State of Wisconsin \ Government Accountability Board

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MEMORANDUM

DATE: For the March 12, 2012 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

Prepared and Presented by:

Michael Haas, Staff Counsel
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SUBJECT: Recall Petition Review: Senator Scott Fitzgerald (Senate District 13)

I. Introduction:

This Memorandum summarizes Board staff's review of the recall petition submitted against Senator Scott Fitzgerald and any challenges, rebuttal, or replies filed by the petitioner and the officeholder.

The staff's analysis and recommendations regarding the legal arguments presented by Senator Fitzgerald's challenges and the petitioner's rebuttals, as described in the Evaluation of Challenges Memorandum, are incorporated into the calculations and conclusions outlined below and on the spreadsheet attached as Exhibit A-Fitzgerald. To exercise their right for a recall election against Senator Fitzgerald, qualified electors of the 13th Senate District were required to submit at least 16,742 valid signatures. Following analysis of the 20,735 total signatures submitted by the petitioners, Board staff recommends striking 867 for reasons cited on the attached Exhibit A- Fitzgerald. Although each signature was personally reviewed at least twice, staff did not separately assess the remaining 1,586 signatures individually challenged by Senator Fitzgerald. Staff determined that this level of analysis was unwarranted given that, should Senator Fitzgerald prevail on all those remaining challenges, the petition would still contain 18,282 valid signatures; exceeding the sufficiency requirement by 1,540 signatures.

Based upon its review of the Fitzgerald recall petition and the challenge documents, Board staff recommends that the Board recognize at least 18,282 signatures as valid and certify that the petition is sufficient to order a recall election.

Summary of Challenge Documents:

A. Senator Fitzgerald's Written Challenge

Senator Fitzgerald's Written Challenge, with accompanying affidavits of Daniel Romportl and a spreadsheet identifying specific signature lines, presents the following challenges:

1. At least 877 individual signatures to the recall petition were affixed prior to the Recall Petition's completion of registration and therefore these signatures fall outside of the circulation period and pursuant to Wis. Stats. §9.10(2)(e)2., these signatures may not be counted.

2. At least 84 individuals do not reside at the respective addresses given on the Recall Petition based on United States Postal Service conclusions that mail is undeliverable or that the addresses are non-existent.

3. At least 227 signatories to the Recall Petition did not date their signatures, signed outside the circulation period, or signed subsequent to the respective circulator's certification. Wis. Stats. §9.10(2)(e)1-3.

4. The residency of at least 569 (11 P.O. Boxes, 33 missing municipalities, 52 indeterminate addresses, and 473 missing apartment numbers) signatories to the Recall Petition cannot be determined by the address given. Wis. Stats. §9.10(2)(e)4.

5. At least 5,944 signatories to the Recall Petition reside outside the new "Act 43" 13th Senate District. Wis. Stats. §9.10(2)(e)5.

6. At least 777 signatories to the Recall Petition reside outside the "former" 13th Senate District. Wis. Stats. §9.10(2)(e)5.

7. At least 5 signatories to the Recall Petition are not qualified electors, as their names appear on the ineligible voter list provided by the G.A.B. Wis. Stats. §9.10(2)(e)8.

8. At least 205 signatories signed the recall petition more than once. Wis. Stats. §9.10(2)(i).

9. At least 1,739 signatures appear on pages that were not properly certified by the circulator. Wis. Stats. §§ 8.40(2) and 9.10(2)(em).

10. At least 24 signatories to the Recall Petition failed to sign the petition.

11. At least 188 signatures to the Recall Petition appear to be in the same handwriting. Wis. Stats. §9.10(2)(e)1., (e)4. and (j).

12. At least 45 signatures (including one "fictitious name") to the Recall Petition are invalid because of miscellaneous insufficiencies.

B. Memorandum In Support of Challenge to Individual Signatures and Joint Reply

In Section III and IV of the Memorandum in Support of Senator Scott Fitzgerald's Written Challenge to the Recall Petition, Senator Fitzgerald argues that the recall petitions fall well below the mandatory 25% threshold required to establish sufficiency and trigger a recall election. Senator Fitzgerald argues that this is so, due to the substantial number of signatures collected from electors that reside outside of the new "Act 43" legislative districts and to the substantial number of signatures collected prior to proper registration of the Recall Petition. In section V of the Memorandum, Senator Fitzgerald also argues that numerous signatures fail to meet the technical standards required by Wis. Stats. §9.10(2) in order to be deemed valid.

The Joint Reply filed on behalf of Senator Fitzgerald focused on the issues of the appropriate legislative districts to conduct recall elections, allegations that signatures were obtained prior to registration of the recall committee, and concerns regarding potential falsification of signatures, issues which are addressed more completely in separate Board materials.

C. Recall Committees' Rebuttal to Senator Fitzgerald's Written Challenge

In the Recall Committees' Brief in Opposition to Written Challenges, the Recall Committees' contend that once the "meritless" "Act 43 districts" and "circulation period" arguments are dispensed with, the overwhelming number of signatures collected render the remaining challenges moot as they are too few to be capable of halting a recall election. However, in Section IV of the Recall Committees' Rebuttal, the Petitioners assert that the majority of the remaining challenges are factually inaccurate, unsupported by evidence and/or lack any basis in law. Although the Rebuttal supplies no correcting affidavits responding specifically to Senator Fitzgerald's written challenge, the Recall Committee did supply correcting affidavits along with the petitions prior to the written challenge.

II. <u>Evaluation of Challenges and Staff Recommendations:</u>

A total of 16,742 valid recall petition signatures are required for a certification of sufficiency to recall Senator Fitzgerald. Following staff's first and second review of the recall petition, a total of 20,129 valid signatures were verified, but subsequent to duplicate review, that total was adjusted downwards to 19,868 verified signatures. Staff reviewed the categories of challenges filed by Senator Fitzgerald and the number of challenges in each category after deducting the signatures already struck by staff. Using the attached Exhibit A-Fitzgerald, staff determined whether it was necessary to review the remaining individual challenges to reach a conclusion as to whether the petition was sufficient. The staff's calculations regarding the categories of challenges submitted by Senator Fitzgerald is set out below and in the attached Exhibit A-Fitzgerald, and they incorporate the conclusions and recommendations in the accompanying Evaluation of Challenges Memorandum.

A. Premature Circulation of Petitions Challenges:

Senator Fitzgerald challenges 877 signatures dated November 15, 2012, alleging that the signatures were executed prior to the petitioner registering with the Government Accountability

Board and should therefore be struck pursuant to Wis. Stat. § 9.10(2)(e)2. During the first and second reviews, staff struck 20 signatures as being dated outside the registration period, but did not strike any signatures due to being dated on November 15, 2012. Staff also struck 23 signatures challenged in this category for reasons other than being executed on those dates.

This challenge category is addressed in the accompanying Evaluation of Challenges Memorandum, in which staff recommends denying all such challenges due to insufficient proof that any particular signature was executed prior to the recall committee's registration being executed. Staff recommends that the remaining 854 challenged signatures in this category, as listed in the "After GAB Struck" column on the attached Exhibit A-Fitzgerald, be excluded from the calculation of the possible "Remaining Challenges.

Recommendation – Deny 854 challenges and no change to total verified signatures.

B. Postcard Mailing Challenges:

According to the "Affidavit of Daniel Romportl In Support of Senator Fitzgerald's Written Challenge," to "ensure the integrity of the recall process" Scott Fitzgerald for Senate authorized a mailing of postcards to 5,000 signature names selected from the Fitzgerald Recall Petition at random. See *Romportl Affidavit* at ¶5. This effort resulted in 84 postcards being returned as undeliverable. *Id*.

Any information that appears on a petition is entitled to a presumption of validity. Wis. Adm. Code §§ 2.05(4) and 2.09(1). Senator Fitzgerald's challenge asserts that these 84 individuals did not add their signatures to the Recall Petition. Senator Fitzgerald bears the burden of proof on this challenge and that burden is clear and convincing evidence of an insufficiency. Wis. Stats. §§ 9.10(2)(g), See also Wis. Adm. Code GAB §§ 2.07(3)(a) and (4) and 2.11(1). The Administrative Code requires the Board to review any evidence that the parties may offer, including "affidavit[s] or other supporting evidence demonstrating a failure to comply with statutory or legal requirements." See Wis. Adm. Code §§ 2. 07(4) and 2.11(1); see also, Wis. Stats. §9.10(2)(h) and §§ 2.07(2)(a) and 2.11(1), Wis. Adm. Code.

Senator Fitzgerald submitted no affidavits from individuals who claimed that their names were fraudulently added to the recall petitions. These challenges arose out of mailings distributed by Senator Fitzgerald, but G.A.B. staff was not given any information with which to verify these challenges apart from their designation in the challenge category on Senator's Fitzgerald's Exhibit C. In addition, names and addresses on many of the postcards were not consistent with the spelling of the individual's name or address on the recall petition. In the absence of any supporting evidence, the challenge does not rebut the administrative presumption of validity, thereby shifting the burden of proof to the Petitioner. Without a single affidavit to support Senator Fitzgerald's challenge, staff cannot recommend striking any signatures based upon the results of Senator Fitzgerald's postings via the U.S. Mail.

However, subsequent to staff's initial review, one of these 84 challenge signatures was struck for reasons other than the United States Postal Service issue identified by Senator Fitzgerald. Accordingly, 83 of the remaining challenges were incorporated into the "After GAB Struck" column of the attached Exhibit A - Fitzgerald. But those challenges are designated as "Not Included" because staff recommends that all such challenges be denied for failure to demonstrate

by clear and convincing evidence a failure to comply with statutory or other legal requirements. The challenges in this category, therefore, are not included in the total of possible "Remaining Challenges."

Recommendation – Exclude 83 signatures from the total verified signatures and classify as "Remaining Challenges.

C. Circulation Date Challenges:

The Challenger asserts that 227 signatories to the Recall Petition did not date their signatures, signed outside the circulation period, or signed subsequent to the respective circulator's certification.

Following staff's first and second review of petitions, staff recommends that the Board strike 74 signatures for failure to date signatures, for signing outside the circulation period, and for signing subsequent to circulator's certification.

Additionally, staff recommends that 120 of the 227 challenged signatures that were not struck during staff's initial review, be incorporated into the "After GAB Struck" column of the attached Exhibit A-Fitzgerald, and included in the possible "Remaining Challenges total.

Recommendation – Exclude 120 signatures from the total verified signatures and classify as "Remaining Challenges."

D. Indeterminate Residency Challenges:

The Challenger asserts that 569 individual signatures to the Recall Petition failed to meet statutory requirements regarding a signer's address.

Following staff's first and second review of petitions, staff recommends that the Board strike 22 signatures for failure to meet statutory requirements regarding a signer's address.

Additionally, staff recommends that 505 of the 569 challenged signatures that were not struck during staff's initial review, be incorporated into the "After GAB Struck" column of the attached Exhibit A-Fitzgerald, and included in the possible "Remaining Challenges total.

Recommendation – Exclude 505 signatures from the total verified signatures and classify as "Remaining Challenges."

E. Signatures from Persons Residing Outside the New 13th Senate District

Senator Fitzgerald challenges 5,944 signatures as being executed by individuals living outside the new 13th Senate District as created by 2011 Act 43. During the first and second reviews, staff did not strike any signatures due to individuals residing outside the new 13th Senate District. Staff did strike 158 of these challenged signatures for other reasons.

This challenge category is addressed in the accompanying Evaluation of Challenges Memorandum, in which staff recommends denying all such challenges due to the Board's

determination that any recall elections conducted prior to November 6, 2012 must be conducted in the pre-Act 43 legislative districts. Even if the allegation was proven by clear and convincing evidence, this category of challenges does not constitute a failure to comply with statutory or other legal requirements. Staff recommends that the remaining 5,786 challenged signatures in this category, indicated in the "After GAB Struck" column on the attached Exhibit A -Fitzgerald, be denied as a challenge and excluded from the calculation of the possible "Remaining Challenges."

Senator Fitzgerald also challenges the entire recall petition based upon an argument that the recall petitioner, Lori Compas, does not reside in the new 13th Senate District. According to the committee registration statement Ms. Compas filed with the Board, she resides at 326 Garfield Street, Fort Atkinson, Wisconsin 53538-1409. Attached as Exhibit B is a copy of a printout from the Legislature's website indicating the legislative district for Ms. Compas' address, based on the pre-Act 43 districts as well as the new districts. The printout indicates that she resides in the 13th Senate District prior to the enactment of 2011 Act 43. She is a qualified elector of the district in which the recall election must be held according to the effective dates of Act 43. Staff recommends denial of this challenge because it does not establish a violation of statutory or other law.

Recommendation – Deny 5,786 challenges and no change to total verified signatures. Also, deny the challenge to the petitioner's

F. Signatures from Persons Outside the Former 13th Senate District Challenges:

The Challenger asserts that 777 signatures belong to persons residing outside the 13th Senate District.

Following staff's first and second review of petitions, staff recommends that the Board strike 412 signatures as belonging to persons who live outside the 13th Senate District.

Additionally, staff recommends that 318 of the 589 challenged signatures that were not struck during staff's initial review, be incorporated into the "After GAB Struck" column of the attached Exhibit A-Fitzgerald and included in the possible "Remaining Challenges" total.

Recommendation – Exclude 318 signatures from the total verified signatures and classify as "Remaining Challenges."

G. Unqualified Electors Challenges:

The Challenger asserts that 5 individual signatures belong to unqualified electors because their names appear on the Ineligible Voter List provided by the G.A.B.

During the first and second reviews, staff does not examine elector qualification and eligibility of persons having signed the recall petition; however, since during the course of that review staff did not recommend striking any of these signatures for reasons other than belonging to unqualified electors staff now recommends incorporating these 5 signatures into the "After GAB Struck" column of the attached Exhibit A-Fitzgerald and included in the possible "Remaining Challenges" total.

Recommendation – Exclude 5 signatures from the total verified signatures and classify as "Remaining Challenges."

H. Duplicate Challenges:

The Challenger asserts that at least 510 signatures belong to persons who had already signed the Recall Petition.

During the first and second reviews, staff does not specifically examine the recall petition for duplicate signatures; however, after staff's initial review was complete a duplicate analysis took place which resulted in 261 additional signatures being struck. Of the 510 instances alleged by the Challenger (205 x 2 = 510), 272 signatures remained after staff's two staged process and were incorporated into the "After GAB Struck" column of the attached Exhibit A-Fitzgerald included in the possible "Remaining Challenges" total.

Recommendation –Exclude 272 signatures from the total verified signatures and classify as "Remaining Challenges."

I. Improper Certification Challenges:

The Challenger asserts 1,739 individual signatures appear on pages not properly certified by the circulator.

1. 1,280 of these challenges are "possible" circulator edits subsequent to certification. Following staff's first and second review of petitions, 140 of these 1,280 challenged signatures were struck for reasons other than circulator edits. The remaining 1,440 challenges attributed to "possible" circulator edits were incorporated into the "After GAB Struck" column of the attached Exhibit A – Fitzgerald; **however**, these challenges are designated as "Not Included" because staff recommends that all such challenges be denied for failure to demonstrate by clear and convincing evidence a failure to comply with statutory or other legal requirements. The challenges in this category, therefore, are not included in the total of possible "Remaining Challenges."

2. Challenger asserts that 599 individual signatures appear on pages otherwise improperly certified by the circulator.

   Following staff's first and second review of petitions, 99 signatures were struck for appearing on pages that were not properly validated by the circulator.

   Additionally, staff recommends that 359 of the 559 challenged signatures that were not struck during staff's initial review, be incorporated into the "After GAB Struck" column of the attached Exhibit A -Fitzgerald and included in the possible "Remaining Challenges" total.

Recommendation – Deny 1,440 challenges with no change to total verified signatures. Exclude 359 signatures from the total verified signatures and classify as "Remaining Challenges."

J. Failure to Sign Challenges:

The Challenger asserts that 24 individuals failed to sign the Recall Petition.

Following staff's first and second review of petitions, 1 signature was struck for failure to sign.

Staff recommends that the 14 of the 24 challenged signatures that were not struck during staff's initial review, be incorporated into the "After GAB Struck" column of the attached Exhibit A–Fitzgerald and included in the possible "Remaining Challenges" total.

Recommendation – Exclude 14 signatures from the total verified signatures and classify as "Remaining Challenges."

K. Fraud/Fakes/Forgeries and Miscellaneous Challenges:

The Challenger asserts 232 individual signatures are either in the same handwriting (188) or constitute instances of fraud (45) for miscellaneous deficiencies.

Following staff's first and second review of petitions, 0 signatures were struck for similar handwriting or miscellaneous instances of fraud; additionally, during the course of that review staff did recommend striking 13 of the challenged signatures for reasons other than similar handwriting or miscellaneous instances of fraud.

This challenge category is addressed in the accompanying Evaluation of Challenges Memorandum, in which staff recommends denying all such challenges due to insufficient proof that any particular signature was fraudulently executed in similar handwriting. Staff recommends that the remaining 183 challenged "handwriting" signatures in this category, as listed in the "After GAB Struck" column on the attached Exhibit A-Fitzgerald, be excluded from the calculation of the possible "Remaining Challenges" total. Staff also recommends that the 33 remaining miscellaneous challenges be incorporated into the "After GAB Struck" column of the attached Exhibit A–Fitzgerald and included in the possible "Remaining Challenges" total.

Recommendation – Deny 183 challenges with no change to total verified signatures and exclude 33 signatures from the total verified signatures and classify as "Remaining Challenges."

III. <u>Determination Regarding Sufficiency of Recall Petition:</u>

Based upon the above findings, Board staff recommends that the Board strike 261 signatures as duplicate names and an additional 606 signatures from the recall petition filed against Senator Fitzgerald as invalid for the reasons listed on Exhibit A -Fitzgerald. Staff also recommends, that the Board accept the recommendations of staff regarding resolution of the categories of challenges filed by Senator Fitzgerald, including denying the challenges designated as "Not Included" on the attached Exhibit A -Fitzgerald, and terminating any further analysis of the challenges of individual signatures. Staff recommends that, for purposes of determining sufficiency of the recall petition, the Board directs that the 1,586 "Remaining Challenges" will

be deducted from the total of 19,868 verified signatures, and that the Board certify sufficiency of the recall petition with at least 18,282 valid signatures.

Recommended Motion:

The Board accepts staff's recommendation as outlined above, to deny certain challenges filed by Senator Fitzgerald for the reasons stated in the accompanying Evaluation of Challenges memorandum: to strike 261 signatures as duplicate names; to strike an additional 606 invalid signatures; and, to deduct 1,586 "Remaining Challenges" signatures from the staff-determined total of verified signatures. The Board verifies that at least 18,282 valid signatures are contained in the recall petition offered for filing against Senator Fitzgerald. The Board further directs staff to file the recall petition and attach a certificate of sufficiency on a date to be determined by the Board in accordance with any court order governing this matter.