



STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY

May 20, 2024

Recall committee
Margaret Ellen McCoy
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Prairie Village, KS 66208

Joan O Clough
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RE: Letter regarding recall petition of Prairie Village Mayor Eric Mikkelson.

On Friday, May 17, 2024, our office received your proposed recall petition from the Johnson County Election Office. *See* K.S.A. 25-4318 (“The recall of a local officer is proposed by filing a petition with the county election officer,” in the relevant county.).

Findings by this Office

Pursuant to K.S.A. 25-4322(b), this Office finds that your petition for recall is sufficient.

The district attorney has a statutory obligation to review recall petitions

Pursuant to K.S.A. 25-4322(b), “[b]efore any petition for recall of a local officer is circulated, the county election officer shall transmit a copy of such petition to the . . . district attorney . . . for determination of the sufficiency of the grounds stated in the petition for recall.”

Within five business days of its receipt, “the . . . district attorney . . . shall make such determination (of the legality of the recall petition) and notify the county election officer, the officer sought to be recalled and the recall committee of such determination.” K.S.A. 25-4322(b).

Factors this Office considers in determining the legality of the petition for recall

Pursuant to K.S.A. 25-4301, every Kansas public official is subject to recall. In judging a recall petition, this Office must determine whether:

- (1) The facts support the grounds for recall as stated in the petition for recall;
- (2) the petition is substantially in the required form;
- (3) the petition was filed during the first 120 days of the term of office of the official sought to be recalled, or within less than 180 days of the termination of the term of office of the officer sought to be recalled;
- (4) the person named in the petition is a local officer;
- (5) there is a sufficient number of required signatures;
- (6) the local officer sought to be recalled has been or is being subjected to another recall election during such officer’s current term of office; or
- (7) the application conforms to any other requirement of this act.

K.S.A. 25-4322(b)(1)-(7).

K.S.A. 25-4322(b)(1): Whether the facts support the grounds for recall

This Office must first determine whether, “[t]he facts . . . support the grounds for recall as stated in the petition for recall.” K.S.A. 25-4322(b)(1). The legal grounds for

recall include: (1) a conviction for a felony, (2) misconduct in office, or (3) failure to perform duties as prescribed by law. K.S.A. 25-4302(a).

Ground for recall: Mayor Mikkelson committed the crime of misuse of funds

For your lone ground for recall, you allege that, between June and August 2023, Mayor Mikkelson committed misconduct in office when he misused public funds, in violation of K.S.A. 21-6005, by using taxpayer-paid consultants to advocate against the recall petition.

Misconduct in Office: Diverting Taxpayer Dollars for Personal Political Benefit

- It is illegal for Mikkelson to spend taxpayer funds against his own recall. (K.S.A. 21-6005, crime of misusing public funds; Kansas A.G. Opinion No. 93-125, public purpose doctrine prohibits spending public funds for private political purposes.)
- Mikkelson unlawfully uses taxpayer-paid political consultants against taxpayers who seek to recall him. For example:
 - On June 7, 2023, Mikkelson used taxpayer-paid consultants for his “public response” against taxpayer recall allegations.
 - From June through August 2023, Mikkelson used taxpayer-paid consultants to advocate against taxpayers’ recall.
- Mikkelson violates his duty to ensure public funds are spent for public purposes when he spends them for his own personal purposes.

The term “misconduct in office,” “means a violation of law by the officer that impacts the officer’s ability to perform the official duties of the office.” K.S.A. 25-4302(b). To establish “misconduct in office,” the allegation must show, “some nexus between the alleged misconduct and the elected official’s duties in office.” *Baker v. Gibson*, 22 Kan. App. 2d 36, 45, 913 P.2d 1218 (1995).

- *Your legal ground is sufficient*

K.S.A. 21-6005 states that the crime of misuse of public funds, “is knowingly using, lending or permitting another to use public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such

person's official position." K.S.A. 21-6005(a). The term "public money" means, "any money or negotiable instrument which belongs to the state of Kansas or any political subdivision thereof." K.S.A. 21-6005(a).

A violation of K.S.A. 21-6005(a) would be a violation of law which is sufficient to establish the first prong of misconduct in office. See K.S.A. 25-4302(a). The second prong - impacting the officer's ability to perform the official duties of the office - is a factual determination, which will be addressed below.

- *Your factual ground is sufficient*

In reviewing the factual allegation, this Office does not pass on the credibility of the allegations. "In conducting the review, the county or district attorney does not determine the truth or falsity of the allegations." *Cline v. Tittel*, 20 Kan. App. 2d 695, 701, 891 P.2d 1137 (1995) (quoting Att'y Gen. Op. 91-59 with approval).

While the county or district attorney is obligated to determine the sufficiency of the grounds asserted in a petition seeking the recall of a local officer, the county or *district attorney does not determine whether the grounds asserted should subject the local officer to recall*. The electors are as qualified to determine the capability and efficiency of their elected officials, after giving those officials an opportunity to perform the duties of their offices, as they were when they first selected the officials to fill the positions. [Citation omitted.] *The truth or falsity of the grounds must be determined by the electors*. [Citation omitted.] Rather, the county or district attorney determines only whether the petition includes "the grounds for recall described in particular in not more than 200 words." K.S.A. 1990 Supp. 25-4320(a)(2).

Att'y Gen. Op. No. 91-59, p. 5 (emphasis added). In other words, this Office assumes the factual allegations are true, and must only determine if they meet the legal requirements: in this case, a violation of K.S.A. 21-6005(a).

Key to this analysis is K.S.A. 21-6005(a)'s requirement that the public funds be used, "in a manner not authorized by law." In *State v. Lampson*, No. 96,155, 2007 WL 737945 (Kan. App. 2007), the Kansas Court of Appeals was asked to interpret this element. It found that, "[i]n order to construe the statute according to its ordinary meaning, the phrase 'in a manner not authorized by law' must include only acts that have been expressly prohibited by statute or judicial interpretation." *Lampson*, 2007 WL 737945 at *4.

Applicable to this case, Prairie Village has expressly prohibited the use of public funds for personal gain. Prairie Village Ordinance 1-212(d)(iii) states:

(A) Members of the governing body shall not use their public office or position for their own private financial or personal gain or advantage of a kind that is not or could not be generally available to other citizens; nor for the private financial or similar personal gain or advantage of friends, relatives, or persons with whom the member is affiliated with in a non-governmental capacity.

The question then becomes, was the use of taxpayer-paid consultants to argue against the recall petition(s) for public or personal gain? As you cite in your petition, in Kan. Atty. Gen. No. 93-125, the City of Wichita contracted with a consultant to, "advise the city relative to the dissemination of information on the public safety city wide sales tax referendum."

The General first noted that, "[i]n general, municipalities may give public funds to private individuals as long as it is for a public purpose and promotes the public welfare. . . . However, there has been a uniform judicial reluctance to sanction the use of public funds for election campaigns." (citations omitted).

Citing Kan. Atty. Gen. No. 93-33, the General found that, “school districts have an obligation to educate regarding school district issues to be voted on by the electors. However, a school district does not have the authority to advocate a position on issues to be voted on by electors and the officers and staff of the school district must maintain a semblance of neutrality.” Kan. Atty. Gen. No. 93-125.

The General determined that, “the public purpose doctrine does not encompass the use of public funds to promote or advocate a governing body’s position on a matter which is before the electorate. However, public funds may be expended to educate and inform regarding issues to be voted on by the electorate.” Kan. Atty. Gen. No. 93-125.

In this case, you have alleged that Mayor Mikkelson used taxpayer funds to advocate his position on the recall petition. Assuming the facts in the petition are true, as this Office must, this ground is sufficient to establish the misuse of public funds and, in turn, misconduct in office.

In addition, there is a nexus between the alleged misconduct and the elected official’s duties in office: the use of public funds was focused on retaining the office of Mayor.

K.S.A. 25-4322(b)(2): Whether the petition is substantially in the required form

This Office must determine if, “the petition is . . . substantially in the required form.” K.S.A. 25-4322(b)(2). Each petition for recall of a local officer shall include the following:

- *The name and office of the local officer sought to be recalled*

The petition must include, “[t]he name and office of the local officer sought to be

recalled.” K.S.A. 25-4320(a)(1). Mayor Mikkelson is a local officer, as he is the Mayor of Prairie Village, Kansas. This requirement is met.

- *Grounds for recall in under 200 words*

The petition must include, “the grounds for recall described in particular in not more than 200 words.” K.S.A. 25-4320(a)(2). A review of the grounds for recall establishes that it is under 200 words. This requirement is met.

- *Verification of the petition signers*

The petition must include, “a statement that the petition signers are registered electors of the election district of the local officer sought to be recalled.” K.S.A. 25-4320(a)(3). The recall petition includes a statement that, “I declare that I am a registered elector of Johnson County, Kansas, and of the election district of the officer named above.” This requirement is met.

- *Three registered electors*

The petition must include, “the names and addresses of three registered electors of the election district of the officer sought to be recalled who shall comprise the recall committee.” K.S.A. 25-4320(a)(4). The recall petition includes the names, signatures, and addresses (within Prairie Village) of Margaret Ellen McCoy, Joan O Clough, and Mary B O’Connor, all of Prairie Village, Kansas. This requirement is met.

- *Statement of warning in K.S.A. 25-4321*

The petition must include, “the statement of warning required in K.S.A. 25-4321, and amendments thereto.” K.S.A. 25-4230(a)(5). The warning states:

Any person who signs a name other than that person’s own name to a

petition for recall of a local officer, or who knowingly signs more than once for the same proposition at one election, or who signs the petition knowing he or she is not a registered elector is guilty of a class B misdemeanor.

K.S.A. 25-4321. This requirement is met.

- *List of petition circulators*

The petition must include, “a statement that a list of all petition circulators, as defined in K.S.A. 25-3608, and amendments thereto, authorized to circulate recall petitions for such recall may be examined in the office of the county election office where the petition is required to be filed.” K.S.A. 25-4320(a)(6). This requirement is met.

K.S.A. 25-4322(b)(3): The correct timing of the petition

Our Office must determine whether, “the petition was filed during the first 120 days of the term of office of the official sought to be recalled or within less than 180 days of the termination of the term of office of the officer sought to be recalled.” K.S.A. 25-4322(c)(3).

Pursuant to Prairie Village Ordinance 6-105(e), the office of the Mayor is elected every four even-numbered years. Mayor Mikkelson was elected to his second term in November 2022. Pursuant to Prairie Village Ordinance 6-106(a), his first term ended, and his second term began, on the first Monday of December (December 5th of 2022).

Based upon the December 5th date, the 120 days ended on April 3, 2023. The recall petition is, thus, outside the 120-day window of K.S.A. 25-4322(b)(3). Because Mayor Mikkelson is serving a four-year term, the petition is also not within 180 days of the termination of his term. This requirement is met.

K.S.A. 25-4322(b)(4): Whether the person named is a local officer

Our Office must determine whether, “the person named in the petition is . . . a local officer.” K.S.A. 25-4322(b)(4). As stated above, Mayor Mikkelson is a local officer, being the Mayor of Prairie Village, Kansas. This requirement is met.

K.S.A. 25-4322(b)(5): Whether there is a sufficient number of required signatures

Our Office must determine whether, “there is an insufficient number of required signatures of any kind.” K.S.A. 25-4322(b)(5). K.S.A. 25-4322(a) requires that the petition be, “thereof accompanied by names and addresses of the recall committee and sponsors.” Per K.S.A. 25-4320(a)(4), the recall must include, “the names and addresses of three registered electors of the election district of the officer sought to be recalled. . . .”

As stated above, the recall petition includes the names, signatures, and addresses (within Prairie Village), of Margaret Ellen McCoy, Joan O Clough, and Mary B O’Connor, all of Prairie Village, Kansas. This requirement is met.

K.S.A. 25-4322(b)(6): Whether the local officer has another pending recall

Our Office must determine whether, “the local officer sought to be recalled has been or is being subjected to another recall election during such officer’s current term of office.” K.S.A. 25-4322(b)(6). There is no other pending recall of Mayor Mikkelson. This requirement is met.

K.S.A. 25-4322(b)(7): Whether the application conforms to any other requirement of the act

Finally, our Office must determine whether, “the application . . . conform[s] to [all] other requirement of this act.” K.S.A. 25-4322(b)(7). This requirement is met.

Conclusion

Pursuant to K.S.A. 25-4322(b), this Office is required to make a determination, “of the sufficiency of the grounds stated in the petition for recall.” This Office finds the ground for recall is sufficient.

Respectfully Submitted:



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CC:

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Mayor Eric Mikkelson, 7700 Mission Road, Prairie Village, KS 66208