LOUISVILLE/METRO COUNCIL COURT

COMMONWEALTH OF KENTUCKY
LOUISVILLE/METRO GOVERNMENT
JEFFERSON COUNTY

IN THE MATTER OF THE REMOVAL CHARGES AGAINST DISTRICT TWENTY-ONE COUNCILMAN DAN JOHNSON

MEMORANDUM OPINION AND ORDER

This matter is before the Council Court on a motion of the Respondent, Dan Johnson, by counsel, for the correct interpretation of KRS § 67C.143. The Charging Committee, by counsel, has filed a response with its own interpretation. Having considered the Respondent's motion and the Charging Committee's response, the Council Court provides the following findings:

Recent changes to KRS §67C.143 have not changed the numerical requirements for removal; removal will require 14 votes of a possible 20 voting members. *Prior* to July 2017, KRS § 67C.143 provided, in pertinent part:

> (1) Unless otherwise provided by law, any elected officer of a consolidated local government in case of misconduct, incapacity, or willful neglect in the performance of the duties of his or her office may be removed from office by the legislative council, sitting as a court, under oath, upon charges preferred by the mayor or by any five (5) members of the legislative council, or, in case of charges against the mayor, upon charges preferred by not less than ten (10) members of the legislative council. No legislative council member preferring a charge shall sit as a member of the legislative council when it tries that charge.
>
> (3) A decision to remove a mayor or legislative council member shall require a vote of two-thirds (2/3) of the total number of legislative council members sitting as a court.

However, in the last legislative session, the legislature modified KRS § 67C.143(3) to strike the "sitting as a court" language and added language concerning boards and commissions. Thus, KRS § 67C.143(3) now reads: "**A decision to remove a mayor, legislative council member,** or appointee to a board or commission **shall require a vote of two-thirds (2/3) of the total number of legislative council members.**" [Emphasis added.]

The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect. Jefferson County Bd. of Educ. v. Fell, 391 S.W.3d 713, 718 (Ky. 2012). Normally, statutes are construed so that the "plain meaning" of the statute controls. Commonwealth v. McBride, 281 S.W.3d 799 (Ky. 2009). The "plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then [a] court **cannot** base its interpretation on any other method or source." Revenue Cabinet v. O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005) [emphasis added]. From this basic tenet, courts are not free to second guess the legislature's choice of ordinary and plain language to express an edict. Most analyses of statutes stop at the plain meaning review, as they must.

When the plain meaning of a statute results in a ridiculous or absurd result, or when injustice occurs, courts may depart from the statute's plain meaning and examine the statute with the goal of garnering the legislative intent thereof. Revenue Cabinet v. O'Daniel 153 S.W.3d 815 (Ky. 2005); Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 455 (Ky. 2009).

> In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.... We presume that the General Assembly intended for the statute to be **construed as a whole**, for **all of its parts to have meaning**, and for it to **harmonize** with related statutes.... We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.... Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts....

Fell, *supra* 391 S.W.3d at 718–19 [emphasis added].

Applying these rules of construction, from a pure and plain reading of the *current* KRS 67C.143(3), one would need 2/3 of the total number of *26* councilmembers. That is, 18 votes to warrant removal.[1] Indeed, the recent amendment by the legislature would appear to create the impression that the legislature intended to change the number of votes to 18 from the previous 14 votes required to remove a legislator by striking the "sitting as a court" language. Yet, this impression leads to an unacceptable—and impermissible—anomaly under law.

This anomaly is revealed when KRS 67C.143(3) is read with KRS 67C.143(1). Subsection (1) requires a charging committee of five councilpersons when removing a legislator. It also adds that none of these charging members shall "sit as a council member when it tries that

[1] Prior to July 2017, the "sitting as a court" language that was removed mirrored the "sitting as a court" language which appeared in KRS § 67C.143(1).

charge." When the current subsections (1) and (3) are read in conjunction, it would appear that 18 votes are required, but only out of a potential of 20[2] voters.

When taken a step further and the same plain meaning review is applied to mayoral removal, this "plain meaning" review has created an absurdity when examined from the perspective of a mayor's removal. KRS § 67C.143(1) requires a charging committee of 10 legislators for the removal of a mayor. Under the "plain meaning" review, the law would then mandate a court of *16* legislators to decide a case requiring *18* votes to warrant removal. Obviously, this result is ridiculous.

In attempting to review the problematic statute in this context, the only way to harmonize the statute is to consider the following phrases together. First, from KRS 67C.143(1):

> No legislative council member preferring a charge shall sit as a **member of the legislative council** when it tries that charge.

Then from subsection (3):

> **A decision to remove a mayor, legislative council member,** or appointee to a board or commission **shall require a vote of two-thirds (2/3) of the total number of legislative council members."**

These two sections may be harmonized. If in subsection (1), the general assembly has defined "membership" on the legislative council for purposes of subsection (3), then there can be only 21 eligible members who can try a charge (or only 16 members in the case of a mayor). Reading the subsections in harmony, the charging committee members are simply not considered as "members of the council" for purposes of the removal. Thus, the general assembly has basically defined the constitution of the council in subsection (1) and utilized that definition of its constitution in subsection (3). This follows the general rules of statutory construction that sections of a statute are to be read in harmony, from top to bottom, with the same definitional terms consistent throughout. Thus, subsection (3) would require 2/3 of the remaining members of council. In short, 14 "yea" votes.

In examining a proposition that a contrary view can be taken—that it was the intent of the legislature to somehow allow the charging committee to vote on the removal despite the fact that statute states that "no member of the legislative council shall sit as a member of the legislative council when it tries that charge"—the proposition does not pass muster based upon the language of the statute and other construction rules. Again, KRS § 67C.143(1) provides:

> Unless otherwise provided by law, any elected officer of a consolidated local government in case of misconduct, incapacity, or willful neglect in the performance of the duties of his or her office may be removed from office by the legislative

[2] A discussion of the voting rights of the accused are addressed below.

council, sitting as a court, under oath, upon charges preferred by the mayor or by any five (5) members of the legislative council, or, in case of charges against the mayor, upon charges preferred by not less than ten (10) members of the legislative council. No legislative council member preferring a charge shall sit as a member of the legislative council when it tries that charge.

The provisions set out in the statute clearly indicate that the legislature placed the Metro Council in a quasi-judicial role for purposes of removal hearings. Phrases like "sitting as a court," "under oath," "charges" and "tries" all connote that the Metro Council, as a tribunal, is sitting in judgment of its peer.[3] Defining[4] these terms to ascertain their common meaning may prove instructive:

Court: an official assembly for the transaction of judicial business.

Charges: a formal assertion of illegality

Trial: the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue.

For the legislature to specifically state that "[n]o legislative council member preferring a charge shall sit as a member of the legislative council when it *tries* that charge," but then to also grant the non-tribunal member a right to vote on the determination of the trial, simply defies logic. The purpose of trying a case is to render a decision. One ***specifically*** prohibited by law from trying a case cannot then decide it.

Support for this view may also arise from the Metro Council's own rules regarding removal proceedings. Rule 16 of the Louisville Metro Council Removal Hearing Rules and Procedure provides that the procedural and evidentiary rules to be applied are those generally accepted in Kentucky for administrative proceedings. KRS Chapter 13B provides the statutory scheme for administrative hearings.

Under KRS § 13B.040, a person charged with hearing a case may be disqualified "upon discovery of facts establishing grounds for a disqualification, stating the particular grounds upon which he claims that a fair and impartial hearing cannot be accorded." KRS § 13B.040(2)(a). Subsection (b) provides the following non-exhaustive grounds for disqualification which includes, "Serving as an investigator or prosecutor in the proceeding or the preadjudicative stages of the proceeding." Obviously, the charging committee occupies both roles in Respondent's removal proceedings.

Moreover, if this had really been the legislature's intent, the legislature could have simply struck the language "No legislative council member preferring a charge shall sit as a member of

[3] This concept of Metro Council as "court" is further accentuated by KRS §67C.143 (2) and (4) which, respectively, require public hearings and guarantee an appeal to the Circuit Court and Court of Appeals.
[4] All definitions from Miriam-Webster, 11th Edition (2017).

the legislative council when it tries that charge." Or it could have added "but shall vote on the removal decision." It did not and under the statutory construction rules addressed above, this provision must be accepted for its meaning.

Additionally, a contrary view would obviously raise due process concerns. The charging committee is, for all intents and purposes, the prosecutor of a charge. Empowering that entity to investigate, to choose the evidence it proffers and call the witnesses it deems most important to prove its case, and then to also render a judgment when a statute explicitly states that it is excluded from "trying the case," is contrary to due process. While it is certainly true that due process concerns are relaxed in the legislative context,[5] Metro Council has, by its own rules, guaranteed that the accused in a removal proceeding "shall be afforded fundamental due process."[6] Fundamental due process usually requires a neutral arbiter. Rranxburgaj v. Mukasey, 286 Fed. Appx. 268, 272 (6th Cir. 2008).

Finally, this suggested "read" of the recent amendments to KRS Chapter 67C—that the changes to KRS § 67C.143(3) were for the purposes of giving those councilpersons excluded from the trial in subsection (1) the right to vote— is inconsistent with the legislative history of Senate Bill 222. The only item pertaining to this change appeared in the legislative title record as the intent to "amend 67C.143 to allow removal of a member of a board or commission by legislative council." A copy of this document is attached as Exhibit A hereto. Viewed from that perspective, the addition of the "boards and commissions" language and the deletion of the "as a court" language from § 67C.143(3) were to allow Metro Council the freedom to remove board members utilizing the elected official process from § 67C.143(1). Assuming that all legislative changes have a purpose, as we are required to do,[7] it would seem that the legislature's *stated* intent for this change will carry the day.

In sum, 14 votes of 20 is required to remove Respondent. KRS § 67C.143 is silent on the matter of whether the accused may vote on their removal.. However, applying the same logic of a "court," "under oath," hearing "charges" and "trying" the removal, it is clear that the accused would not have a vote on their removal. Additionally, Metro Council is free under KRS § 67C.103 to determine its own rules and has, in the past, voted to disallow the accused the right to vote in a removal hearing. Under the circumstances, it will be 14 from 20.

Therefore, the Council Court, by its Chair, having considered the motion of the Respondent and the response of the Charging Committee and being sufficiently advised, **IT IS HEREBY ORDERED** that the Council Court will use the KRS 67C.143 interpretation that requires 14 of 20 votes for removal.

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[5] *see* Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464, 469 (Ky. 2005).

[6] Metro Council Removal Hearing Rules and Procedures

[7] Smith v. Teachers' Ret. Sys. Of Kentucky, 515 S.W.3d 672, 678 (Ky. App. 2017).

President David Yates
Chair, Metro Council Court

10/24/2017
DATE

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