in the recall statutes. Black's Law Dictionary defines "misconduct" as follows: "A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, *willful in character*, improper or wrong behavior." Black's Law Dictionary 999 (6th ed. 1990) (emphasis added). Both definitions require some element of knowing conduct—that is the actor must know that the conduct is wrong in order for it to be misconduct.

In this case, there is no indication that the board knew that it had to have four affirmative votes to pass this motion. The board may have thought, as did the recall committee, that an abstention properly counted as an affirmative vote. Or it may have thought that once quorum was established that all motions carried with a majority vote. In any event, there is no allegation that the board knew that it was wrong for this particular motion to carry with only three votes. Accordingly, we conclude that though it was a procedural mistake to do so, it was not misconduct on the facts here alleged for the board to have treated the business office overtime motion as having carried.

b. The Subject of the Motion was Not Improper.

The subject of the recall committee's concern, however, is not with the procedural issue. The recall committee believes that the subject of the motion is illegal. The recall committee believes that federal law prohibits the payment of overtime to exempt employees. We disagree.

Federal and state law requires the payment of overtime to non-exempt employees. 29 U.S.C. §207; AS 23.10.060. Included in the definitions of exempt employees are professional and management-level employees. 29 U.S.C. §213(a)(1); AS 23.10.055(9). Notably, these federal and state laws do not prohibit the payment of overtime to exempt employees. While it may be unusual for an employer to pay overtime to an exempt employee, we know of no law that prohibits it. Moreover, we are aware that courts have

required the payment of overtime to employees classified by their employer as exempt but who were performing non-exempt tasks. *See American Restaurant Group v. Clark,* 889 P.2d 595 (Alaska 1995); *Grimes v. Kinney Shoe Corp.,* 902 F.Supp. 1070 (D. Alaska 1995). Thus, as a matter of law, there are instances when an employer may be required by law to pay an exempt employee overtime.

The recall committee also draws attention to the board policy manual which provides:

> The Regional School Board designates, in accordance with law, salaried positions which are exempt from overtime. Persons holding these positions work whatever hours are necessary in order to fulfill their assignments. Their positions are set apart from other positions by virtue of the duties, flexibility of hours, salary, benefit structure and authority which they entail.

Alaska Gateway Policy Manual, BP 4372. We do not think payment of overtime to an exempt employee violates this provision. The key words in this policy are "[t]he Regional School Board designates." The school board has the power to designate or not designate which positions are exempt from overtime. Thus, the board has the power to not designate a position as exempt from overtime.

In summary, the board's procedural mistake regarding passing the motion with three affirmative votes, when four were required, was not misconduct. The board's objective to pay overtime to an exempt employee was not prohibited by federal law or board policy. Since it is possible that the exempt employee was performing non-exempt tasks, the payment of overtime may in fact have been required. Therefore, it was not misconduct for the board to seek to pay this overtime.

The summaries of grounds with respect to this issue are factually and legally insufficient. Reading the summary of grounds regarding Eric Hannan as a whole, we find no misconduct. Reading the summary of grounds regarding Doug Hosken as a whole, we find no misconduct.

2. Multi-purpose Building

The allegations relating to the multi-purpose building vote are similar to the allegations that were raised in the previous recall application brought against Mr. Zabielski. *See* 2005 Inf. Op. Att'y Gen. (Nov. 22; 663-06-0075). Here, we learn that Mr. Zabielski supported a motion to spend $36,668 on the rifle range in the multi-purpose building. The recall committee contends that because Mr. Zabielski is the shooting team coach, he has a conflict of interest. The recall committee alleges that Mr. Zabielski gives

out scholarships for the shooting club. Presumably, Mr. Zabielski is funding these scholarships with his own money.

We previously explained why Mr. Zabielski does not have a prohibited conflict of interest by virtue of his being the coach of the shooting team. *Id.* at 5-6. We incorporate by reference that discussion here. The recall committee has alleged no new facts that cause us to change our analysis.

The recall committee additionally thinks that the $36,689 could have been better spent elsewhere. A legitimate difference of opinion over a policy matter cannot be a ground for recall.[2]

In summary, the summary of grounds regarding this issue is factually and legally insufficient. Reading the summary of grounds regarding John Zabielski as a whole, we find no improper conflict of interest or evidence of misconduct.

IV. CONCLUSION

As set forth above, we find the summaries of grounds for Eric Hannan, Doug Hosken and John Zabielski to be insufficient. Accordingly, we recommend that you not prepare petitions for recall.

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

MB/tcm

[2] The Superior Court in *Coghill v. Rollins,* No. 4FA-92-1728 Civil, slip op. at 24 (Alaska Sup. Ct. Sept. 14, 1993) held that disagreements over political issues cannot be grounds for recall.