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THE HONORABLE MARY ROBERTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

IN RE THE MATTER OF RECALL
CHARGES AGAINST CITY OF SEATTLE
MAYOR JENNY DURKAN (HARVEY)

Case No. 20-2-10455-8 SEA

REPLY IN SUPPORT OF MOTION FOR
RECONSIDERATION OF ORDER ON
PETITION TO DETERMINE
SUFFICIENCY OF RECALL CHARGES
AND ADEQUACY OF BALLOT
SYNOPSIS

ORAL ARGUMENT REQUESTED

I. INTRODUCTION¹

Recall petitions are not the forum to resolve political disagreements. Washington law only permits a recall petition to proceed where, at minimum, the petitioner can specifically identify a law or legal duty that a public official has violated. Mayor Durkan has not violated any law or legal duty, and Petitioners’ Response fails to allege otherwise.

Instead, Petitioners heavily rely on criticism of Mayor Durkan’s discretionary decisions and actions. While such criticism is a necessary and legitimate part of public debate, it is not

¹ In their July 21 Response, Petitioners purport to bring a “Cross-Motion for Reconsideration.” The Court issued its Order on July 10. Petitioners’ “Cross-Motion” is therefore untimely. See CR 59(b) (requiring a motion for reconsideration to be filed within ten days). In compliance with KCLCR 59(b), Mayor Durkan will not otherwise respond to the “Cross-Motion” unless requested to do so by the Court. A proposed order dismissing the Cross-Motion as untimely is submitted herewith.

1 a substantive basis to justify a recall petition. Mayor Durkan respectfully requests that this
2 Court grant the Motion for Reconsideration and dismiss the remaining charge in the Petition.

3 **II. AUTHORITY AND ARGUMENT**

4 **A. Petitioners fail to allege any act that justifies recall.**

5 Petitioners now admit Mayor Durkan is not subject to recall for not implementing an
6 outright ban on CS gas and claim they never maintained otherwise. Response at 8 (“[A] request
7 to outlaw CS gas was not present in the charges, nor was it the intent.”). At the very least, the
8 Petition and associated filings strongly implied that anything short of an outright ban on CS
9 gas was a violation of the law or a legal duty sufficient to justify recall. Indeed, the Court
10 appears to have interpreted the Petition as claiming an outright ban was required. *See* Order
11 at 5 (holding that allegations were sufficient to the extent they pertained to “failure to step in
12 to stop the use of chemical crowd control agents” after becoming aware of their use) (emphasis
13 added). Even though she supported restrictions on the use of CS gas, Mayor Durkan has
14 demonstrated that an outright ban was not legally required, which presumably accounts for
15 Petitioners’ changed position.

16 Having abandoned the call for an outright ban, Petitioners vaguely allege that Mayor
17 Durkan is nonetheless subject to recall, but do not include specifics as to the purported grounds
18 for the Petition. For example, Petitioners do not identify the “orders” they contend Mayor
19 Durkan should have given SPD. Petitioners also fail to describe how their unspecified
20 preferred policies would have differed from SPD’s existing court-approved use-of-force and
21 crowd management policies, as well as Chief Best’s June 5 order prohibiting CS gas except at
22 her direction in life-safety circumstances. Without this basic information, Petitioners do not
23 satisfy RCW 29A.56.110’s requirement that a recall petition identify the alleged act or acts
24 justifying recall. *See Jenkins v. Stables*, 110 Wn.2d 305, 307 (1988) (A petition must describe
25 the charge with “sufficient precision and detail to enable the electorate and the challenged
26

1 official to make informed decisions in the recall process.”). Absent a specific failure to act,
2 there is no basis to find that the failure to do the act violated the law or a legal duty.

3 1. Mayor Durkan had no legal duty under the Seattle City Charter to implement
4 new SPD policies.

5 Petitioners concede that the City Charter “places initial implementation of SPD policies
6 upon the Chief of Police,” not the Mayor. Response at 5. Indeed, Article V, Section 2 of the
7 Charter states, “The Mayor shall see that the laws in the City are enforced . . . except in so far
8 as such enforcement . . . is by this Charter reposed in some other officer or board” Article
9 VI, Section 4, in turn, states that the Chief of Police “shall manage the Police Department and
10 shall prescribe rules and regulations, consistent with law, for its government and control.”).
11 To construe the Charter otherwise would render superfluous the Mayor’s discretionary
12 authority to “assume command of whole or part of the police force” during an emergency. *See*
13 Charter, Article V, Sec. 2.

14 Petitioners’ reliance on *Pepper* and *Cy Sun* is unpersuasive, primarily because they
15 rebut an argument Mayor Durkan has never made. Mayor Durkan does not “blame” Chief
16 Best for policy decisions she did or did not make. Chief Best has the Mayor’s complete trust
17 and support. Rather, Mayor Durkan has highlighted for the Court that she did not violate the
18 law and had no legal duty to override Chief Best’s policy decisions or authority.

19 The existence of a legal duty is at issue here, not causation. A recall petition must, at
20 minimum, allege (1) wrongful conduct that affects, interrupts, or interferes with performance
21 of a legal duty or (2) a public officer’s failure to faithfully perform a duty imposed by law.”
22 RCW 29A.56.110 (1)-(2) (emphasis added). Mayor Durkan had no legal duty for purposes of
23 the recall statute to implement “new policies” for SPD. The Petition accordingly fails.

24 2. Mayor Durkan’s discretionary decisions were not “manifestly unreasonable.”

25 While conceding that Mayor Durkan is not responsible for the “initial implementation
26 of SPD policies,” Petitioners nonetheless claim that Mayor Durkan’s exercise of discretion in

1 the midst of massive civil unrest and multiple unfolding civil emergencies was “manifestly
2 unreasonable.” Petitioners claim that Mayor Durkan should have (1) “remove[d]” Chief Best
3 and (2) “take[n] control of the Seattle Police Department and give[n] it orders.” Response at
4 5. The City Charter illustrates the Mayor’s wide discretion in determining whether to assume
5 command of SPD, noting that the Mayor “shall be the judge” of whether to declare a civil
6 emergency. *See also* SMC 10.02.010A (noting that the determination of whether to declare a
7 civil emergency shall be “in the judgment of the mayor.”).

8 The Washington Supreme Court has shown deference to public officials’ discretionary
9 exercise of their executive and/or emergency authority. *See Matter of Recall of Inslee*, 194
10 Wn.2d 563, 573 (2019) (governor’s failure to declare a state of emergency to address
11 homelessness was an appropriate exercise of discretion and therefore not legally sufficient
12 basis for recall); *In re Recall of Bolt*, 177 Wn.2d 168, 175 (2013) (noting that “[s]upervising
13 an employee inherently involves a substantial amount of discretion” and holding that mayor’s
14 terminating employee without following personnel policy was insufficient for recall); *In re*
15 *Zufelt*, 112 Wn. 2d 906, 913–14 (1989) (mayor’s discretionary decision to disband the reserve
16 police force was not legally sufficient basis for recall).

17 Any suggestion that it was manifestly unreasonable for Mayor Durkan not to “remove”
18 Chief Best or otherwise usurp her authority is meritless. Chief Best is a nationally recognized
19 law enforcement leader who is committed to constitutional policing, police reform, and
20 community safety. Mayor Durkan trusts Chief Best to lead SPD through a period of
21 unprecedented difficulty.

22 3. Petitioners’ Response illustrates the Mayor’s intent to balance constitutional
23 rights and community safety, not to violate the law.

24 Petitioners devote significant attention in their Response to alleged violations of the
25 TRO entered by Judge Jones in the *Black Lives Matter Seattle-King County* litigation, urging
26 this Court to inappropriately apply a broad tort liability standard to a recall petition. As this

1 Court has already recognized, however, “Mayor Durkan is not accountable by way of recall
2 for the actions of her subordinates without her knowledge, not at her direction.” Order at 5
3 (citing *In re Recall of Morrisette*, 110 Wn.2d 933, 936 (1988)). Particularly given their
4 admission that the Petition does not allege that Mayor Durkan should have banned the use of
5 CS gas outright, Petitioners have not and cannot show that any individual use of force that they
6 allege violated Judge Jones’ TRO was carried out with the Mayor’s knowledge or intent.²

7 As for the remaining allegations, Petitioners’ lengthy timeline demonstrates that Mayor
8 Durkan sought significant input regarding the use of less lethal tools. *See* Dkt. 25, Ex. C
9 (showing Mayor Durkan’s June 2 and June 5 requests that the City’s accountability partners
10 provide “immediate recommendations” and “systemic review” of SPD’s crowd management
11 policy). As Petitioners note, certain community groups advocated for an outright ban of less
12 lethal tools. Conversely, the Office of Inspector General noted in its June 12 report that “[i]n
13 its preliminary research, OIG did not find credible external sources advocating a blanket ban
14 on the use of less lethal tools either in general patrol operations or crowd control.” Dkt. 16,
15 Ex. B. Rather, in the absence of such tools, “officers may rely on greater use of lethal force to
16 respond to threats to their or others’ safety.” *Id.*³

17 Seeking to balance these concerns, Chief Best announced that SPD would suspend the
18 use of CS gas for at least 30 days pending the accountability partners’ oversight work, except
19 in life-safety circumstances where the Chief or her designee authorized the deployment.
20

21 _____
22 ² Indeed, Petitioners’ claims regarding the clearing of the area near SPD’s East Precinct are misleading.
23 Petitioners claim that on July 1st and 2nd, SPD used CS gas. The very materials Petitioners rely on (news articles
24 from the Seattle Times and capitolhillseattle.com), however, contain no reference to CS gas. *See* Response at
25 24, n.58, 60. Moreover, in support of their claim that CS gas was deployed on July 19 near the West Precinct,
26 Petitioners rely on Tweets from unidentified Twitter users. Response at 25, n.63. No credible media outlet has
reported that CS gas was deployed in response to protests on July 19. *See* <https://www.seattletimes.com/seattle-news/crowd-of-protesters-marches-through-downtown-seattle-and-capitol-hill-police-report-arrests-vandalism/>.

³ The SPD operations manual notes that “less-lethal tools are used to interrupt a subject’s threatening behavior so that officers may take physical control of the subject with less risk of injury to the subject or officer than posed by greater force applications.” *Id.*

1 Mayor Durkan supported this order. Dkt 25, ¶8.

2 In every action, Mayor Durkan sought to reasonably balance interests. Even in the
3 event individual officers are ultimately found to have violated constitutional rights, they did so
4 in contravention of Mayor Durkan's and Chief Best's actions, not as an intended result.

5 **III. CONCLUSION**

6 Contrary to Petitioners' claims, Mayor Durkan welcomes accountability and careful
7 review of recent events from SPD's accountability partners and the community at large. Come
8 regularly scheduled election time next year, Seattle voters can and will hold Mayor Durkan
9 accountable for the City's successes and failures during her administration. Petitioners,
10 however, fail to identify any policy or order that the Mayor should have issued, let alone that
11 such alleged failure violates a law or legal duty under the recall statute. The Petition should
12 accordingly be dismissed.

13
14 I certify that this memorandum contains 1,750 words, in compliance with the Local
15 Civil Rules.

16 DATED this 23rd day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2020, I caused the foregoing opposition to be served via the Court's e-service portal on the party listed below:

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DATED this 23rd day of July, 2020

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