

August 16, 2016

Received

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Vicki Dalton, Auditor
1116 West Broadway Ave
Spokane WA 99260

Spokane County Auditor
Elections

Re: Filing of Statement of Charges in Support of the Recall of Spokane Mayor David Condon

Dear Ms. Dalton:

This letter shall constitute the Statement of Charges in support of the recall of Spokane Mayor David Condon pursuant to the Washington Constitution, Article 1, Sections 33 and 34, and RCW 29A.56.110.

Mayor Condon has committed acts of malfeasance and misfeasance and has violated his oath of office while serving as Mayor of the City of Spokane.

This Statement of Charges is verified under oath, states the acts complained of, and provides facts supporting the charges, and is signed by the person making the charge. The undersigned is a legal voter residing in the City of Spokane, Washington.

I. Background

David Condon was elected Mayor of the City of Spokane on November 8, 2011 and was re-elected as Mayor on November 3, 2015. At the beginning of each term, he took an oath of office, as required by Article IV, Section 34 of the City Charter, to support the Constitution of the United States and of the State of Washington, and to perform faithfully, honestly, and impartially the duties of office.

II. The Straub Investigative Report

During Mayor Condon's first term of office and prior to his re-election, a series of events occurred which culminated in the resignation of Frank Straub, Chief of Police for the City of Spokane.

Subsequent to Mayor Condon's re-election, an investigative report with respect to issues related to the Straub matter was prepared for the City of Spokane by Seabold Group, a Seattle-based investigation consulting firm.

Seabold Group released a 126 page summary report ("original report") in late July, 2016, which among other findings, concluded that along with others, the Mayor intentionally withheld information from the City Clerk about the existence of documents with the intent and purpose of

delaying the production of those records until after the Mayor's election. The original report is included as Appendix A.

Within a day of the release of the original report, Seabold Group issued a second 126 page summary report ("amended report"), in which references to Mayor Condon and another individual having intentionally withheld information from the City Clerk about the existence of documents with the intent and purpose of delaying the production until after the Mayor's election were excised or removed from the report. The amended report is included as Appendix B.

On July 26, 2016, a letter was sent by Kris Cappel of Seabold Group to the Joint Oversight Committee of the City of Spokane, indicating the reasons for making changes to the report. In that letter, Ms. Cappel wrote (emphasis added):

The conclusion that Mayor Condon and Mr. Coddington withheld information with the purpose and intent of delaying the release of records was based on a preponderance standard, which is a very low threshold of proof (more likely than not). My finding with respect to those individuals was also based entirely on circumstantial evidence, meaning I drew inferences based on other evidence. That is in contrast to my findings regarding Ms. Isserlis, Ms. Sanders, and Mr. Dalton, which is detailed in the report.

Given the low standard of proof and the fact that all of the information was circumstantial, my initial finding as to the Mayor and Mr. Coddington should have been inconclusive. I should have reserved judgment with the caveat that I believe certain members of the City Attorney's Office likely have information bearing on these issues that would aid in a more definite finding.

In the letter, Ms. Cappel also indicated that conversations with others prompted her to reconsider all the evidence related to the issue of the intentional withholding of documents from the City Clerk.

In both reports, it was noted that certain members of the City Attorney's office declined to provide information to the Seabold Group, citing concerns over the preservation of attorney-client privilege.

A copy of the July 26, 2016 letter is included as Appendix C.

The Spokesman-Review newspaper summarized the changes to the original report and amended report and published them online. Copies of the Spokesman-Review's summary of changes to the respective report are included as Appendix D ("Investigator's Original Report on Straub Ouster") and Appendix E ("Investigator's Amended Report on Straub Ouster").

Chapter 42.56 RCW is the Public Records Act, and RCW 42.56.550 provides for judicial review for failure to respond to a public record request within a reasonable period of time. Such judicial review may result in the award of all costs, including reasonable attorney fees, as well as the discretionary award of a \$100 per day penalty for each day that a person was denied the right to inspect or copy a public record.

The Municipal Research and Services Center (MRSC), a non-profit organization based in Seattle with a mission of supporting effective local government in Washington through trusted consultation, research, training, and collaboration, has issued a 74-page publication called "Public Records Act for Washington Cities, Counties, and Special Purpose Districts" which references the duties imposed by the Public Records Act on municipalities. On page 51 of their publication, they advise that local governments are to "provide for the fullest assistance to inquirers and the most timely possible information on requests for information", citing RCW 42.56.100. The publication at page 53 also warns local governments to "not expect leniency from the court if there is evidence that a local government agency willfully tried to delay or avoid disclosing records when no exemption or prohibition applied." The MRSC publication is included as Appendix F.

* * * * *

On pages 87-88 of both the original and amended Seabold Group reports was a section devoted to a press conference on September 22, 2015 at which Chief Straub's resignation was announced.

From page 88 of both reports:

During the press conference, Mayor Condon was asked:

"Were there any sexual harassment complaints lodged against Frank?"

Mayor Condon replied, "No."

In response to a follow up question from a KHQ reporter, Mayor Condon added, "[T]here had been no official filings of anything."

In his investigative interview, the Mayor was asked and answered the following questions:

Q: Did you consider what she [Ms. Cotton] was telling you – and that is that she was sexually harassed by Straub. Did you consider that she was making a complaint?

A: In the sense I – yes. I turned that over to – to – to Theresa to - to further take through the process, yeah.

Q: So you did – you did think that Monique was making a complaint? She was complaining about something?

A: She was complaining about something, yes.

(Condon Tr. 44-45)

This exchange (and whether Mayor Condon answered truthfully on September 22, 2015) is the subject of a Spokane Ethics Commission complaint filed against Mayor Condon by the Spokane Chapter of the National Organization of Women on December 22, 2015 alleging a Spokane Code of Ethics violation (SMC 1.04A.030 Subsection N): *“No City officer or employee shall commit any act of ... dishonesty relating to his or her duties or position as a City officer or employee or arising from business with the City.”*

A copy of the 43-page complaint is included as Appendix G (Center for Justice filing dated December 22, 2015 with reference to “Ethics Complaints of the Spokane Chapter of the National Organization of Women against Mayor David Condon”). Pages 1 through 3 of the Ethics Complaint Form are the pages with applicable information concerning the event(s) which are the subject of this Statement of Charges.

* * * * *

Contemporaneous newspaper articles concerning the Straub investigation are included in support of the filing of Statement of Charges, as follows:

- May 12, 2016 Spokesman-Review (online): “Shawn Vestal: Throwing an invisibility cloak over Straub investigation not in citizens’ best interest” (Appendix H)
- June 2, 2016 Spokesman-Review (online): “Shawn Vestal: Mayor can’t defend secrecy in one breath, condemn it in the next” (Appendix I)
- May 31, 2016 Spokesman-Review (online): “Condon says Stuckart politicizing investigation into police chief firing” (Appendix J)
- June 2, 2016 Spokesman-Review (online): “Editorial: City Hall probe losing significance” (Appendix K)
- July 27, 2016 Inlander (online): “Condon administration hid damning records until after election – and other big revelations” (Appendix L)
- July 27, 2016 Spokesman-Review (online): “Report: City officials intentionally withheld information about Straub ouster until after election” (Appendix M)
- August 2, 2016 Spokesman-Review (online): “Shawn Vestal: Cappel report’s biggest revelation is how much still hasn’t been revealed” (Appendix N)
- August 4, 2016 Spokesman-Review (online): “Shawn Vestal: The mayor’s Cotton-Straub mess ‘has been entirely self-inflicted’” (Appendix O)

III. Appointment of Assistant Police Chief Craig Meidl as Chief of Police

On August 1, 2016, Mayor David Condon appointed Assistant Police Chief Craig Meidl as Chief of Police of the City of Spokane.

Craig Meidl is listed as Police Chief on the City’s online directory as of August 16, 2016.

Spokane Municipal Code, Section 03.01A.100 (A), (included as Appendix P) states:

“As provided in the City Charter, the mayor is the chief executive and administrative officer of the City with final authority over the employment, termination and assignment of all employees of the City, not including the elected officers, except that:

I. the appointment of the city attorney, the city clerk and the administrative heads of each department requires approval of the city council;”

Contemporaneous newspaper articles concerning the appointment are included as follows:

- August 1, 2016 Spokesman-Review (online): “Mayor Condon selects Assistant Chief Craig Meidl to lead Spokane Police Department” (Appendix Q)
- August 1, 2016 Spokesman-Review (online): “Council members challenge mayor’s authority to name police chief without vote” (Appendix R)
- August 4, 2016 Inlander (online): “City Council will vote on Craig Meidl’s appointment with or without the mayor” (Appendix S)
- August 11, 2016 Spokesman-Review (online): “Meidl addresses Thompson salute, desire for full City Hall buy-in at public forum” (Appendix T)

The August 1, 2016 Spokesman-Review article (Appendix Q) on page 2 says in part “Condon said Monday he might not seek the City Council’s confirmation of Meidl as the chief”.

The August 1, 2016 Spokesman-Review article (Appendix R) on page 2 says in part “Mayor David Condon said Monday that he might not seek the Spokane City Council’s approval of his decision to promote Craig Meidl as the next police chief, a move that appears to contradict city law.” Later on page 2 appears the sentence “He did not provide legal justification for side-stepping the council.”

The August 4, 2016 Inlander article (Appendix S) says on page 1 “Mayor David Condon announced he would not submit his appointment for police chief for approval by city council – at least not for an indeterminate period of time – as required by city law.”

The August 11, 2016 Spokesman article (Appendix T) reiterates that that [Mayor David Condon] “wouldn’t seek City Council approval of the nomination, as is seemingly required by the city charter and municipal code.”

As of the filing of this Statement of Charges, the appointment of Craig Meidl as Police Chief has not been submitted to council for approval by Mayor David Condon. City Council, on its own, is scheduled to consider the appointment at its August 22, 2016 meeting per a resolution introduced by council member Lori Kinnear, chairperson of the Public Safety Committee.

IV. Handling of Human Resource-Related Matters

Pursuant to the Spokane Municipal Code, Section 03.01A.100 (A), the Mayor has the final authority over the employment, termination and assignment of all employees of the City. (Appendix P)

A number of high-profile incidents related to the handling of human resource-related matters have occurred during the Condon administration:

- Firing of Frank Straub (complaint dismissed, \$468,000 so far in investigation costs and legal fees, more to come).
- Layoff of Liane Carlson (damages of \$230,000, unknown cost for legal fees).
- Transfer of Monique Cotton (lawsuit not yet filed).
- Dismissal of Nancy Goodspeed (lawsuit filed for \$1 million on August 8, 2016).

Contemporaneous newspaper articles related to these incidents are included as follows:

- November 26, 2014 Spokesman Review (online): “Jury: City of Spokane wrongly dismissed worker” (Appendix U)
- November 29, 2015 Spokesman-Review (online): “Records unveil layers of secrecy at Spokane City Hall” (Appendix V)
- June 7, 2016 Spokesman-Review (online): “Spokane’s human resources director leaving city as Straub investigation continues” (Appendix W)
- July 28, 2016 Spokesman-Review (online): “Report highlights deficiencies in city of Spokane’s workplace policies” (Appendix X)
- August 4, 2016 Inlander (online): “Updated: The city has already been billed more than \$468,000 for the Straub investigation and lawsuit” (Appendix Y)
- August 8, 2016 Spokesman-Review (online): “Former parks spokeswoman Goodspeed sues Spokane for \$1 million in wake of Straub ouster” (Appendix Z)

The July 28, 2016 Spokesman-Review article includes the following information attributed to Kris Cappel from the Seabold Group: “But she calls the investigation limited in scope and said officials ignored city policies that prescribe an immediate, well-documented investigation – though she notes ‘it appears that those steps are routinely overlooked by the City.’”

At page 114 of the amended report (Appendix B), the investigator writes: *[Ms. Cotton] brought her allegations to the attention of his [Straub’s] supervisors, Mayor Condon and Ms. Sanders, neither of whom consulted HR, but they did consult their legal advisors.* The related footnote to that sentence (footnote 98) is as follows: *It does not appear that Mayor Condon or Ms. Sanders consulted or considered what was required under the City’s or SPD’s policies at the time they were deciding how to address Ms. Cotton’s complaints.*

The amended report notes at page 114, “It is well-established that employers have a duty to exercise “reasonable care to *prevent* and *correct* promptly any sexually harassing behavior.” and cites *Burlington Industries, Inc. v. Ellerth*, 526 U.S. 742 (1998) (emphasis added in the amended report).

* * * * *

Articles and items in the various Appendices are incorporated into this Statement of Charges by reference herein.

The activities and events listed above occurred in the City of Spokane on or about the dates described in the Statement of Charges and/or in the accompanying Appendices.

The Supreme Court of Washington in *In re Recall of Kast*, 144 Wash.2d 807, 814 (2001) affirmed that attachments to recall documents shall be considered in a court's review.

V. Charges

1. David Condon, Mayor of Spokane, committed an act of malfeasance and misfeasance and violated his oath of office when he withheld information with the purpose and intent of delaying the release of records requested with respect to the Frank Straub matter, as more fully described in the Seabold Group investigative reports and related letter.
2. David Condon, Mayor of Spokane, committed an act of malfeasance and misfeasance and violated his oath of office when he said "no" at the September 22, 2015 press conference when asked the question "Were there any sexual harassment complaints lodged against Frank?"
3. David Condon, Mayor of Spokane, is committing an act of malfeasance and misfeasance and violating his oath of office by his continuing failure to submit the appointment of Craig Meidl to Spokane City Council in accordance with the Spokane Municipal Code.
4. David Condon, Mayor of Spokane, has committed an act of malfeasance and misfeasance and violated his oath of office by his failure to follow City and Spokane Police Department policies with respect to the sexual harassment claim by Monique Cotton, resulting in direct financial loss to the taxpayers and citizens of Spokane.

VI. Statements in Support of the Charges

Charge 1 is supported by the July 26, 2016 letter from independent investigator Kris Cappel of Seabold Group when she indicated that, based on a preponderance of the evidence standard, it was more likely than not that Mayor Condon withheld information with the purpose and intent of delaying the release of records. The fact that Ms. Cappel subsequently amended the original report to remove the specific finding in the original report does not negate the fact that the preponderance of the evidence available to her at the time indicated that the Mayor withheld information with the purpose and intent of delaying the release of the records. Ms. Cappel did not change her opinion that Mayor Condon withheld

information with the purpose and intent of delaying the release of records, she simply indicated that for purposes of amending the initial report she applied a higher threshold of proof than she had initially. The “more likely than not” threshold is a standard of proof which is sufficient in civil actions and should be sufficient in a recall action.

The independent investigator determined that Mayor Condon’s actions were willful and thus it is highly likely that the City of Spokane (by his actions) has violated the Public Records Act. Because the Public Records Act places an affirmative duty on a municipality to comply in a timely manner with its provisions, Mayor Condon’s actions are conduct that affects, interrupts, or interferes with the performance of official duty, and is also the performance of an official duty in an improper manner. Further, it is conduct which is the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

Charge 2 is supported by the language on page 88 of the Seabold Group investigatory reports where the Mayor answered “no” to the question posed at the September 22, 2015 press conference and answered “yes” during his investigative interview with the Seabold Group. The non-truthful answer to the question was material and not inconsequential insofar as the Mayor was involved in a re-election campaign and both the news media and voter interest in his answer to the question was high. Mayor Condon, in the interest of securing his re-election, chose to not tell the truth.

A violation of the Spokane Code of Ethics relating to dishonesty is wrongful conduct that affects, interrupts, or interferes with the performance of official duty, and is also the performance of an official duty in an improper manner. Further, a violation of the Spokane Code of Ethics is the neglect or knowing failure by an elective public office to perform faithfully a duty imposed by law --- as well as a literal violation of his actual oath of office to “perform faithfully, honestly, and impartially the duties of office”.

Charge 3 is supported by the continuing failure of the Mayor to fulfill an obligation required by the Spokane Municipal Code, which is to obtain the approval of city council of the appointment of administrative heads of City departments. The fact that city council is moving forward on its own volition to approve the Mayor’s appointment does not excuse the Mayor from the performance of his duties as required by the municipal code.

Such action is wrongful conduct that affects, interrupts, or interferes with the performance of official duty, and is also the performance of an official duty in an improper manner. Further, it is the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

Charge 4 is supported by the findings of the Seabold Group investigator that Mayor Condon did not consult the City’s Human Resources department nor did he consult or consider the City’s or Spokane Police Department’s policies at the

time he and Ms. Sanders were deciding how to address Ms. Cotton's complaint. Further, numerous cited newspaper articles concerning the disarray of the City with respect to human resources issues as well as the continuing high-dollar payouts to former employees who have filed employment-related lawsuits against the City support that the mishandling of the Cotton complaint is not an isolated instance. Pursuant to Spokane Municipal Code Section 03.01A100, Mayor David Condon is the chief executive and administrative officer of the City responsible for the establishment, operation, and supervision of the City's employees and the implementation of the City's policies. The failure of the Mayor to follow the City's and Spokane Police Department's human resource policies reflects his gross negligence with respect to the handling of the Cotton complaint, resulting in a multi-lawyer investigation that has to date resulted in expenditures exceeding \$468,000.

Such action is wrongful conduct that affects, interrupts, or interferes with the performance of official duty, and is also the performance of an official duty in an improper manner. Further it is the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

VII. Standards in Measuring the Adequacy of the Charges

In *Matter of Recall of Lee*, 122 Wn.2d 613 (1993), the Supreme Court of Washington indicated the following:

- A charge need only make a prima facie showing of official misconduct. The elected official has the opportunity to defend himself/herself during the electoral process.
- Charges in a recall petition must be both factually and legally sufficient.
 - To be factually sufficient, a charge must state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, ... and be verified under oath that [the petitioners] believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.
 - To be legally sufficient, a charge must state with specificity "substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office."
- "Misfeasance" or "malfeasance" means "any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." RCW 29A.56.110(1). "Misfeasance" also includes the "performance of an official duty in an improper manner." RCW 29A.56.110(1)(a).
- "Violation of the oath of office" means the "neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law." RCW 29A.56.110(2).

In *In the Matter of Recall of Robinson*, 156 Wash.2d 704 (2006), the Supreme Court of Washington noted “Discretionary acts of a public official are not a basis for recall insofar as those acts are an appropriate exercise of discretion by the official in the performance of his or her duties.” citing *Cole v. Webster*, 103 Wn2d 280, 283 (1984).

None of the charges cited in this Statement of Charges relate to a discretionary act or acts by Mayor David Condon. Instead, all charges relate to the performance (or non-performance) of official duties as prescribed by federal law, state law, the Spokane Municipal Code, or policies and procedures of the City of Spokane. Accordingly, all charges are appropriate subject matter for a petition for recall.

VIII. Conclusion

A voter could reasonably conclude based on the facts set forth above that Mayor David Condon committed malfeasance and misfeasance and also violated his oath of office.

Certification

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and that I have sufficient knowledge of the alleged facts upon which the stated grounds for recall are based.

DATED THIS August 16, 2016 in Spokane, Washington



David Green, Petitioner

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