

JAMES SCHMITT,

Petitioner,

Case No. 17 CV 193

vs.

CITY OF GREEN BAY COMMON COUNCIL,

Respondent.

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### **DECISION & ORDER**

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#### **I.**

This case is before the Court on a Petition for a Writ of Prohibition. James Schmitt (Schmitt) is the Mayor of Green Bay. During the last campaign, Schmitt violated various campaign financing laws, for which he was convicted of three misdemeanor counts and sentenced to community service and a fine. A Green Bay citizen has petitioned for his removal from office. The City of Green Bay Common Council (Common Council) has issued a notice that it plans to hold quasi-judicial hearings on this petition on February 20, 2017. Schmitt seeks a writ of prohibition ordering the Common Council not to hold such a hearing because there are no allegations that Schmitt engaged in any misconduct in his capacity as Mayor and therefore, the hearing would be outside the jurisdiction of the Common Council.

#### **II.**

A writ of prohibition is primarily a jurisdictional remedy; it acts to “restrain the exercise of judicial functions outside or beyond the jurisdiction of a court, or an official acting in a judicial capacity, where great hardship would otherwise result.” *State ex rel. Individual*

*Subpoenaed to Appear at Waukesha Cty. v. Davis*, 2005 WI 70, ¶ 16, 281 Wis.2d 431, 440 (internal citation omitted). It “is an extraordinary remedy that normally will not issue except in the absence of other adequate remedies.” *Id.* at ¶ 15. This type of writ is usually “employed to restrain an inferior tribunal from exceeding its jurisdiction.” *City of Madison v. Wis. Dep’t of Workforce Dev.*, 2003 WI 76, ¶ 9, 262 Wis.2d 652, 658–59. A writ of prohibition, if issued,

shall command the court and party to whom it shall be directed to desist and refrain from any further proceedings in the action or matter specified therein until a day therein named to be fixed by the court and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such action or matter.

Wis. Stat. § 783.08 (2015). Whether to grant a writ of prohibition is within the discretion of the court. *Id.* at ¶ 10. However, where a court determined that an inferior tribunal lacked jurisdiction over a matter, it was an erroneous exercise of discretion to deny the writ. *State ex rel. Wis. Dep’t of Pub. Instruction v. Wis. Dep’t of Indus., Labor & Human Relations*, 68 Wis.2d 677, 687 (1975).

### III.

“Officers of cities, ... operating under the general law or under special charter including school officers, may be removed as follows: (a) Elective. Elective officers by recall as provided in s. 9.10, or by the common council, for cause.” Wis. Stat. § 17.12 (1)(a) (2015). “What is ‘due cause’ for the removal of an officer, is a question of law to be determined by the judicial department....” *State ex rel. Gill v. Common Council of City of Watertown*, 9 Wis. 254, 261 (1859). The question before this Court is whether the citizen petition alleges “cause” over which the Common Council has jurisdiction as a matter of law.

“Cause” under Wis. Stat. Ch. 17 is defined as “inefficiency, neglect of duty, official misconduct, or malfeasance in office.” Wis. Stat. § 17.001 (2015). The Wisconsin Attorney

General has explained that the “cause” must be connected to the official duties of the elected officer. Op. Wis. Atty. Gen. 339 (Aug. 12, 1947). “Cause” has been found where a city clerk performed services for personal friends but not did perform the same services for others and where a mayor accepted large sums of money collected from city employees who were subject to the mayor's power of removal at any moment. *State ex rel. DeLuca v. Common Council of City of Franklin*, 72 Wis.2d 672, 679 (1976); *State ex rel. Starkweather v. Common Council of City of Superior*, 90 Wis. 612, 64 N.W. 304, 307 (1895).

Schmitt argues that the Common Council does not have jurisdiction to consider removing him because the petition does not allege any misconduct relating to his actions as Mayor. He points out that the prosecutor who investigated the campaign finance charges indicated that he did not find any evidence of misconduct in office and that all of the transactions were entered into as a candidate, not as a public official. (Knight Aff. Ex. A. at 20:7-14, Feb 14, 2017.) The Court agrees with Schmitt that not any violation of a law will constitute “cause” just because an elected official undertakes an oath to uphold the laws of this state.

Violating campaign laws as an incumbent attempting to retain an office, however, cannot always be viewed as unconnected to the incumbent’s actions as an elected official. When the violations indicate some merging of the official’s role as candidate with his role as incumbent elected official, the requisite connection to satisfy the cause requirement of § 17.12 (1)(a) could be found. The Common Council has alleged, for example, that in the course of violating campaign finance laws, Schmitt used his official position as Mayor to direct the City Clerk to conduct an audit of his campaign finance reports, thus merging his acts as Mayor with his acts as a candidate. As a result, the Common Council has shown that it is proceeding on alleged wrongs connected to Schmitt’s actions as Mayor.

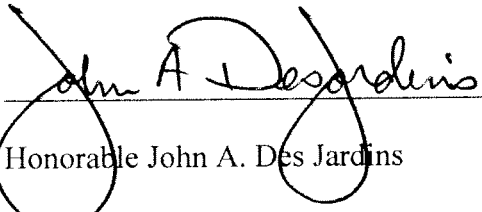
Under the circumstances of this case, the Court does not find grounds to grant the extraordinary remedy of a writ of prohibition. Schmitt retains the alternative remedy of certiorari review if the Common Council votes to remove him on grounds without a sufficient connection to his capacity as Mayor. Therefore, the Court finds that a writ of prohibition is not appropriate.

**ORDER**

Schmitt's Petition for Writ of Prohibition is DENIED. Schmitt is not entitled to an award of his costs and disbursements.

Dated this 20 day of February 2017.

BY THE COURT:

  
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Honorable John A. Des Jardins  
Circuit Court Judge, Branch VII