IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RUSSELL BIGGS, Appellant, v. BARBARA A. JONES, in her official capacity as Municipal Clerk for the Municipality of Anchorage, and MUNICIPALITY OF ANCHORAGE, Appellees.	)	Case No. 3AN-20-08262CI

DECISION ON APPEAL

This appeal concerns two recall applications, Nos. 2020-01 and 2020-05, submitted by the appellant, Russel Biggs. Both applications sought petitions to recall Anchorage Assembly Member Meg Zaletel. Recall application No. 2020-01 alleged that Assembly Member Zaletel committed misconduct in office by violating the Alaska Open Meetings Act, and application No. 2020-05 alleged that Assembly Member Zaletel committed misconduct when she knowingly participated in an indoor gathering of more than 15 people in violation of Emergency Order 15 (EO-15). The Municipal Clerk, Barbara A. Jones, denied both petitions.

Mr. Biggs appealed each denial to the Superior Court, and the two appeals were consolidated by stipulation and court order on February 11, 2021. This Court affirms the Municipal Clerk's denial of recall petition 2020-01, but it reverses the Municipal Clerk's denial of application 2020-05.

BACKGROUND FACTS

The Anchorage Assembly is the legislative body for the city of Anchorage, and it holds regular meetings on Tuesday evenings at the Loussac Library. These meetings are generally open to in-person attendance by the public, with some capacity limitations based on space and seating.[1] The meetings are also streamed online, and since 2020, the streaming has been on YouTube, allowing for closed-captioning.[2] Members of the community are able to provide oral or written comments or testimony at the Assembly's regular meetings.[3]

In March 2020, in response to the spread of the COVID-19 virus, the Assembly made a number of changes. Assembly members were permitted under certain circumstances to participate in meetings telephonically for the purposes of establishing a quorum.[4] On July 22, 2020, Anchorage Mayor Ethan Berkowitz issued Emergency Order EO-14, limiting indoor gatherings within the Municipality to no more than 25 people. The Assembly Chambers were closed to the public beginning on July 23 so as not to exceed the 25-person limit.[5] Meetings continued to be televised and streamed online, and the MOA website reminded members of the public that they could submit testimony over the phone or in writing, and could submit comments.[6] Some staff and Assembly members remained in chambers for the purposes of efficient electronic review and voting on proposed legislation.

EO-14 was later superseded by EO-15, which prohibited all indoor gatherings with more than 15 people, including political gatherings. EO-15 was in effect from

[1] Record on Appeal in Case No. 3AN-20-08262CI (hereinafter designated "RA"), at 1-2.
[2] *Id.*, at 28.
[3] *Id.*; AMC 2.30.035(A)(9), 2.30.040, 2.30.055.
[4] AO 2020-31, As Amended (passed March 20, 2020).
[5] RA, at 30.
[6] *Id.*, at 30.

August 3 to August 30, 2020.[7] During that time, Assembly meetings remained closed to in-person participation by the public.

On August 3, 2020, Russell Biggs, a resident of Anchorage, submitted a recall petition to the Anchorage Municipal Clerk's Office alleging that Anchorage Assembly Member Meg Zaletel, committed "misconduct in office."[8] The application stated:

> Assembly member Megan Zaletel committed removable misconduct by violating the Alaska Public Meetings Statute at the Anchorage Assembly meeting July 28th by engaging in willful, flagrant, and obvious collusion to limit public testimony inside the assembly chambers. Zaletel conducted municipality business after the public presence had been prohibited within the chambers except to those approved by the assembly through means not disclosed to the public prior to the meeting. This misconduct occurred with and despite video evidence of amply physical space and availability to comply with the Mayor's emergency powers proclamation which, regardless of merit, would not over-ride AS 44.62.31's proscription of actions limiting public participation in Assembly meetings. Zaletel disenfranchised the economically disadvantaged who lacked the electronic means to view the assembly proceedings, the 70+ members of the public outside the chambers desiring to be admitted, and the hearing and visually impaired public left without proper modes of participation.

The application was numbered as No. 2020-01 by the Municipal Clerk.

The Clerk reviewed the application and determined that it contained sufficient allegations of fact to allow for the reader to understand the allegation and for the accused to respond in 200 words.[9] But, the Clerk determined that the application was legally insufficient, because a recall application based on conduct permitted by applicable law is not viable.[10] In making this determination, the Clerk relied on the Alaska Supreme Court's opinion in *von Stauffenberg v. Committee for an Honest and Ethical School Board*,[11] and found that the Open Meetings Act provided the specific

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[7] Record on Appeal in Case No. 3an-20-08262CI (hereinafter designated "RB"), at 9-10.
[8] RA, at 2.
[9] *Id.*, at 10.
[10] *Id.*, at 13-14, 22; Brief of Appellees, at 5.
[11] 903 P.2d 1055 (Alaska 1995).

statutory authorization for remotely-held meetings. Mr. Biggs application was denied on September 23, 3030.

After that denial, Mr. Biggs submitted a second recall application for Assembly Member Zaletel.[12] This second application was numbered No.2020-05, and this time Mr. Biggs alleged that Ms. Zaletel had violated applicable law restricting the size of in-door gatherings, and in so doing, committed misconduct in office:

> Assembly member Meg Zaletel committed misconduct in office on August 11, 2020 by violating EO-15, an emergency order intended to protect the health and safety of Anchorage citizens, issued by the Mayor of Anchorage pursuant to AMC 3.80.060(H) by: 1) knowingly participating in an indoor gathering of more than 15 people (a meeting of the Anchorage Assembly) and 2) continuing to participate in an indoor gathering of more than 15 people at a meeting of the Anchorage Assembly after being specifically informed of the violation. Of all citizens in Anchorage, the Anchorage Assembly members should have been scrupulous in obeying the gathering limitations established by paragraph 4 of EO-15. Zaletel's willful, intentional failure to do so needlessly endangered the lives of Anchorage citizens, encouraged the spread of COVID-19 throughout the community, and merits recall from office.

The Clerk's office similarly found that No. 2020-05 was factually sufficient but legally insufficient.[13] The Clerk determined that an allegation of "misconduct in office" must contain "some component of dishonesty, private gain, or improper motive," and simply participating in a meeting in violation of EO-15 was not enough to sustain an allegation of misconduct.[14] Petition No. 2020-05 was denied on November 5, 2020.

Along with his second Zaletel application, Mr. Biggs submitted a companion application seeking the recall of Assembly Chair Felix Rivera.[15] The Rivera application alleged the same misconduct in office issue regarding exceeding the person limit set by EO-15 at the August 11, 2020 meeting. Additionally, it alleged that Assembly Chair

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[12] RB, at 1-4.
[13] *Id.*, at 9-12.
[14] *Id.*, at 10-12.
[15] Brief of Appellee's, Appx. A at 3-4.

Rivera, based on his position as Chair, "fail[ed] to perform prescribed duties" under AS 29.26.250.[16] The Municipal Clerk determined that the recall application's allegation of misconduct in office was legally insufficient, applying the same analysis that was used in the denial of No. 2020-5, but determined that the "failure to perform duties" allegation was legally sufficient to go forward. The parties brought motions for summary judgment before Judge Crosby of the Superior Court, and while she agreed with the Municipal Clerk's determination regarding the "failure to perform duties" allegation, the "misconduct in office" allegation was not litigated. Following Judge Crosby's holding, the application was approved and the petition to recall Chair Rivera appeared on the April 6, 2021 municipal ballot.

STATUTORY FRAMEWORK

Article XI, § 8 of the Alaska Constitution states that "[a]ll elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature." Article 3 of AS 29.26 (AS 29.26.240-360) provides the statutory authority for the recall of municipal officials. The Anchorage Municipal Charter section 3.03 also ensures the right of recall in the Municipality of Anchorage.

The statutory grounds for the recall of a municipal official are "misconduct in office, incompetence, or failure to perform prescribed duties."[17] The word "misconduct" is not expressly defined for that statute. Under AS 29.26.260, an application for a recall petition must be filed with the municipal clerk and is required to contain: "(1) the signatures and residence addresses of at least 10 municipal voters who will sponsor the

[16] *Id.*
[17] AS 29.26.250.

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."

In municipal recall cases, the municipality must evaluate the recall application against procedural and substantive requirements of Article 3 of AS 29.26. But the validity of the allegations is ultimately a question for the voters. This is because "[t]he recall process is fundamentally a part of the political process," and the requirements for a valid application should not function like a "legal straitjacket that . . . could only be prepared by an attorney who is a specialist in election law matters."[18]

STATEMENT OF THE ISSUES

The parties dispute the following:

1. Whether the Municipal Clerk correctly rejected recall application No. 2020-01, which alleges that Assembly Member Zaletel committed misconduct in office by violating the Alaska Open Meetings Act?
2. Whether the Municipal Clerk correctly rejected recall application No. 2020-05, which alleges that Assembly Member Zaletel committed misconduct in office by remaining in the room and participating in-person at an assembly meeting that exceeded the gathering-size limitation of EO-15?

STANDARD OF REVIEW

This case raises only questions of law for the Court's review. In interpreting Alaska's recall statutes, courts apply their independent judgement and adopt "the rule of

[18] *Meiners v. Bering Strait School Dist.*, 687 P.2d 287, 296, 301 (Alaska 1984).

law which is most persuasive in light of precedent, policy and reason."[19] In assessing the legal sufficiency of allegations in recall petitions, a court's approach is analogous to reviewing a motion to dismiss for failure to state a claim—construing the application liberally and accepting its factual allegations as true.[20] And statutes relating to recall "should be liberally construed so that 'the people [are] permitted to vote and express their will . . ."[21] The Municipal Clerk's determination is not afforded deference.[22]

DISCUSSION

I. Whether the Municipal Clerk correctly rejected recall application No. 2020-01, which alleges that Assembly Member Zaletel committed misconduct in office by violating the Alaska Open Meetings Act?

The Municipal Clerk determined that the application for recall petition No. 2020-01 failed to meet legal standards because it fell squarely within the controlling principle set out in *von Stauffenberg,* that a recall cannot be based on the otherwise-lawful exercise of discretion.[23] This Court agrees.

The application alleged that Assembly Member Zalatel violated Alaska's Open Meetings Act.[24] The specific allegations are repeated on page 4 of this decision. Boiled down to its essence, Mr. Biggs alleged that Member Zalatel committed misconduct in office by participating in a meeting that was closed to the general public, in violation of

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[19] *von Stauffenberg v. Committee for an Honest and Ethical School Board*, 903 P.2d 1055, 1059 n.9 (Alaska 1995)(quoting *Zsupnik v. State*, 789 P.2d 357, 359 (Alaska 1990));
[20] *See Id.*, at 1059; *Recall Dunleavy v. State of Alaska*, 3AN-19-10903CI, January 14, 2020, Order at 3 (Upheld by the Alaska Supreme Court in *Recall Dunleavy v. State of Alaska*, No. s-17706, May 8, 2020 Order).
[21] *Meiners,* 687 P.2d at 296 (Alaska 1984)(quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)).
[22] *See Recall Dunleavy*, at 3 (citing *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017)).
[23] 903 P.2d, at 1060.
[24] AS 44.62.310-312; RA, at 2.

AS 44.62.310. But the public record illustrates that, at all times, while excluded from in-person participation, the public was given access to the meeting(s) through live-streaming, television broadcasts, and opportunities to testify via phone or email.[25] And Mr. Biggs did not argue otherwise in the petition language and does not do so now in his briefing. So, the Court construes Mr. Biggs' recall certification application to be a complaint that, by participating in a meeting at which public participation was available only through live-streaming, television broadcasts, phone or e-mail, Member Zalatel violated Alaska's Open Meetings Act, which also disenfranchised economically disadvantaged and hearing and visually impaired would-be participants.

Yet, the Open Meetings Act expressly provides that "[a]ttendance and participation at meetings by members of the public or by members of a governmental body may be my teleconferencing."[26] The Act clarifies that, "the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.[27] Thus, the Anchorage Municipal Assembly was, especially in the face of a pandemic, authorized to require public attendance via teleconferencing. "Teleconferencing" is not specifically defined in the Act, but Webster's defines "teleconference" as "a conference held among people in different locations by means of telecommunications equipment, such as closed-circuit television."[28] The techniques used here fit this definition.

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[25] RA, at 11-14.
[26] AS 44.62.310(a).
[27] AS 44.62.312(a)(6).
[28] *Teleconference*, Webster's II New College Dictionary. (3d ed. 2005).

In the *von Stauffenberg* case, the Alaska Supreme Court was faced with a situation in which a local school board was the subject of an attempted recall petition.[29] The petition application accused members of committing misconduct while in office, and failing to perform prescribed duties, by violating the Open Meetings Act because members went into executive session to discuss the retention of an elementary school principal.[30] The Supreme Court ruled that, because the Open Meetings Act specifically authorized executive sessions to discuss such personnel matters, the petition failed to state sufficient grounds for recall.[31] In doing so, the Court applied the rule that, "where recall is required to be for cause, elected officials cannot be recalled for legally exercising the discretion granted to them by law."[32] And that is precisely what happened here. Assuming, as this court must, the truth of Mr. Biggs' factual allegations, the Assembly's decision to require public participation via teleconferencing was, nevertheless, within the discretion granted to it by law. Mr. Biggs' petition failed to contain a sufficient statement of the grounds for recall.

Mr. Biggs' assertions that the Assembly disenfranchised various groups does not change the analysis. He did not assert in his petition, for example, that the Assembly violated any disability access or voting laws. And, as explained above, AS 44.62.310 expressly authorizes the Assembly to limit public participation at their meetings to teleconference. Biggs' application, thus, failed to set forth a prima facie case that the Assembly members committed any misconduct while in office.

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[29] 903 P.2d 1055 (Alaska 1995).
[30] *Id.*, at 1057.
[31] *Id.*, at 1060.
[32] *Id.*

II. Whether the Municipal Clerk correctly rejected recall application No. 2020-05, which alleges that Assembly Member Zaletel committed misconduct in office by remaining in the room and participating in-person at an assembly meeting that exceeded the gathering-size limitation of EO-15?

The Municipality's rejection of application 2020-05 was based on its interpretation of the meaning of "misconduct in office." "Misconduct in office" is not defined in the recall statutes or the municipal code. The Municipal Clerk reasoned that a legally sufficient allegation of misconduct "requires some component of dishonesty, private gain, or improper motive."[33] The Clerk derived this rule from a review of the *Black's Law Dictionary*'s definition of "official misconduct": "1. A public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance. 2. Abuse of public office."[34] She also looked to the *Black's Law Dictionary* definition of "corrupt: as "[h]aving unlawful or depraved motives; given to dishonest practices, such as bribery."[35]

Mr. Biggs argues that resorting to the definitions of "official misconduct" and "corruption" in *Black's Law Dictionary* was improper for a few different reasons. First, *Black's* is a technical law dictionary, and the "words and phrases" of Alaska's statutes are to be "construed . . . according to their common and approved usage."[36] The Alaska Supreme Court specifically instructed that recall statutes "should be liberally construed so that 'the people [are] permitted to vote and express their will . . ."[37] Thus, Mr. Biggs

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[33] RB, at 10-12.
[34] *Id.*, at 6-7; *Black's Law Dictionary* "Official Misconduct" (11th ed. 2019).
[35] *Id.*, 6-7, 11; *Black's Law Dictionary* "Corruption" (11th ed. 2019).
[36] AS 01.10.040; *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 16 (Alaska 2014); *Norville v. Carr-Gottstein Fods co.* 84 P.3d 996, at n.3 (2004).
[37] *Meiners*, at 296.

argues that a broader, more accessible meaning of the phrase "misconduct in office" should apply.

Second, while conceding that the Alaska Supreme Court will at times use *Black's* to assess common meanings of words and phrases for the purpose of statutory interpretation,[38] Mr. Biggs argues that there are instances in which the Court has rejected *Black's* definition when it is overly precise in a way that is not on point for the litigated issue.[39] Here, he asserts that using the *Black's* definition of "official misconduct" is unhelpful because it adopts a definition that is the functional equivalent of the crime of Official Misconduct with no suggestion of any legislative intent to do so.[40] Alaska has long had a statute listing the elements of the crime of Official Misconduct, but there is no indication in the record that the legislature intended for that definition to apply in the civil context of a recall for misconduct in office. This Court agrees with the reasoning of Superior Court Judge Marston in *Aderhold v. City of Homer and Heartbeat of Homer* that, in a recall context, "requir[ing] misconduct in office to be criminal would be to undermine the intent and effectiveness of the recall statutes. . . and deny the voters' right to effectively seek recall of their elected officials."[41]

Mr. Biggs further argues that the definition of the word "misconduct," when not defined within the context of the crime of Official Misconduct, has a broader meaning more compatible with the recall context. He cites to *Black's* definition of misconduct as "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a

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[38] *E.g.*, *Benavides v. State*, 151 P.3d 332, 335-6 (Alaska 2006); *Univ. of Alaska v. Esitauts*, 666 P.2d 424, 430 (Alaska 1983).
[39] *Parson v. State Dep't of Rev.*, 189 P.3d 1032, 1037 (Alaska 2008); *Little Susitna Const. v. Soil Processing*, 944 P.2d 20, 24 (Alaska 1997); *Rhines v. State*, 30 P.3d 621, 625-6 (Alaska 2001).
[40] AS 11.56.850; Appellant's Opening Brief, 10-11.
[41] 2017 WL 4712102, at *2, 3AN-17-06227CI.

position of authority or trust."[42] He argues that this definition is more in line with the ordinary meaning of misconduct one finds in non-technical dictionaries.[43] And the requirement that the misconduct must be "in office" can be met by showing that the subject was acting in his or her official capacity when committing the alleged misconduct. Thus, borrowing the corruption element from "official misconduct" is unnecessary for the purpose of interpreting "misconduct in office."

The Municipality argues that it is not requiring misconduct to be criminal, and is instead drawing an analogy from the definition of Official Misconduct in order to better understand "misconduct in office."[44] But it is unclear what use this analogy is when it effectively includes a scienter requirement that raises the bar for misconduct in office to be on par with Official Misconduct. If the legislature wanted to add additional scienter elements to its broad reference to misconduct in office, it could have done so, as it has for findings of misconduct in other circumstances.[45] But the legislature has instead elected not to further constrain the meaning of "misconduct in office" for the purposes of municipal recall petitions.

Significantly, to this court, the definitions in the most current edition of *Black's* would be far less probative of legislative intent than the definitions contained in the edition in print in 1985 when AS 29.26.250 was enacted. The Fifth Edition of *Black's* law was most current in 1985, and it "define[d] misconduct in office as '[a]ny unlawful behavior by a public officer in relation to the duties of his office, willful in character.

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[42] *Black's Law Dictionary* "Misconduct" (5th ed. 2019).
[43] Appellant's Opening Brief, at 12.
[44] Brief of Appellees, at 18-20.
[45] Appellant's Brief, at 16-8 (citing the more heightened requirements for establishing judicial or legislative misconduct); Appellant's Reply, at 9-10.

Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."[46] If this definition is applied in this case, then Member Zaletel's alleged unlawful behavior of participating in an over-capacity meeting as a public officer, after being warned that the gathering was unlawful, would constitute misconduct in office.

Mr. Biggs' arguments are persuasive on this issue. The Clerk's definition of "misconduct in office" was overly reliant on the current definition of "official misconduct" in a way that obviated, rather than captured, the ordinary meaning of AS 29.26.250. Consequently, the "corrupt" requirement, does not apply within the meaning of "misconduct in office." And, this Court agrees with Judge Crosby that "there is no de minimis exception under Alaska law mandating that an alleged ground for recall must reach a certain threshold of severity to be certified."[47]

But this Court also appreciates that Alaska is a "for cause" recall state, and that there must be some sufficient allegation of actual misconduct in order for a petition to go forward.[48] Officials must be able to identify, and potentially avoid, the conduct that would serve as the basis for a recall petition. Member Zaletel's alleged violation of EO-15, is sufficient to meet that threshold. She allegedly violated EO-15 in her official capacity as an assembly member and actively participated in a meeting that violated an existing emergency order. This is enough for her misconduct to have been "in office," and enough to make a prima facie case.

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[46] 1988 Inf. Op. Alaska Att'y Gen. (April 22; 663-88-0462)(quoting Black's Law Dictionary 5th ed. 1979)); *See also* 2010 Op. Alaska Att'y Gen. (June 7, 2010), at n.7.
[47] Municipality's Brief, Appx. A., *Order Regarding Case Motions 1 & 2*, May 19, 2021 3AN-20-09614CI, at 6.
[48] *Von Stauffenberg*, at 1059-60; *Meiners*, at 294.

This Court, in reviewing applications for recall petitions treats the factual claims as true. And the recall statutes are to be construed liberally. Participating in an assembly meeting, as an assembly member, in knowing violation of municipal law, while obviously defensible, is legally sufficient to support an allegation of misconduct in office for the purposes of a recall petition. The decision must be left up to the voters.

CONCLUSION

In summary, the Municipal Clerk correctly applied the reasoning from *von Stauffenberg* in finding that application No. 2020-01 was legally insufficient. But, the Clerk applied an inaccurate definition of "misconduct in office" in determining that application No. 2020-05 was insufficient, and concluded incorrectly that a showing of "some component of dishonesty, private gain, or improper motive" was required for the allegation's legal sufficiency. Thus, this Court affirms the Municipal Clerk's denial of application No. 2020-01 but reverses the Clerk's denial of application No. 2020-05.

Accordingly, and for these reasons, the Appellant's motion is **DENIED in part and GRANTED in part.**

IT IS SO ORDERED.

Dated at Anchorage, Alaska this 20th day of May, 2021.

Hon. Kevin M. Saxby
Superior Court Judge

I certify that on 5/24/21 a copy of the above was mailed to each of the following at their addresses of record:

B. Chandler & S. Scrudato & R. Bolstein
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