

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

IN RE: PETITION TO REMOVE REBECCA NEAL)
FROM THE OFFICE OF TREASURER OF) CL08-00406
THE CITY OF HARRISONBURG)

FILED IN THE CLERK'S OFFICE
ROCKINGHAM COUNTY, VA.

APR 29 2008

Heather Seaman
DEPUTY CLERK

MOTION FOR CONTINUANCE

Comes now, the Respondent, by counsel, who pursuant to Va. Code §24.2-235, moves for a continuance of the hearing on the Rule to Show Cause, seeking removal of the Respondent from her constitutionally elected office and as grounds states a follows:

1. Va. Code § 24.2-233 states, inter alia:

Upon petition, a circuit court may remove from office any elected officer or officer who has been appointed to fill an elective office, residing within the jurisdiction of the court:

1. For neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office.

2. To prevail, the Petitioner must show, by clear and convincing evidence, that the Respondent engaged in conduct tantamount to a neglect of duty, misuse of office or incompetence in the performance of her duties as Treasurer for the City of Harrisonburg and further, that such actions have a material adverse effect of the conduct of the office. The threshold showing of misuse of office is essentially the same element which the Commonwealth must prove in the criminal trial of the Respondent on embezzlement charges now set for a week long trial beginning August 4, 2008. Even a suspension for office pursuant to Va. Code §24.2-236, requires the same factual findings as a hearing on the removal Petition itself.

3. The evidence in the case consists of literally thousands of pages of documents and many witnesses. Trial on the Petition is set for the return on the Rule to

A TRUE COPY

ATTESTE

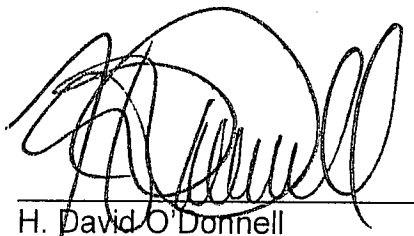
Heather Seaman
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Show Cause (dated April 25, 2008) on May 1, 2008 and will likely take multiple days. Counsel needs more than 5 days to prepare an adequate defense to the Petition and accordingly good cause exists for the granting of a continuance, as contemplated by Va. Code §24.2-235.

4. In addition, the Respondent has filed a Demurrer setting forth serious and fatal flaws in the form of the Petition which must be addressed before proceeding to the evidentiary phase of the proceedings.

5. Given the contemplated expenditure of resources by the Commonwealth and the Respondent, the absence of any factual allegation whatsoever in the Petition of "material adverse effects on the conduct of the Treasurer's Office"¹ (indicative of a lack of prejudice) and the "highly penal"² nature of these proceedings, a continuance is warranted.

THEREFORE, the Respondent respectfully requests a continuance in the above Petition and that the current Motion be heard before May 1st, 2008, if practicable.



H. David O'Donnell
Counsel for Defendant
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Suite 206
Harrisonburg, Virginia 22801

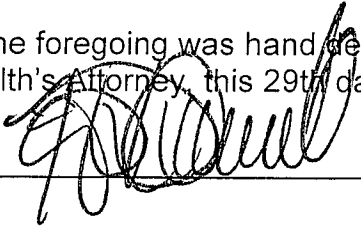
REBECCA BYRD NEAL
By Counsel

¹ Va. Code § 24.2-233

² Davis v. Malbon 195 Va. 368 (1953)

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was hand delivered to Marsha L. Garst, Rockingham County Commonwealth's Attorney, this 29th day of April, 2008.



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DEMURRER

Comes now, the Respondent, by counsel, who demurs to the Petition filed herein and states that it is not sufficient at law and ought not to be prosecuted and as grounds states as follows:

1. The Petition does not meet the requirements of Rule 1:4(d) of the Rules of the Supreme Court of Virginia, which requires that "Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense".

2. Va. Code § 24.2-233 states, inter alia:

Upon petition, a circuit court may remove from office any elected officer or officer who has been appointed to fill an elective office, residing within the jurisdiction of the court:

1. For neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office.

3. Notwithstanding the general mandate of Rule 1:4 requiring a party to plead sufficient facts to put an adverse party of notice of the basis for the claim asserted in the pleadings, the Petition, as drafted, recites only information contained in an affidavit filed by Officers of the Harrisonburg Police Department in support of their application for a search warrant. Despite a statutory requirement that the Petition state "with

reasonable accuracy and detail the grounds or reasons for removal”¹, the Petition is devoid of any articulated facts which suggest a basis for the conclusion that alleged misuse of office “has a material adverse affect upon the conduct of the office”.

4. Further, Va. Code § 24.2-235 requires that the Petition “shall be signed by the person or persons making it under penalties of perjury”. The Petition filed herein recites that “*Further that we, the undersigned registered voters of the City of Harrisonburg, do hereby affix our names to this petition and the allegations contained herein under penalty of perjury pursuant to § 24.2-235 of the Code of Virginia, as amended.*”

5. This oath is defective since none of the parties signatory to the Petition make a declaration, under penalty of perjury, that the factual allegations in the petition are true and correct.² Had the parties signing the Petition actually had any basis of knowledge for their assertion, under penalty of perjury, of the “allegations contained herein” they may have noticed that the date of Respondent election is off by several

¹§ 24.2-235. **Procedure.** A petition for the removal of an officer shall state with reasonable accuracy and detail the grounds or reasons for removal and shall be signed by the person or persons making it under penalties of perjury. As soon as the petition is filed with the court, the court shall issue a rule requiring the officer to show cause why he should not be removed from office, the rule alleging in general terms the cause or causes for such removal. The rule shall be returnable in not less than five nor more than ten days and shall be served upon the officer with a copy of the petition. Upon return of the rule duly executed, unless good cause is shown for a continuance or postponement to a later day in the term, the case shall be tried on the day named in the rule and take precedence over all other cases on the docket. If upon trial it is determined that the officer is subject to removal under the provisions of §24.2-233, he shall be removed from office.

² § 8.01-4.3. **Unsworn declarations under penalty of perjury; penalty**

If a matter in any judicial proceeding or administrative hearing is required or permitted to be established by a sworn written declaration, verification, certificate, statement, oath, or affidavit, such matter may, with like force and effect, be evidenced, by the unsworn written declaration, certificate, verification, or statement, which is subscribed by the maker as true under penalty of perjury, and dated, in substantially the following form:

"I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct." (Emphasis added)

This section shall not apply to a deposition, an oath of office, or an oath required to be taken before a specified official other than a notary public.

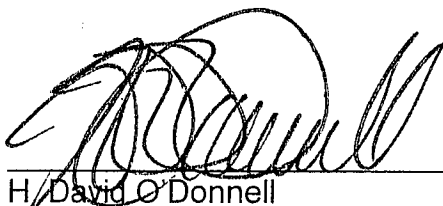
months.³ In any event, none state that the allegations in the Petition are "true and correct", as required by Va. Code §8.01-4.3. Had the legislature intended to create a simple recall process for elected officials who had fallen in disfavor with the voters, they could have done so.

6. While assuming, *arguendo*, that the Petition may be amended by leave of Court to correct factual deficiencies, the failure of the Petition to conform to the statutory requirement for a declaration that the facts in the Petition are true and correct is fatal to further proceedings on the current pleadings.

7. Rule 1:4(c) of the Rules of the Supreme Court of Virginia requires that "an unrepresented party who files a pleading shall sign it and state his address". There are no represented parties having signed the Petition and save four individual petitioners, none have stated their address. This number does not meet the 10% requirement of Va. Code 24.2-233. Accordingly, the Petition is not properly executed, in accordance with the Rules of Court.

THEREFORE, the Respondent prays that the Petition filed herein be dismissed.

REBECCA BYRD NEAL
By Counsel



H. David O'Donnell
Counsel for Defendant
57 South Main Street
Suite 206
Harrisonburg, Virginia 22801

CERTIFICATE

³ Respondent acknowledge receipt of a copy of a Motion to Amend, apparently filed by the Commonwealth's Attorney, seeking to correct this error.

I hereby certify that a true and correct copy of the foregoing was hand delivered to Marsha L. Garst, Rockingham County Commonwealth's Attorney, this 29th day of April, 2008.

