

VOLUME NO. 38

OPINION NO. 41

PUBLIC OFFICERS - Recall elections;  
ELECTIONS - Recall, statutory limitations;  
ELECTIONS - Recall, authority of Secretary of State to  
reject petitions;  
MONTANA CODE ANNOTATED - Sections 2-16-603, 2-16-617.

- HELD: 1. A public officer is not subject to recall based on allegations that he voted against the wishes or desires of his constituents.
2. The Secretary of State is empowered to reject a petition for recall of a public officer if it is not based on the statutory grounds for recall.

18 September 1979

Frank Murray  
Secretary of State  
State Capitol Building  
Helena, Montana 59601

Dear Mr. Murray:

You asked for my opinion concerning:

1. Under the provisions of the Montana Recall Act does an allegation that a public officer voted contrary to the wishes and desires of his constituents constitute a sufficient basis for recall.
2. If statements similar to those listed above are insufficient, may the Secretary of State properly reject any petition which has been submitted for review containing those statements but which is otherwise in the form as prescribed by statute?

The "Montana Recall Act" is codified in sections 2-16-601 through 2-16-635, MCA. Section 2-16-603, MCA, provides the statutory basis for recall:

2-16-603. Officers subject to recall--grounds for recall. (1) Every person holding a public office of the state or any of its political subdivisions,

either by election or appointment, is subject to recall from such office.

(2) A public officer holding an elective office may be recalled by the qualified electors entitled to vote for his successor. A public officer holding an appointive office may be recalled by the qualified electors entitled to vote for the successor or successors of the elective officer or officers who have the authority to appoint a person to that position.

(3) Physical or mental lack of fitness, incompetence, violation of his oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45 is the only basis for recall. No person may be recalled for performing a mandatory duty of the office he holds or for not performing any act that, if performed, would subject him to prosecution for official misconduct. (Emphasis added.)

The act was amended by the legislature in 1977 and 1979. The 1977 amendment repealed a provision of the original act which allowed recall for "any reason causing the electorate dissatisfaction with a public official ... notwithstanding good faith attempts to perform the duties of his office." [See former § 59-612(3), R.C.M. 1947.]

The house and senate committee reports concerning the 1977 amendment reveal that portions of the Montana Recall Act as passed by the 1976 initiative were ambiguous and so broad as to conflict with existing law. Of major concern was the possibility an organized minority might cause a costly recall election merely to harass an official who was acting in a manner which was contrary to their wishes. The committees feared that public officials would be forced to react to pressures from highly vocal special interests instead of exercising an independent and informed judgment. The minority (10-20%) required to initiate a recall election made it possible for relatively small, well-organized groups to harass public officials and impose great costs upon the governing body. It was estimated that the cost of running a special recall election would be from 1.25 to 1.75 million dollars at the state level, 7,500 to 40,000 dollars at the county level and between 500 and 6,000 dollars at the city level. See House State Administration Committee Report (1977); Senate State Administrative Committee Report (1977).

Any material change in the language of the original act is presumed to indicate a change in legal rights, that is, a change in substance rather than mere form. 1A Sutherland, Statutory Construction, 4th Ed., § 22.30. Montana has long subscribed to the foregoing rule: State ex rel. Federal Land Bank of Spokane v. Hays, 86 Mont. 58, 65-66, 282 P. 32 (1929); Nichols v. School District No. 3, Ravalli County, 87 Mont. 181, 186, 287 P. 264 (1930); Montana Milk Control Board v. Community Creamery, et al., 139 Mont. 523, 526, 366 P.2d 151 (1961).

It is clear that the Legislature intended to limit the grounds for recall. In light of the amendment, it is my opinion that an allegation that an officer voted in a manner contrary to the wishes, will, or desires of his constituents is not a sufficient ground for recall as defined in section 2-16-603, MCA. Under our republican form of government, public officials must have the freedom to make difficult and informed decisions based upon the best information available and be free from the threat of harrassment from a minority of constituents who may not be aware of all the factors that serve as the basis for the decision.

Your second question is whether a petition may be rejected as to form if it fails to allege one of the statutorily prescribed grounds for recall. It is my opinion that such a petition may be rejected as to form. Section 2-16-617, MCA, provides that prior to circulation a recall petition must be submitted for approval as to form, and gives the filing official the authority to reject the petition.

Section 2-16-617

...

(3) Before a petition may be circulated for signatures, a sample circulation sheet must be submitted to the officer with whom the petition must be filed in the form in which it will be circulated. The filing officer shall review the petition for sufficiency as to form and approve or reject the form of the petition, stating his reasons therefor, within a week of receiving the sheet.

(4) The petition form submitted must be accompanied by a written statement containing the reasons for the desired recall as stated on the petition. The truth of the purported facts contained in the statement shall be sworn to by at least one of the petitioners before a person authorized to administer oaths. (Emphasis added.)

The section requires that both the petition submitted for approval and the statement attached to the petition explain the basis for the recall. As the grounds for the desired recall specifically constitute part of the form of the petition, the Secretary of State is empowered to reject the petition unless it meets all of the statutory requirements. See Mahoney v. Murray, 159 Mont. 176, 496 P.2d 1120 (1972).

THEREFORE, IT IS MY OPINION:

1. A public officer is not subject to recall based on allegations that he voted against the wishes or desires of his constituents.
2. The Secretary of State is empowered to reject a petition for recall of a public officer if it is not based on the statutory grounds for recall.

Very truly yours,

MIKE GREELY  
Attorney General