

LOUISVILLE/METRO  
COUNCIL COURTCOMMONWEALTH OF KENTUCKY  
LOUISVILLE/METRO GOVERNMENT  
JEFFERSON COUNTYIN THE MATTER OF THE REMOVAL CHARGES AGAINST DISTRICT TWENTY-  
ONE COUNCILMAN DAN JOHNSON

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MEMORANDUM OPINION AND ORDER

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This matter has come before the Court on three Motions filed by the Charging Committee on October 18, 2017, seeking to exclude evidence of bias, irrelevant evidence, and leaks. The Respondent failed to file a Response to these Motions within due course.

This matter has also come before the Court on Respondent's Motion to introduce certain photographic evidence filed October 16, 2017, and the Charging Committee's Response filed October 20, 2017. This Order will address these four motions and the responses thereto.

OPINION

The Council Court is cognizant of the fact that its decision on the ultimate question in this matter—whether Respondent is subject to removal under KRS § 67C.143—should be based upon substantial evidence. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky.1972). To govern evidentiary questions in removal matters, this legislative body has chosen to adopt the evidentiary rules regularly applicable to administrative proceedings.<sup>1</sup> Those rules are embodied in KRS Chapter 13B and the cases interpreting the same.

"KRS Chapter 13B, grants hearing officers considerable discretion in the admission and exclusion of evidence." *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 323 (Ky. Ct. App. 2011); *See* KRS § 13B.090(1). "To the extent necessary for the full disclosure of all **relevant** facts and issues, the hearing officer shall afford all parties the opportunity to...present evidence[.]" Ky. Rev. Stat. Ann. § 13B.080 [emphasis supplied]. This does not mean that the parties can introduce unlimited evidence. *Drummond*, 349 S.W.3d at 325. "The hearing officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this Commonwealth." Ky. Rev. Stat. Ann. § 13B.090.

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<sup>1</sup> See Generally, Rule 16, Louisville Metro Council Removal Hearings and Procedures.

Evidence is relevant if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE 401. Lawson, *Kentucky Evidence Law Handbook*, § 2.00(B) (2d ed. 1984), explains the “standard of relevancy” as follows: “An item of evidence—an evidentiary fact—is relevant when it renders a material ultimate fact more probable or less probable than it would be without the item.” This is extended to give even greater leeway:

An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

*Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996), quoting, R. Lawson, *The Kentucky Evidence Law Handbook* § 2.05, p. 53 (3d ed. Michie 1993) and Cleary, *McCormick on Evidence* 542–43 (3d ed.1984).

However, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403. “KRE 403 gives the trial judge substantial discretion to balance probative worth against harmful effects.” *Webb v. Com.*, 387 S.W.3d 319, 329 (Ky. 2012), citing *Brock v. Commonwealth*, 947 S.W.2d 24, 29 (Ky. 1997). Obviously, these considerations are present in the administrative hearing context. *Drummond*, supra; KRS 13B.090. With these considerations in mind, we can turn to the Motions at hand.

Both parties claim that the evidence of the other is not relevant to this proceeding. The Charging Committee has not identified the particular items of evidence it seeks to prohibit, but speaks to broadly limit Respondent’s ability to address the charges against him in its three motions. Respondent has sought to preliminarily introduce photographic evidence he claims were taken at Wyandotte Park. This appears to be the same incident referred to in the Charging Committee’s Complaint at paragraph 2.

On the latter question of Respondent’s Motions to introduce photographic evidence of Wyandotte Park purporting to depict the scene on June 7, 2017, these photographs would be relevant to the inquiry. The Charging Committee argues that they should be excluded because they might “delay and diver the Council Court from hearing important evidence.” Response dated October 20, 2017. However, this argument goes to *weight* of the relevant evidence and not to *admissibility*. As such, subject to such objections as may be raised for lack of foundation, this evidence should be admitted if proffered.

In the Charging Committee’s Motion to “exclude irrelevant evidence,” its Motion to exclude “evidence of leaks,” and its Motion to exclude evidence of “bias,” there has been no particularized identification of the specific evidence which the Charging Committee seeks to

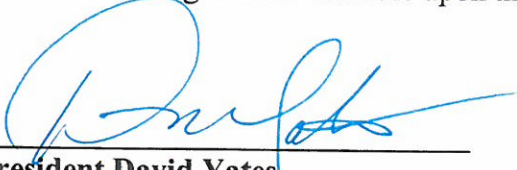
exclude. As such, the Charging Committee may object to specific items of evidence as being irrelevant or prejudicial when they are proffered by Respondent. However, a blanket prohibition of evidence without making an examination should not issue. The court will examine each objection in light of the above; all relevant evidence is admissible unless properly excluded because it is immaterial, excludable on statutory or constitutional grounds or its probative value is *substantially* outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

In short, pursuant to KRS §13B and case law, the Council Court has wide discretion in its determination of what is admissible. Parties will be afforded the opportunity during the Removal Hearing Proceedings to introduce evidence that they deem relevant to support their case. All objections will be heard and a ruling will be formulated at that time of the proposed entry of the evidence.

### **ORDER**

Subject to objections raised at the time of its proffer, Respondent's Motion to introduce photographic evidence is **SUSTAINED**.

The Charging Committee's Motions regarding bias, evidence of leaks, and irrelevancy are **STAYED** until the Removal Hearing Proceedings. The Charging Committee may raise these objections at the time of the proffer of specific items of evidence which it deems objectionable, and the Presiding Officer will rule upon the same at that time.

  
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**President David Yates**  
**Chair, Metro Council Court**

  
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**DATE**

**Copies to:**

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