THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Law
CIVIL DIVISION

1031 West 4th Avenue, Suite 200
Anchorage, AK 99501
Main: 907.269.5100
Fax: 907.276.3697

January 26, 2023

Michaela Thompson
Acting Director, Division of Elections
PO Box 110017
Juneau, AK 99811-0017

Re: *Review of Application for Recall of Peter Talus*
AGO No. 2023100123

Dear Ms. Thompson:

You have asked for our opinion regarding the application for a petition to recall Alaska Gateway School District ("AGSD") School Board President Peter Talus.[1] The AGSD School Board is comprised of seven members, including Mr. Talus. Regional school board members can be subject to recall under AS 14.08.081, which adopts by reference the recall procedures for municipal elected officials, set out in AS 29.26.240-.360.[2] Alaska Statute 29.26.270 requires the director of the Division of Elections to review the recall application and prepare a recall petition if the application meets the requirements of AS 29.26.260. Because one of the grounds for recall stated in the application satisfies the requirements of AS 29.26.260(a)(3), we recommend the Division prepare a recall petition.

I. Background

On November 22, 2022, a group of AGSD residents filed an application for the recall of Mr. Talus. The application included the names, residence addresses, identifiers, and signatures of ten people and the name, mailing address, identifier, phone number, and

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[1] The AGSD is in Regional Education Attendance Area number 16 ("REAA 16"), and is located in Tok, Alaska. Mr. Talus was first elected in 2017, and re-elected for a three-year term in 2020. *See* REAA 16 School Board Members (last updated March 18, 2022), available at https://www.elections.alaska.gov/reaa/districts/?r_id=reaa16.

[2] In an REAA recall under AS 14.08.081, the director of the Division performs the functions of a municipal clerk as set out in AS 29.26.240-.360.

signature of a contact person and an alternate contact person. The application provided the following grounds for recall (verbatim):

1. Violation of the Open Meeting Act, AS 44.62.310 – 312. During the August 22nd meeting an impromptu executive session was called to address Personnel Actions (transfer of several district staff) the transferee's were discussed by name but none were notified or invited to speak. The action taken was illegal and the vote is void. This has been called to president Talus's attention and he has refused to address the issue.

2. Incompetence/dereliction of duties. (BP9860) refusal to address parent and community concerns and complaints brought before the board at the August 22nd and September 19th meetings. These letters were handed to the President and board members. None of which have been addressed.

3. Non-compliance with BP9810. Meeting agenda not posted within the ten working day time and designated place.

4. Non-compliance with BP9860. Two parents sent emails requesting their concerns be added to the agenda for the October meeting. These were sent within the correct timeframe and again no action taken by the President.

5. Allowing an illegal motion, Sept. 19th meeting, on an item not on the agenda. Directing the Superintendent to investigate, and hire outside investigators, to address parent concerns.

II. Applicable law

The Division must determine whether this application satisfies the requirements of AS 29.26.260.[3] That statute requires that applications include:

> (1) the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition;
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> (2) the name and address of a contact person and an alternate to whom all correspondence relating to the petition may be sent; and
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> (3) a statement in 200 words or less of the grounds for recall stated with particularity.[4]

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[3] The statute does not specify a timeframe in which the application review process must take place.

[4] AS 29.26.260(a).

Under AS 29.26.250, there are three grounds for recall of a regional school board member: "misconduct in office, incompetence, or failure to perform prescribed duties." These are also the grounds for the recall of a municipal official, but they differ from the grounds for recall of a state elected official. Under AS 15.45.510, the grounds for state officials are: "(1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption."

This office and the Alaska Supreme Court have considered the sufficiency of multiple applications to recall regional school board members, municipal officials, and state officials.[5] Recently, the Court issued decisions in *Jones v. Biggs*, addressing the recall of a municipal official, and *State v. Recall Dunleavy*, addressing the recall of a state official.[6] These decisions provide the standard of review the Division should apply and help define the legal grounds for a recall.

A recall application must be legally and factually sufficient, meaning it alleges one of the grounds for recall and does so "with particularity."[7] In *Biggs*, the Court explained that this is a "low" bar.[8] The Division should construe the recall statutes liberally and "'avoid wrapping the recall process in . . . a tight legal straitjacket' navigable only 'by an attorney who is a specialist in election law matters.'"[9] Thus, to assess legal sufficiency, the Division "must take [the] factual allegations in the petition as true and assess 'whether such facts constitute a prima facie showing of' at least one of the statutory grounds for recall."[10] If the recall is based on unlawful conduct, the alleged conduct must be actually unlawful, rather than discretionary.[11] And if the conduct is discretionary, it still must be within constitutional bounds, as determined by the voters, not the Division.[12]

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5 *See, e.g.*, 2019 Op. Alaska Att'y Gen. (Nov. 4) (recall of governor), 2019 WL 5866609; 2014 Op. Alaska Att'y Gen. (Sept. 30) (recall of Kashunamiut School District board member), 2014 WL 5323741.

6 *Jones v. Biggs*, 508 P.3d 1121, 1124-25 (Alaska 2022); *State v. Recall Dunleavy*, 491 P.3d 343, 356 (Alaska 2021).

7 AS 29.26.260(a)(3); *Recall Dunleavy*, 491 P.3d at 356. The Court found no meaningful difference between the particularity requirement in AS 15.45.500(2) ("described in particular") and that in AS 29.26.260(a)(3) ("stated with particularity"). *Id.*

8 *Biggs*, 508 P.3d at 1127.

9 *Id.* (quoting *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 301 (Alaska 1984)).

10 *Id.* (quoting *Recall Dunleavy*, 491 P.3d at 356).

11 *Recall Dunleavy*, 491 P.3d at 357.

12 *Id.* at 366 (quoting *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975)). In *Recall Dunleavy*, the Court declined to determine whether the state official violated the separation of powers doctrine by acting with an improper

Next, a recall application is factually sufficient if "the facts alleged . . . describe the relevant acts or omissions with sufficient particularity to give the targeted official a 'fair opportunity to defend his conduct in a rebuttal limited to 200 words.'"[13] The application need not draw a direct line between the facts alleged and the legal grounds; "[i]f a logical connection can be made, [the Division should] leave it to the voters to decide whether to make it."[14]

The Division's role, therefore, is like that of a court ruling on a motion to dismiss under Alaska's lenient notice pleading standard.[15] In *Recall Dunleavy*, the Court equated recall applications with civil complaints, which need only include "a short and plain statement of the claim" and a demand for relief.[16] Notably, motions to dismiss civil complaints "should rarely be granted" under this standard.[17] If there are portions of an application that are not legally or factually sufficient, the Division should delete them from the recall petition.[18]

1. Misconduct in office

The first ground for recall of a regional school board member is misconduct in office.[19] This is not a ground for recall of a state official and it is not defined by statute.[20] Nor has this term been defined by the Alaska Supreme Court.[21] In *Biggs*, the Court rejected a definition of "misconduct in office" that would require the official have a criminal degree of intent, meaning "some component of dishonesty, private gain, or

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motive, leaving this determination to the voters. *Id.* at 370, 371 n.204, 373 (Stowers, J., dissenting).

13 *Biggs*, 508 P.3d at 1127 (quoting *Meiners*, 687 P.2d at 302).

14 *Recall Dunleavy*, 491 P.3d at 359.

15 *Id.* at 357.

16 *Id.* (quoting Alaska R. Civ. P. 8(a)). The Court relied in part on AS 15.45.550(1), which allows applications to recall state officials to be "substantially in the required form." *Id.* There is no such allowance for applications to recall municipal officials or regional school board members. *See* AS 29.26.270(a). But the Court previously compared an application to recall a regional school board with a civil complaint. *Meiners*, 687 P.2d at 300 n.18.

17 *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 4 (Alaska 2012).

18 *Meiners*, 687 P.2d at 303.

19 AS 29.26.250.

20 *Biggs*, 508 P.3d at 1124; *see* AS 15.45.510.

21 *Biggs*, 508 P.3d at 1124.

improper motive."[22] Instead, the Court approved, but did not adopt, a definition that includes "[a]ny unlawful behavior by a public officer in relation to the duties of his office, willful in character."[23]

Using this definition, the Court affirmed the approval of a recall application alleging that an assembly member violated a COVID-19 executive order by participating in an over-capacity in-person assembly meeting. While this action was "obviously defensible," the Court held that the voters must decide whether it warranted the recall of the assembly member.[24] Misconduct in office, therefore, includes any intentional, unlawful action in the course of an official's duties.

2. Incompetence

The next ground for recall of a regional school board member is incompetence.[25] This is also a ground for recall of a state official.[26] In *Recall Dunleavy*, the Court defined incompetence as "lack of ability to perform the official's required duties."[27] The Court noted that this ground could overlap with others and that a single mistake, regardless of the practical results, could constitute incompetence.[28] Further, while a lawful discretionary decision cannot serve as the basis for recall, "[a] mistake by definition is not a deliberate decision or judgement."[29] Allegations of an official's mistake, then, can meet the definition of incompetence.[30]

3. Failure to perform prescribed duties

The final ground for recall of a regional school board member is the "failure to perform prescribed duties."[31] This includes the failure to perform "not just the specific duties imposed by statute on school board members but also 'the duty to comply with

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22 *Id.* at 1127.

23 *Id.* at 1123-24, 1126.

24 *Id.* at 1127. The Court adopted and quoted the superior court's decision. *Id.* at 1125.

25 AS 29.26.250.

26 AS 15.45.510.

27 *Recall Dunleavy*, 491 P.3d at 361.

28 *Id.*

29 *Id.* at 371.

30 *Id.*

31 AS 29.26.250.

statutes of general application relating to education.'"[32] Regional school board members must act lawfully, even if they are not required to act at all, and must abide by "statutes of general application."[33] These include the constitution, the Alaska Public Records Act, and the Open Meetings Act.[34]

In *Recall Dunleavy*, the Court addressed a state official's "neglect of duty."[35] While this ground for recall may be different than the "failure to perform a prescribed duty," the Court held the two phrases are "analogous."[36] The Court noted that the separate statutory schemes for recalls of state and municipal officials "arise from the same constitutional background" and "there are significant statutory parallels" between them.[37] Thus, the Division may treat these grounds as essentially identical.

The Court defined "neglect of duty" as "the nonperformance of a duty of office established by applicable law."[38] The Court held that the significance of the duty or of the nonperformance was irrelevant: "If the recall application alleges both the existence of a duty and the official's failure to perform it, we will leave it to the voters to decide whether the duty is significant and whether the failure to perform it matters."[39]

Taken together, the Court's recent decisions suggest the Division should approve applications to recall regional school board members that are factually and legally sufficient. Applications are factually sufficient if they inform the board member of the relevant conduct and there is some logical connection with one of the legal grounds. Applications are legally sufficient if, assuming the allegations are true, the board member intentionally acted unlawfully, or lacked the ability to or failed to perform duties. Beyond that, the Division should leave the decision to the voters.

III. Analysis

A. Technical requirements

As required by AS 29.26.260(a)(1) and (2), the application includes the signatures

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32 *Recall Dunleavy*, 491 P.3d at 361 (quoting *Meiners*, 687 P.2d at 300).

33 *Id.*

34 *Meiners*, 687 P.2d at 300-01.

35 *Recall Dunleavy*, 491 P.3d at 361.

36 *Id.* at 362.

37 *Id.* at 354.

38 *Id.* at 362.

39 *Id.*

and contact information for ten sponsors and two contact people. The recall committee used the Division's sample signature page, which indicates the signers are "Qualified Sponsors," in accordance with AS 29.26.260(a)(1). We understand from the Division that the signatories are qualified voters within this school district.

B. Statement of grounds

Alaska Statute 29.26.260(a)(3) requires that the grounds for recall be stated with particularity in 200 words or less. According to our word count, the statement of grounds is less than 200 words. The next consideration is whether the grounds are factually sufficient and legally sufficient under AS 29.26.250, which permits recalls for misconduct in office, incompetence, or failure to perform prescribed duties. We conclude that the first allegation is factually and legally sufficient, meaning it alleges a ground for recall and does so "with particularity."[40]

1. The allegation that Mr. Talus violated the Open Meetings Act is factually and legally sufficient.

The first paragraph of the petition alleges that Mr. Talus violated the Open Meetings Act by holding an "impromptu executive session" on August 22 to discuss "Personnel Actions (transfers of several district staff)." Specifically, the paragraph alleges that district staff were discussed by name but not notified of the meeting or invited to speak. It also alleges that Mr. Talus refused to correct the issue.

The Open Meetings Act requires government meetings to be open to the public.[41] Certain subjects, however, are exempt and may be discussed in executive session.[42] One such exception is for "subjects that tend to prejudice the reputation and character of any person."[43] The consideration of personnel matters, including discussions about the retention and hiring of an individual employee, fall under this exception if the discussion would tend to impugn the employee's reputation and character.[44] But although such "character/reputation" discussions may occur in executive session, the affected employee can "request a public discussion."[45] Thus, employees must have notice that their

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40 AS 29.26.260(a)(3).

41 AS 44.62.310(a).

42 AS 44.62.310(b).

43 AS 44.62.310(c)(2).

44 *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995) (citing *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1325-26 (Alaska 1982)).

45 AS 44.62.310(c)(2).

employment will be discussed at an upcoming meeting.[46] Under the Open Meetings Act, government bodies have an "implied statutory obligation" to both inform the employee of the upcoming meeting *and* of the right to request a public discussion.[47]

Here, the petition alleges that Mr. Talus and the rest of the Board held an executive session to discuss personnel matters without providing the affected district staff an opportunity to request public discussion. Even though the first paragraph does not refer to one of the legal grounds, it does allege potentially unlawful activity. Assuming these allegations are true, this paragraph may state a violation of the Open Meetings Act. It also gives Mr. Talus enough information about the relevant action so that he has a "fair opportunity to defend his conduct in a rebuttal'" if the recall process goes forward.[48]

The Alaska Supreme Court has held that a regional school board's violation of the Open Meetings Act constitutes a failure to perform a prescribed duty.[49] This alleged conduct could also logically relate to misconduct, given the allegation that Mr. Talus refused to correct the issue or incompetence if it was a mistake.

We find this allegation both factually and legally sufficient.

2. The allegations that Mr. Talus refused to address parent and community concerns are not legally sufficient.

The second and fourth paragraphs allege that Mr. Talus violated the Board's Bylaws[50] by refusing to address parent and community concerns and complaints. Because these paragraphs concern the same bylaw and similar allegations, we will address them together.

Board Bylaw ("BB") 9860 gives Mr. Talus, as the Board president, along with the superintendent, the discretion to determine what matters go on the Board's agenda. It provides:

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46 *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 429 (Alaska 1983).

47 *Id.*

48 *Biggs*, 508 P.3d at 1127 (quoting *Meiners*, 687 P.2d at 302).

49 *Meiners*, 687 P.2d at 302. The Court has also found that an alleged Open Meetings Act violation was not factually sufficient. *von Stauffenberg*, 903 P.2d at 1060. But in that case, the affected employee requested a private, rather than a public, discussion. *Id.* at 1056.

50 Alaska Gateway School District Board Policy Manual, available at https://boardpolicyonline.com/?b=gateway.

> Any member of the public may request that a matter within the jurisdiction of the board be placed on the agenda of a regular meeting. The request must be in writing and submitted to the Superintendent with supporting documents and information, if any, at least ten (10) working days before the scheduled meeting. When constructing the agenda, the Board President and Superintendent will decide whether a request is within the subject matter jurisdiction of the Board and whether the agenda item is appropriate for discussion in open or executive session.

The bylaws do not define the Board's subject matter jurisdiction, leaving that to the discretion of the president and the superintendent.

The second paragraph of the petition asserts that Mr. Talus refused to address parent and community concerns contained in letters presented to Mr. Talus and the Board at meetings in August and September. It characterizes this as "Incompetence/dereliction of duties." The allegation does not explain the nature of the concerns or the subjects of the letters. Given the citation to BB 9860, it is reasonable to infer that the letters included requests to place a matter on a meeting agenda.

The fourth paragraph is more specific. It states that two parents sent emails within the correct timeframe—presumably ten working days—requesting that their concerns be added to an October meeting agenda. It alleges that Mr. Talus again took no action in violation of BB 9860.

Without any allegations about the nature of the concerns referenced in the second and fourth paragraphs, it is impossible to determine whether the concerns would conceivably fall with the Board's subject matter jurisdiction. Even if they did, Mr. Talus would have the discretion to determine the extent of that jurisdiction. Discretionary actions usually cannot be grounds for recall, and there is no allegation that Mr. Talus exercised his discretion unconstitutionally or otherwise unlawfully.[51] While these allegations may include sufficient factual detail, they do not allege a prima facie violation of the bylaws or any other legal duty.

In addition, paragraphs two and four do not allege that Mr. Talus or the Board prohibited parents and community members from commenting at the meeting. The bylaws require that members of the public have the opportunity to be heard at board meetings on both agenda and non-agenda items.[52] But both paragraphs allege only that Mr. Talus did not add the concerns to the agenda, which does not implicate the opportunity for public comment itself under the bylaws.

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51 *See Recall Dunleavy*, 491 P.3d at 366, 371 ("Discretionary acts are those requiring personal deliberation, decision and judgment." (quotation omitted)).

52 BB 9860; BB 9874(1) – (2).

Because the second and fourth paragraphs are legally insufficient, we recommend the Division remove them from the petition.[53]

3. The allegation that Mr. Talus failed to post a meeting agenda within ten days of a meeting is not legally sufficient.

The third paragraph alleges that Mr. Talus failed to comply with BB 9810 because he did not post a meeting agenda within ten working days of the meeting. The paragraph does not identify when the alleged violation occurred.

BB 9810 requires that notice of regular meetings be posted ten days before the meeting and include the date, time, and place of the meeting.[54] This bylaw contains no requirement that the meeting agenda be included with this notice. Another bylaw, BB 9860, does state that the agenda must be posted for public review before the meeting. But our review of the bylaws reveals no mandated deadline by which the agenda must be posted for public review, nor any requirement that an agenda be posted concurrent with notice.

Similarly, the Open Meetings Act does not require that an agenda be posted a specific length of time before a meeting. The Act requires only "reasonable public notice" of all meetings, including the date, time, and place of the meeting.[55] Courts have interpreted this "reasonable public notice" requirement to include some "reasonable advance notice of the subject of each meeting."[56] But there is no legal cutoff that distinguishes reasonable notice from unreasonable notice; instead, the reasonableness of notice is dependent on the specific circumstances. Shorter notice may be reasonable if the body needs to take urgent action while longer notice may be necessary to be reasonable if the issue is complex, wide-reaching, or controversial.[57]

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53 *Meiners*, 687 P.2d at 303.

54 BB 9800 provides:

> The Superintendent or designee shall provide reasonable public notice of open meetings of the Board. Such notice shall include the date, time and place of the meeting, and shall be provided to the local news media and posted at district and school sites before the meeting.

While the superintendent is responsible for providing public notice pursuant to BB 9800, the president is also responsible for "giving notice as prescribed by law" under BB 9131.

55 AS 44.62.310(e).

56 *Anchorage Indep. Longshore Union Loc. 1 v. Municipality of Anchorage*, 672 P.2d 891, 895 (Alaska 1983) (citing *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 81 n.35 (Alaska 1981)).

57 *Id.*

The allegation that the Board failed to post a meeting agenda within ten days of a meeting, even if true, does not amount to a violation of the bylaws or the Open Meetings Act. Even if this allegation were particular enough to notify Mr. Talus of the specific agenda and meeting at issue, it is legally insufficient and we recommend the Division remove it.

4. The allegation that Mr. Talus allowed an illegal motion for an item not on the agenda is not factually or legally sufficient.

The final paragraph alleges that Mr. Talus allowed an "illegal motion" on an item not on the agenda at a September 19 meeting. It also states that the superintendent was directed to investigate "parent concerns." Unlike the others, this allegation does not reference any laws, bylaws, or grounds for recall. While these two assertions are presented in the same paragraph, it is not clear how—or even if—they are related.

The first portion of the allegation does not explain why the motion was "illegal." The bylaws explicitly prohibit Board action in only one circumstance. Under BB 9860, members of the public may testify on matters that are not on the agenda, but the Board "shall not take action on such matters at that meeting." Beyond that provision, the bylaws do not expressly prohibit Board action on a matter outside the agenda. Board action on a non-agenda item could, however, be limited by the statutory reasonable public notice requirement.[58] But as discussed above, the reasonableness of notice depends on the subject's importance and complexity.[59] Here, the conclusory assertion that the motion was "illegal" provides no actual information about the importance or complexity of the subject of the motion itself. It is therefore impossible to determine whether the Board's act of "allowing" the motion violated public notice requirements.

The second portion of the allegation, that Mr. Talus directed the superintendent to investigate unidentified parent concerns, does not itself appear to be unlawful. While the Board cannot take action in response to matters raised by the public about non-agenda items, it "may refer such a matter to the Superintendent or designee."[60] Instructing the superintendent to investigate is, under that provision, a lawful exercise of the Board's discretion.

We find that paragraph five does not meet the particularity requirement and so is factually insufficient. There is no obvious connection between the two assertions, which makes it difficult to understand precisely what unlawful behavior is alleged. Read separately, the first assertion fails to assert any specific facts that could support the conclusion that the motion was illegal. And the second assertion, whether standing alone

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58 AS 44.62.310(e).

59 *Anchorage Indep. Longshore Union Loc. 1*, 672 P.2d at 895.

60 BB 9874(2).

or read together with the first, alleges only lawful discretionary conduct. For that reason, we also find that paragraph five is also not legally sufficient. We recommend the Division remove this paragraph from the petition.

IV. Conclusion

This application to recall Mr. Talus meets the technical requirements, and the first paragraph of the petition is factually and legally sufficient. We recommend that you prepare petitions for recall that include the first paragraph.

Sincerely,

TREG R. TAYLOR
ATTORNEY GENERAL

By:
Claire C. Keneally
Assistant Attorney General