

<p>DISTRICT COURT, CUSTER COUNTY, COLORADO, Eleventh Judicial District 205 S. 6th St. Westcliffe, CO 81252 Telephone: (719) 783-2274 Fax: (719) 783-2995</p> <hr/> <p>Petitioner: Marjorie Ann Barthrop, in her capacity as committee member for the Petition to Recall Tom Flower, Custer County Commissioner,</p> <p>v.</p> <p>Respondent: Kelley S. Camper, in her official capacity as the Clerk and Recorder for Custer County, Colorado</p>	<p>DATE FILED: May 31, 2023 12:05 PM CASE NUMBER: 2022CV6</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2022CV6 Division: 1</p>
<p align="center">FINDINGS AND ORDER ON PETITION FOR RELIEF UNDER C.R.S. § 1-1-113</p>	

I. Introduction and Stipulated Facts.

This case is before the court on Petitioner’s Verified Amended Petition for Relief under C.R.S. § 1-1-113. THE COURT FINDS:

The primary dispute here is whether a recall election for a Custer County commissioner should be held. It depends upon whether the county clerk erred in subsequently allowing the withdrawal of signatures which dropped the total to below the required minimum. And that turns on whether a purported protest letter met the requirements of § 1-12-108(8)(a)(c), C.R.S., specifically whether it was “under oath”, so that the time for filing signature withdrawal requests was properly extended.

The parties stipulated at a hearing on March 21, 2023 that the merits of this action would be decided upon the basis of the record, stipulated exhibits, uncontested offers of proof, and oral and written argument.

The court understands the facts to be: The recall committee submitted signed petitions to recall a commissioner. Respondent county clerk notified the recall committee that the recall

petition appeared to be sufficient per § 1-12-108(8)(a)(c), C.R.S. Then a document purporting to be a protest per § 1-12-108(9)(a)(I), C.R.S., was timely submitted to the county clerk. See Jordan Hedberg letter, Exhibit A to Verified Amended Petition, filed October 12, 2022. The county clerk concluded a hearing on the protest¹ was required per § 1-12-108(9)(a)(II), C.R.S. A hearing was held and the hearing officer apparently determined the protest was invalid, though there is nothing in the record from the hearing.² Meantime, the county clerk received enough requests for withdrawal of signatures from persons who had signed the original recall petition to drop below the required total. Following the hearing, and after deducting the withdrawn signatures, the county clerk notified the recall committee that the recall petition was insufficient for insufficient signatures.

II. Legal Standard.

[T]he power of the people to use the recall procedures must be liberally construed and ... conversely, limitations thereon must be interpreted strictly. *See DiManna v. Election Commission*, 187 Colo. 270, 530 P.2d 955 (1975). Nevertheless, “to liberally construe the statutes governing the exercise of the power to recall is not to ignore entirely the requirements of those statutes.”

R.E.C.A.L.L. v. Sauer, 721 P.2d 154, 155 (Colo.App.1986).

(1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause

¹ Other purported protests were filed but the parties stipulated that they were not qualifying protests and they will not be addressed.

² The only reference in the record is at ¶ 14 of Petitioner’s Response to Motion to Dismiss, filed Nov. 17 (“Respondent scheduled a protest hearing to hear the protests. In the end, each of the protests were rejected by the hearing officer.”).

why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113, C.R.S. Neglect of duty and wrongful acts--procedures for adjudication of controversies--review by supreme court.

III. Discussion and Legal Conclusions.

First, the court concludes that § 1-12-108(9), C.R.S., grants the county clerk the duty and authority to make an initial determination as to whether a submission to her of a document purporting to be a protest is either facially void – i.e., not “a protest in writing under oath” as provided in § 1-12-108(9)(a)(I), C.R.S. – or requires a hearing per § 1-12-108(9)(a)(II), C.R.S. *R.E.C.A.L.L. v. Sauer*, 721 P.2d 154, 155 (Colo.App.1986). However, the county clerk erred in finding the Hedberg letter sufficient to require a hearing.³ The letter is facially invalid as failing to be “under oath”.

The phrase “under oath” is undefined in the election code. The parties agree that there is no Colorado case applying a definition. The court has found none. It seems to the court that guidance should be taken from the statutory scheme Colorado has adopted regarding sworn statements, i.e., the Revised Uniform Law on Notarial Acts, § 24-21-501, et seq, C.R.S. It defines “Verification on oath or affirmation” to “mean() a declaration, made by an individual on oath or affirmation before a notarial officer, that a statement in a record is true.” § 24-21-502(16), C.R.S. “(1) A notarial act must be evidenced by a certificate. ... (3) A certificate of a notarial act is sufficient if it ... (a) Is in a short form set forth in section 24-21-516.” § 24-21-515(1) and (3)(a), C.R.S.⁴ § 24-21-516, C.R.S., Short form certificates, provides (with **bold** added for emphasis):

³ The court is not, by these conclusions, making any judgment that the county clerk did not act in good faith. The election laws are complex and not easily administered. And whether the protest met the requirements of the statute is a close question, turning on the preponderance of evidence, the lowest standard in the law.

⁴ § 24-21-515, C.R.S., sets out other requirements and forms which may be sufficient but none were addressed by the parties so the court confines its analysis of the uniform act to the form which the Hedberg letter most closely conforms.

(1) The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by section 24-21-515 (1) and (2):

...

(c) For a verification on oath or affirmation:

State of _____

County of _____

Signed **and sworn to (or affirmed)** before me on _____ (date) _____ by

(name(s) of individuals making statement)

Signature of notarial officer

Stamp

The Hedberg letter’s notarial stamp does not contain the words “and sworn to (or affirmed)”. It does not meet the requirements of the Revised Uniform Law on Notarial Acts and is patently not “sufficient” as a “verification on oath or affirmation.” §§ 24-21-502(16), 515 (1) and (3)(a), and 516(1)(c), C.R.S. The protest letter of Mr. Hedberg did not meet the requirements of § 1-12-108(9)(a)(I), C.R.S. The document does not show that anyone administered an oath to Mr. Hedberg or that he swore to the statement in the letter as required by the statute. Because there is nothing in the record from the protest hearing, there is nothing to show that the protest was “under oath”. The protest, as a document that is facially insufficient, and which was not found at the protest hearing to be “under oath”, is void ab initio.

Second, the court concludes that if a protest is facially invalid or the hearing officer determines the protest fails to conform to the requirements of the statutes, that any requests to withdraw signatures submitted during the period provided in § 1-12-108(9)(d)(IV), C.R.S., are void. The county clerk erroneously determined a facially sufficient protest had been received.

And, apparently here⁵ the hearing officer determined the Hedberg letter did not qualify as a valid protest.

In spite of the findings of the hearing officer, the county clerk issued her October 4 Statement of Insufficiency.⁶ She erred in tallying the number of valid petition signatures by deducting the requests to withdraw signatures that were received subsequent to the protest letter of Mr. Hedberg. The protest, as discussed above, was facially insufficient to trigger a hearing. Nor does the county clerk provide authority to the court for the proposition that a protest determined to be invalid nevertheless extends the deadline for requests to withdraw signatures. The county clerk provides no authority for the proposition that an invalid protest extends the deadline for filing requests to withdraw signatures under either circumstance. Although the statute does not address what happens in the event a protest is determined to be void ab initio,⁷ in other contexts that status requires vacation of subsequent events. See e.g., *Union High School Dist. No. 2 v. Paul*, 95 P.2d 5, 7, 105 Colo. 93, 95–96 (Colo. 1939) (teacher’s contract which violates licensing statute is void ab initio”). Further, this conclusion is consistent with how the court must apply the law. As respondent says: “the right of recall is a fundamental right of the people. Statutes governing the exercise of the power to recall are to be liberally construed in favor of the “ability to exercise it.” *Hazelwood v. Saul*, 619 P.2d 499 (Colo. 1980); *Dodge v. County Clerk and Recorder of the County of Fremont*, 678 P.2d 1271 (Colo. App. 1989).”⁸

The deadline extension for filing requests to withdraw signatures provided in § 1-12-108(9)(d)(IV), C.R.S. is effective only in the event that a valid protest is filed. Once it is determined that no valid protest has been filed, the county clerk must determine if the recall petition is sufficient as of the original deadline. Put another way, an invalid protest does not

⁵ It is puzzling to the court why the parties did not include the hearing officer’s findings. The court infers the hearing officer found the protest failed. Whether it was because it was not “under oath” or for another reason, it does not matter for purposes of this order because the court must find that there is no protest “under oath” in the record.

⁶ Exhibit C 1-7, filed October 12, 2022.

⁷ “Null from the beginning ...” Black's Law Dictionary (11th ed. 2019).

⁸ Legal Argument of the Custer County Clerk, ¶ 2.

extend the deadline for filing requests to withdraw signatures. The lack of an oath voided the requests for withdrawal of signatures received while the protest was pending, which means the deadline for filing requests to withdraw signatures lapsed.

In sum, good cause has been shown by petitioner for a court order requiring substantial compliance by respondent with the election code.

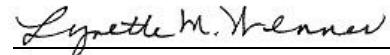
IV. Order.

THEREFORE, IT IS ORDERED:

Respondent County Clerk shall forthwith make a determination that the recall petition is sufficient and conduct a recall election consistent with the requirements of Title 1, Article 12, C.R.S. or show cause why this order should not be obeyed.

Entered this 31st day of May, 2023.

BY THE COURT:


DISTRICT COURT JUDGE