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GOVERNMENT
ACCOUNTABILITY BOARD

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April 28, 2011

VIA MESSENGER

Mr. Kevin Kennedy
Wisconsin Government Accountability Board
212 East Washington Avenue, Third Floor
Post Office Box 7984
Madison, WI 53707-7984

Re: In Re Petition to Recall Senator Randy Hopper of the 18th Senate District

Dear Mr. Kennedy:

Enclosed please find Senator Hopper's Reply in Support of his Written Challenge to the Recall Petition Offered for Filing on April 7, 2011. By copy of this letter, we are providing a copy of same to Attorney Levinson by facsimile and mail this date.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP



Eric M. McLeod

EMM:skt

Enclosure

cc: Jeremy Levinson, Esq. (*via fax & mail*)

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STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD APR 29 PM 4: 15

IN RE PETITION TO
RECALL SENATOR RANDY HOPPER
OF THE 18th SENATE DISTRICT

GOVERNMENT
ACCOUNTABILITY BOARD

WGAB ID # 0600012

**SENATOR HOPPER'S REPLY IN SUPPORT OF HIS WRITTEN CHALLENGE TO
THE RECALL PETITION OFFERED FOR FILING ON APRIL 7, 2011**

INTRODUCTION

The purported¹ rebuttal offered by the Committee to Recall Hopper (the "Recall Committee") fails to address the fundamental defect in Scott Dillman's effort to present a valid recall petition. The Recall Committee continues to maintain that it is "the petitioner," despite the clear and unambiguous statutory language that requires the petitioner to be an individual. The Recall Committee concedes that Mr. Dillman, the true recall petitioner in this effort, never registered as required by Wis. Stat. § 9.10(2)(d). Thus, Mr. Dillman never fulfilled the prerequisites to circulating a recall petition and the sixty day circulation period for his petition has never begun.

¹ Wis. Stat. § 9.10(3)(b) states that "the petitioner may file a written rebuttal to the challenge with [the Government Accountability Board] within 5 days after the challenge is filed." It does not provide a mechanism for other interested persons to file rebuttals with GAB. Counsel for the Recall Committee do not indicate that they filed the rebuttal in this matter on Mr. Dillman's behalf. The signature block on the submitted rebuttal indicates that Friebert, Finerty & St. John, S.C. is appearing in this matter as "Attorneys for the Petitioners," but the rebuttal clearly indicates that counsel is representing the Recall Committee in its purported role as the recall petitioner, and disavows any notion that Mr. Dillman is the petitioner. Consequently, the petitioner in this matter, Mr. Dillman, has not provided a rebuttal to Senator Kapanke's challenge and the Government Accountability Board should disregard the rebuttal filed by the Recall Committee.

ARGUMENT

I. The Recall Committee Fundamentally Misapprehends Its Role In The Recall Process

A. The Recall Committee Is Not The Petitioner

Wisconsin's recall statute does not allow a committee to be a recall petitioner; the petitioner must be an individual. *See* Mem. of Law in Support of Sen. Hopper's Written Challenge (hereafter, "Hopper Br.") at 3-5. The Recall Committee ignores this fundamental aspect of the recall statute, as reflected in the following statements (all page references are to the Recall Committee's Rebuttal):

- "the Committee offered petitions bearing approximately 22,500 signatures for filing with the GAB" (p.1)
- "Hopper submitted purported challenges to the Committee's petitions." (p. 1)
- "Dillman delivered [the petitions] on behalf of the Committee." (p. 3)

Curiously, the Recall Committee acknowledges the very flaw in its position, noting that a recall petitioner "needs to append the Statement [of intent to circulate a petition] to its registration indicating its intent" and then immediately conceding that the Recall Committee is unable to "form intent." (Rebuttal at 4.) This apparent conundrum is precisely why § 9.10(2)(d) requires the recall petitioner to be an individual. The Recall Committee does not attempt to engage in any statutory interpretation of § 9.10(2)(d) in order to resolve the identified conundrum, other than to state, with great emphasis, that § 9.10(2)(d) "recognizes that a petitioner is specifically authorized to be a committee." (Rebuttal at 4.) This statement is simply false. A straightforward reading of the plain language of the statute shows that it does not authorize a committee to be a petitioner, rather it authorizes the individual recall petitioner to

satisfy his or her registration requirement by registering under either § 11.05(1) or § 11.05 (2). (See Hopper Br. at 3-5.) This Mr. Dillman has not done.

By arguing that the Recall Committee can effectively act as the petitioner, the Recall Committee violates the central principle that recall is an act taken by the people, not some unknown, shadowy entity identified only by an individual with a post office box in Madison. That individual, Peter Larson, is not a qualified elector in the 18th Senate District. Nor is the Recall Committee. Only a qualified elector can be a petitioner pursuant to Wis. Stat. § 9.10(2)(d).

B. The Recall Committee Cannot Satisfy Mr. Dillman’s Registration Obligation

The Recall Committee also errs by assuming that its registration with GAB eliminated Mr. Dillman’s obligation, as the petitioner, to fulfill the registration requirement imposed by Wis. Stat. § 9.10(2)(d). The Recall Committee asserts numerous times that it properly registered with GAB:

- “On March 2, 2001 (sic) the Committee to Recall Hopper filed its Campaign Registration Statetment, GAB-1.” (p. 1)
- “The Committee filed its GAB-1 Campaign Finance Registration Statement” (p. 2)
- “The GAB’s records confirm the Committee filed the required registration” (p. 3)
- “the Committee properly registered and did so precisely as the statute permits.” (p. 4)

It is undisputed that the Recall Committee registered as a committee that supports the effort to recall Senator Hopper.² However, the Recall Committee's registration with GAB does not, and could not, satisfy Mr. Dillman's statutory obligation to register. (*See* Hopper Br. at 5-8.)

Mr. Dillman's failure to register prior to circulating a recall petition constitutes fundamental noncompliance with the statutory requirements. There is simply no basis to conclude that Mr. Dillman complied with the requirement that he may not "circulate a petition for the recall of [Senator Hopper] prior to completing registration." Wis. Stat. § 9.10(2)(d). The Recall Committee tries to ignore Mr. Dillman's fundamental noncompliance by trying to frame the issue as whether or not "the recall effort was [] in substantial compliance" with the law. But the recall statute imposes obligations, including the registration requirement, on recall petitioners, not "recall efforts." Here, there was no compliance by the petitioner with that requirement.

II. GAB Staff's Erroneous Guidance Regarding Recall Committees Has Created Unnecessary Confusion

The Recall Committee similarly fails to articulate how GAB staff's guidance to recall committees can be squared with the clear, unambiguous language of § 9.10(2)(d). Instead, it relegates such "analysis" to a mere parenthetical when it makes reference to "GAB's (correct) understanding of the requirements." (Rebuttal at 5.) The requirements that Mr. Dillman needed to follow in order to properly initiate a recall effort are those set forth in § 9.10, and they cannot be waived or superseded by the Government Accountability Board or GAB staff. (*See* Hopper Br. at 8-12.) Specifically, the statutory requirements were not and could not be amended by the materials provided GAB in advance of its March 22, 2011 meeting and referenced by the Recall

² Whether the Recall Committee "properly registered" in accordance with the precise requirements of Wisconsin's campaign finance law is less clear, as the Recall Committee's registration form failed to identify its principal officers, as required by law. Wis. Stat. § 11.05(3)(f).

Committee. (Rebuttal at 5.) In fact, at least two of the issues GAB staff attempted to have clarified or resolved at GAB's March 22 meeting would not have been issues at all had staff properly adhered to the statutory requirement that only individuals can be recall petitioners.

A. An Individual Recall Petitioner Could Not File Serial Registrations

Section II.B. of staff's memo regarding "Recall Status, Guidance, and Administrative Processes" (hereafter, "Staff Memo")³ addressed the issue of "serial recall registrations with different petitioners." (Staff Memo at 78-79.) While the Staff Memo notes that the recall statute "requires that the recall petitioner is a qualified elector," it introduces a term not found in the statute - the "recall effort organizer." (Staff Memo at 78.) The Staff Memo proceeds to conflate the "recall petitioner" and the "recall effort organizer" by stating that "the recall effort organizer is authorized to begin circulation of a recall petition upon filing [a] valid recall registration statement" and stating that a recall effort organizer may "offer a petition for filing." *Id.* This is erroneous to the extent that staff means that a committee can serve as the "recall effort organizer."

Based on the erroneous conclusion that a committee serving as a "recall effort organizer" obtains the status of the recall petitioner, staff then proceeds to address situations in which a single committee registers multiple times and in support of multiple individual recall efforts. While staff reached the correct conclusion regarding application of the statutory 60-day circulation period, this entire "issue" is a non-issue when the recall statute is properly followed.

³ The Staff Memo is posted on GAB's website as part of the packet of meeting materials publicly available at: http://gab.wi.gov/sites/default/files/event/74/3_22_11_open_session_board_materials_packet_pdf_15609.pdf (last visited Apr. 28, 2011). The Staff Memo is at pages 74-83, with related exhibits following. Specific pages of the Staff Memo will be referenced with respect to their respective page numbers as part of the entire packet of meeting materials.

The statute provides, as GAB staff repeatedly states, that the recall petitioner must be an individual. If a recall petitioner properly registers pursuant to § 9.10(2)(d), that petitioner has a 60-day window within which to collect signatures and submit a petition to GAB. Any number of separate committees can register in support of or opposition to that petitioner's effort, and those committees may raise and expend funds accordingly. However, when the individual recall petitioner submits his or her petition, only signatures that were collected (by any qualified circulator) during the circulation period may be counted. Wis. Stat. § 9.10(2)(e)2.

Staff's concern that a "recall effort organizer" might attempt to extend the circulation period beyond sixty days by filing multiple GAB-1 forms, and therefore "frustrate the specific statutory 60-day recall circulation period," is only an issue because GAB staff erroneously assumes that a committee can act as the recall petitioner. Clearly the recall statute allows a single committee to support multiple recall efforts, and it separately requires the individual recall petitioner to submit only valid signatures. There is no conflict or ambiguity in the statute – just confusion created by GAB staff's erroneous conclusion that a committee can serve as the recall petitioner.

B. There Is No Confusion In Determining The Date An Individual Recall Petitioner Offers A Petition For Filing

Staff's erroneous conclusion that a recall committee can perform functions of the recall petitioner also created unnecessary confusion regarding the time at which a petition is offered for filing. (See Staff Memo § II.D., Exh. B.) By ignoring the statutory requirement that the individual recall petitioner must offer the petition to GAB for filing, the staff encountered questions as to who might be authorized to offer such a petition on a committee's behalf. For example, Exhibit B to the Staff Memo states that committees should "make sure that only an authorized representative of a recall committee presents himself or herself to the Board to offer

the recall petition for filing.” Again, this “issue” becomes a non-issue by applying the plain language of § 9.10(2)(d); since the recall petitioner must be an individual, the petition could not be offered for filing by an unauthorized representative. A recall petition is not offered for filing until the *individual recall petitioner* presents the petition to GAB. The only advice GAB staff must provide recall petitioners is to remind them not to deliver a petition to GAB piecemeal, but rather offer the entire petition all at the same time.

III. GAB Has A Statutory Obligation To Review Each Petition Signature For Validity

The Recall Committee erroneously states that Senator Hopper’s challenge of certain individual signatures confirms that the Recall Petition is valid. (Rebuttal at 2, 6.) This assertion misstates both the challenge and the law. After noting that nearly 1,000 signatures were clearly invalid, Senator Hopper stated that “there is reason to believe that additional evidence of irregularities regarding the signatures on the Recall Petition will be discovered and the Government Accountability Board should conduct a thorough review of the Recall Petition as required under Wis. Stat. § 9.10(3)(b).” (Written Challenge of Senator Randy Hopper, ¶ 11.) GAB is required to perform a “careful examination” of the Recall Petition to determine the validity of the signatures and the sufficiency of the petition. Wis. Stat. § 9.10(3)(b). The validity of the Recall Petition cannot be determined until GAB conducts that examination.

CONCLUSION

The Recall Petition is invalid because the petitioner failed to follow the mandatory procedures of Wis. Stat. § 9.10(2)(d) in order to trigger the start of the circulation period. No signature on the Recall Petition may be counted and the entire petition is, therefore, insufficient.

Dated this 28th day of April, 2011.

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