

STATE OF WISCONSIN

CIRCUIT COURT 5

BROWN COUNTY

JAMES SCHMITT
509 Spring Street,
Green Bay, WI 54301,

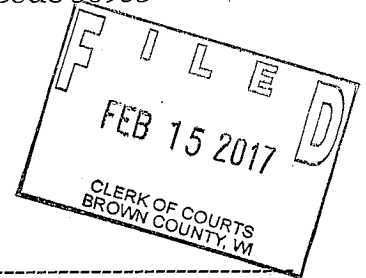
Petitioner,

vs.

CITY OF GREEN BAY COMMON COUNCIL
100 N. Jefferson Street
Green Bay, WI 54301,

Respondents.

Case No. 17CV193
Case Code 30953



PETITION FOR WRIT OF PROHIBITION

TO: Marck Hamme ✓ BROWN COUNTY CIRCUIT JUDGE

Petitioner Mayor James Schmitt, by his attorneys Gimbel, Reilly, Guerin & Brown LLP, respectfully petitions this Court for a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition seeking to remove him from office under Wis. Stat. §17.12, *et seq.*, which is set to be heard before the Common Council on February 20, 2017 at 7 p.m., until such a time when the Court can schedule and notice a hearing at which the City of Green Bay Common Council shall show cause as to why the Common Council should not be absolutely restrained from taking any action related to the petition for removal.

The petition shows:

1. Schmitt is an adult resident of the State of Wisconsin residing at 509 Spring Street, Green Bay, Wisconsin 54301.

2. Schmitt is the duly elected Mayor of Green Bay, Wisconsin, with a term set to expire in April 2019, and has been the Mayor at all times pertinent to this petition.

3. Respondent City of Green Bay Common Council is a municipal body organized and existing under the laws of the State of Wisconsin, with principal offices located at 100 North Jefferson Street, Green Bay, WI 54301.

4. On December 5, 2016, Schmitt pled guilty to three misdemeanor charges:

- a. one count of attempting to make false statements to an election official, contrary to Wis. Stat. §§12.13(1)(b), 12.60(1)(a) and 939.32;
- b. one count of attempting to accept campaign contribution funds not belonging to a reported contributor, contrary to Wis. Stat. §§11.24(1), 11.61(1)(a), and 939.32;
- c. one count of attempting to accept campaign contributions in excess of limits, contrary to Wis. Stat. §§ 11.26, 11.61(1)(b), and 939.32.

5. Additional charges were dismissed and read in. Upon Schmitt's accepting his plea, the Circuit Court, Judge Mitchell J. Metropulos sentenced Schmitt to 40 hours of community service and imposed a total forfeiture of \$4,000. A true and correct copy of an excerpt of the plea and sentencing transcript is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit A.

6. On February 3, 2017, Schmitt filed with the Judge Metropulos letters verifying his completion of community service and a copy of the receipt confirming full payment of the forfeiture.

7. On or about December 8, 2016, after Schmitt pled guilty to the three misdemeanors and was sentenced, a Green Bay citizen filed a petition for removal of

Schmitt from the office of Mayor of Green Bay under Wis. Stat. chapter 17 and Article XIII, Section 3(2) of the Wisconsin Constitution. A true and correct copy of the petition for removal is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit C. That petition later was amended and a true and correct copy of the amended petition for removal is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit D.

8. The citizen petition identifies the charges set forth above, Schmitt's plea to those charges and his conviction. In addition, the petition alleges that Schmitt violated the public trust by making misrepresentations related to the charges.

9. The common council of a city may remove an elected official for cause under Wis. Stat. §17.12(1)(c). "Cause" is defined as "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stat. §17.001.

10. The statutory definition limits the common council's power, authority and jurisdiction to remove an officer. Any attempt to remove an officer for some alleged cause not affecting the officer's competency or fitness to discharge the duties of the office, constitutes an excess of power and is not a removal within the statute.

11. The citizen petition fails to allege any facts establishing that Schmitt was inefficient, that he neglected his mayoral duties, that he engaged in any misconduct in his official mayoral duties or that he engaged in malfeasance in office.

12. All of the charges were brought against Schmitt related to his conduct as a candidate for office, not his conduct as mayor. Indeed, the prosecutor's sentencing argument affirmatively stated that he had uncovered no evidence of misconduct in

public office and that the charges were unrelated to anything that Schmitt did while acting in his capacity as Mayor. (Knight Affidavit at ¶2, Ex. A, p.20).

13. Schmitt has never been convicted or accused of any crimes other than those to which he pled guilty on December 5, 2016.

14. None of the crimes to which Schmitt pled guilty were felonies, nor have they been designated by the legislature as misdemeanors involving a violation of public trust pursuant to Article XIII, Section 3(2) of the Wisconsin Constitution.

15. None of the crimes to which Schmitt pled guilty were related to his official duties as mayor; Schmitt has never been accused or convicted of a crime that constitutes cause for removal under Wis. Stat. §17.16(2).

16. The City of Green Bay Common Council lacks jurisdiction and authority to proceed with a hearing on the petition for removal because the petition fails to allege any misconduct by Schmitt that meets the definition of cause for removal under Wis. Stat. §§17.001 and 17.16(2).

17. Counsel for Schmitt has notified the City of Green Bay Common Council and its legal counsel that the Common Council has no legal basis to proceed with a hearing on the petition for removal.

18. Nevertheless, the City of Green Bay Common Council has scheduled a public hearing regarding the petition for removal, which is set to occur on February 20, 2017 at 7 p.m. A true and correct copy of the notice of hearing is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit I.

19. The notice of hearing states that the City of Green Bay Common Council intends to function in a judicial or quasi-judicial capacity, and expects the parties to “submit evidence and legal authorities, question and cross-examine witnesses, and present argument as to whether cause exists for Mayor Schmitt to be removed from office.” The notice further states that the Council “shall deliberate (potentially in closed session according to Wis. Stat. §19.85(1) upon proper motions) and resolve the matter in the fashion required by the referenced statutes.” (*Id.*).

20. Schmitt lacks any adequate remedy at law to prohibit the City of Green Bay Common Council from proceeding with the removal hearing.

21. If the Common Council is allowed to exceed its statutory authority and proceed with the hearing, Schmitt will be compelled to defend himself at a judicial or quasi-judicial proceeding, incurring substantial legal expense, great political harm and public embarrassment.

22. Schmitt’s only remedy at law is a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition for removal, and for this Court to notice and schedule a hearing to show cause as to why the City of Green Bay Common Council should not be absolutely restrained from any further proceedings related to conducting a hearing on the petition for removal.

WHEREFORE, petitioner James Schmitt, requests the following relief:

(a) issuance of a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition for removal;

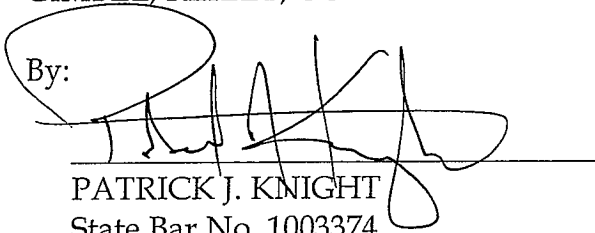
(b) an order scheduling a hearing at which the City of Green Bay Common Council shall show cause as to why it should not be absolutely restrained from any further proceedings related to conducting a hearing on the petition for removal;

(c) an order awarding Schmitt his costs and disbursements in this action, and any further relief the court deems just and equitable.

Dated this 14 day of February, 2017.

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r/cr/Schmitt/p/petition for writ of prohibition