LOUISVILLE METRO COUNCIL

COMMONWEALTH OF KENTUCKY
LOUISVILLE METRO GOVERNMENT
JEFFERSON COUNTY

IN THE MATTER OF CHARGES AGAINST
DISTRICT 21 COUNCILMAN DAN JOHNSON

RESPONSE TO RESPONDENTS MOTION FOR CORRECT INTERPRETATION OF KRS 67C.143

Comes the Charging Committee, by counsel, and for its Response to Respondent's Motion states as follows:

The Charging Committee agrees with Respondent that the statute enabling the Metro Council's removal proceedings, KRS 67C.143, was amended in Section 3 to require a vote of 2/3 of the Metro Council members for removal of a mayor, council member or appointee. The Metro Council must comply with the statute or it will act outside the authority given by the Kentucky Constitution and the staute. Any removal action arising from a vote of 2/3 of the Council Court, as opposed to 2/3 of the Metro Council, is void as an *ultra vires* action by the Council and violates the Respondent's due process rights as an arbitrary and capricious action.

The Metro Council Removal Hearing Rules and Procedures as adopted July 2011 must be amended to conform to KRS 67C.143 before this removal hearing can proceed.

First, this court should recognize that the vote of a charging member of a legislative body against another member of the body does not offend due process, and may look to the Kentucky courts for reassurance:

> "Appellants complain that they were denied a fair hearing because the members of the hearing board were involved in preferring charges against them. We cannot agree. In *Arbogast v. Weber*, 249 Ky. 20, 60 S.W.2d 144 (1933), it was held that city commissioners could not be enjoined from acting on charges against another commissioner even if it were shown that they were biased or prejudiced in the matter." *Reed v City of Richmond*, 582 S.W.2d 651, 655 (Ky.App. 1979)

The Reed Court went on to say that, if an appellant can bear the burden of proving bias, then "the court will give full consideration to the fact that *the same body acted as accuser, judge and jury.*" *Reed*, 655 (Ky. App. 1979). (emphasis added).

It is presumed that when the General Assembly originally adopted KRS 67C.143, and when it amended the statute this year, the legislature knew Kentucky law and knew that administrative bodies commonly serve as accuser, judge and jury. With that understanding, harmonizing Section 3 addressing the final vote requirement, with Section 1, addressing the removal procedure generally, is not difficult. The first sentence of Section 1 provides that an elected official may only be removed "by the legislative council, sitting as a court..." This sentence plainly states that removal is a function of the *full* Metro Council, following an adjudication. It does not create a "Council Court," and that phrase that does not appear in the statute.

The second sentence in Section 1 sets the minimum number of council members needed to initiate a removal proceeding, and prohibits their participation in the *trial*: "No legislative council member preferring a charge shall sit as a member of the legislative council *when it tries that charge*." It is clear the General Assembly made a distinction between participating in the trial and voting for removal as a member of the legislative council when the evidentiary hearing ends. The Legislature intended that, while the trial is in progress, the Charging Committee members and the Respondent will not sit with their peers and actively participate in the hearing. They will not participate in pre-hearing decisions, question witnesses or join their fellow Council members in deliberations.

That prohibition is just plain common sense. The Charging Committee and Respondent are represented by counsel, and are heard only through their counsel during the hearing of

evidence and legal arguments. To allow them to question a witness or vote on a motion or deliberate in closed session would allow those parties infinite bites of the apple.

But when the Council returns to open session and reports its findings, it will call for action on the findings. That action is an expression of legislative will in which all members of the Council vote on the question of removal.

There is be no question that a removal vote following the Council's current procedures will be void as an *ultra vires* act, and that the Council must revise its hearing procedures before the upcoming hearing of charges against 21st District Councilman Dan Johnson in order to ensure due process is afforded the Respondent.

Respectfully submitted

Deborah Kent, Counsel
Charging Committee

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was sent via email and first class mail to the following on October 9, 2017:

Hon. Stephen Ott
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Deborah Kent

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582 S.W.2d 651 (Ky.App. 1979)

Andrew REED, Appellant,

v.

CITY OF RICHMOND, Appellee.

Edward GRAVES, Wayne Grant, Michael Sexton, William K.

Johnson, Carson Lawless, Danny B. Collett, Blaine

Martin, and Glenn C. Gordon,

Appellants,

v.

CITY OF RICHMOND, Appellee.

Court of Appeals of Kentucky

April 27, 1979

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Rehearing Denied June 22, 1979.

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Larry M. Greathouse, Robert C. Moody, Richmond, for appellee.

Stephen D. Wolnitzek, Covington, for amicus curiae, Fraternal Order of Police of Kenton County, Charles T. Donaldson, President.

William S. Haynes, Robert K. Salyers, Louisville, for appellants.

Before HOWARD, VANCE and WINTERSHEIMER, JJ.

VANCE, Judge.

These appeals arise from judgments in two separate actions which are factually related and involve similar issues. We have elected to dispose of both appeals with this opinion.

On August 2, 1977, appellant Reed was notified of his suspension without pay from his position as chief of the Richmond Police Department. Appellants Graves, Grant, Sexton, Johnson, Lawless, Collett and Martin were suspended without pay pursuant to City of Richmond Executive Order 77-3 dated August 3, 1977. Appellant Gordon was suspended by City of Richmond Executive Order 77-4, dated August 5, 1977.

A hearing on fifteen violations alleged against Reed was scheduled for August 5, 1977, at 7:00 p. m. Hearings on the charges filed against the other appellants (except Gordon) were scheduled for August 6, 1977, at 10:00 a. m. Appellants were unable to secure legal representation locally and on August 5, 1977, Reed contacted a Louisville law firm which consented to represent all of the appellants. This counsel did not arrive in Richmond until shortly before Reed's hearing was scheduled to begin. Prior to the commencement of that hearing, counsel for appellant Reed orally requested that the hearing be public as required by KRS 61.810(6). That request was denied. Written motions for a continuance due to insufficient time to confer with counsel and for the disqualification of the members of the hearing board were likewise denied. At the beginning of each of the other appellants' hearings, the following written motions were tendered:

(1) motion for an open hearing;

(2) motion for a continuance;

(3) motion to disqualify the members of the board from hearing the case; and

(4) motion to dismiss the charges for lack of specificity.

All of these motions were denied.

The hearing board found Reed guilty of ten of the fifteen alleged violations and dismissed him effective immediately. Each of the other appellants was found guilty of some of the charges against him. Graves, Sexton and Grant were dismissed from the force. The others received suspensions without pay for periods of from two to ten days.

Separate appeals were prosecuted by Reed and by the other appellants to the circuit court, which heard the cases without a jury using the standard of review set out in *Kilburn v. Colwell, Ky.*, 396 S.W.2d 803 (1965):

(I)n a de novo hearing under KRS 95.460 the question to be determined is not whether there is substantial evidence to support the action of the city legislative body, but whether the evidence preponderates against it. 396 S.W.2d at 804.

The court in Kilburn went on to point out that the effect of using this standard is to shift the burden of proof to the appealing party and thus the review is "something less than

purely de novo." 396 S.W.2d at 804.

The trial court found that the evidence before it did not preponderate against the findings of the hearing board in either case and affirmed the disciplinary actions taken

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by the board. Separate appeals to this Court followed.

The issues raised by Reed in his appeal are substantially identical to those raised by the appellants in case 78-CA-791-MR. First it is urged that the trial court erred in failing to void the board's action for violation of KRS 61.805 Et seq., the open meeting law. Next, the appellants maintain the trial court improperly refused to dismiss the charges against them for lack of specificity. Thirdly, appellants contend they were denied a fair and impartial hearing as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that their motions for a continuance and for the disqualification of the board members were summarily rejected. Their final allegation is that the trial court's findings are erroneous and should be set aside.

Without reaching the issue of whether the evidence before the trial court preponderated against the findings of the board, we have concluded that the judgment is erroneous in each case.

KRS 61.810 requires that all meetings of public agencies at which any business is discussed or any action taken shall be open to the public, subject to certain enumerated exceptions. Among those exceptions is the following:

(6) Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employe, member or student Without restricting that employe's, member's or student's right to a public hearing if requested, provided that this exception is designed to protect the reputation of individual persons and shall not be interpreted to permit discussion of general personnel matters in secret. (emphasis added.)

We believe the refusal of the hearing board to grant the appellants' requests for public hearings clearly violates KRS 61.810. Nothing in that statute permits a public agency to condition an employee's right to a public hearing upon written or timely notice. The requirement of holding an open hearing could have been satisfied by the simple expedient of opening the doors and permitting the public to attend the hearing. This opening of the doors could have been accomplished on such short notice as to render the board's claim of lack of timely notice meaningless. Appellee argues that timely notice was required to make security arrangements but nothing in the record supports this. If, in fact, special precautions were deemed necessary, adjournment of the hearings for the length of time necessary to make such arrangements would not have been out of order.

We also note that the closed hearings were held without compliance with KRS 61.815 which specifies the conditions under which closed hearings may be conducted. Notice must be given in a regular open meeting of the general nature of the business to be conducted in the closed session and the reason for secrecy, KRS 61.815(1). Closed sessions may be held only upon adoption of a motion for that purpose made in an open, public session, KRS 61.815(2). *Jefferson County Board of Education v. Courier-Journal and Louisville Times, Ky.App.,* 551 S.W.2d 25 (1977).

Under KRS 61.830, any formal action taken by a public agency in violation of KRS 61.810 and KRS 61.815 shall be voidable by a court of competent jurisdiction. We therefore hold that the action taken by the City of Richmond Administrative Hearing Board in disciplining appellants is void for failure to comply with KRS 61.810 and KRS 61.815.

As we have voided the action of the board for failure to comply with the open meeting statute and not upon the merits, it is foreseeable that the board will elect to reconsider these charges at a public hearing. We therefore believe appellants' argument regarding the lack of specificity of the charges against them needs to be examined. A review of the charges in issue leads us to conclude that appellants' contention is correct. KRS 95.450(2) contains the statement, "The charges shall be written and shall set out clearly the charges made." The charges against appellants fail to designate the conduct constituting the alleged

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offenses and the time at which the infractions supposedly occurred.

However, insofar as any subsequent action by the board may involve these same charges upon which evidence has been heard, we are of the opinion that the appellants have been sufficiently apprised of the specifics of the charges to the extent that reconsideration of them is confined to matters placed in evidence before the circuit court. Further action upon the charges which were dismissed has been precluded by the failure of the appellee to appeal from their dismissal.

Appellants complain that they were denied a fair hearing because the members of the hearing board were involved in preferring charges against them. We cannot agree. In *Arbogast v. Weber,* 249 Ky. 20, 60 S.W.2d 144 (1933), it was held that city commissioners could not be enjoined

from acting on charges against another commissioner even if it were shown that they were biased or prejudiced in the matter. In the case at bar, appellants had a statutory right of appeal and presumably an opportunity to show any evidence of prejudice by the board members at the hearing before the circuit court.

Although the standard of review set out in Kilburn v. Colwell,supra, will control insofar as the sufficiency of the evidence is concerned, that standard has no application to a determination of whether the board acted arbitrarily and unreasonably because of bias or prejudice. In any claim that the action of the board is arbitrary, the burden of proof rests upon the claimant, but the court will give full consideration to the fact that the same body acted as accuser, judge and jury.

Appellants also argue that they were denied effective assistance of counsel because of the failure to grant their motion for a continuance. Appellants' counsel has now had time to fully explore all avenues of defense and this issue will not likely recur if the appellee chooses to reconsider the charges at another hearing.

Finally, the issue of attorneys' fees is not properly before this Court.

The judgment of the circuit court is reversed for proceedings consistent with this opinion.

All concur.

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60 S.W.2d 144 (Ky.App. 1933)

249 Ky. 20

ARBOGAST

v.

WEBER, Mayor, et al.

Court of Appeals of Kentucky

May 5, 1933

Appeal from Circuit Court, Campbell County.

Action by Carl J. Arbogast against Fred C. Weber, Mayor of Newport, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

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Hubbard Schwartz, of Newport, for appellant.

L. W. Scott and Carl H. Ebert, both of Newport, for appellees.

HOBSON, Commissioner.

In this case the circuit court sustained a general demurrer to the plaintiff's petition and refused to grant an injunction as prayed therein. On a motion before the Chief Justice of this court to grant the injunction, the motion was overruled, Judges Clay, Willis, and Richardson concurring therein, and the following opinion was delivered:

"The plaintiff, Carl J. Arbogast, was elected a commissioner of the City of Newport, a city of the second class, on November 3, 1931, and assumed the duties of his office on January 4th of this year as the statute prescribed. On May 18, 1932, there was filed by the defendant, Charles E. Lester, Jr., city solicitor of the City of Newport, with the mayor and the three other commissioners of the City of Newport, charges against Arbogast accusing him of willful, intentional and unlawful misconduct in his office as such commissioner. Notice of these charges and of the time and place set for their hearing by the commissioners was served upon Arbogast, who thereupon brought this suit to enjoin the mayor and the three remaining commissioners and Lester from taking any steps in the hearing of such charges and to enjoin the mayor and commissioners from hearing such charges. A motion was made by Arbogast for a temporary injunction and the court heard such motion on the petition, the exhibits filed therewith and a demurrer to such petition. The court sustained the demurrer to the petition and declined to issue the temporary injunction, whereupon motion was made before me as a judge of the Court of Appeals to grant the temporary injunction refused by the lower court and that is the matter now up for decision.

From the petition and the exhibits filed therewith, it appears that on May 16, 1932, affidavits signed by A. F. Lorenz and H. S. Berlin were filed with the city manager of Newport, that city being under the city manager form of government. These affidavits set out that the respective affiants had procured positions with the City of Newport by an agreement to pay and by paying Arbogast certain moneys for his influence and efforts in procuring such positions for them. The city manager promptly and properly referred these affidavits to the city solicitor who informed the board of commissioners that it was their duty under section 3235dd-45 of the Kentucky Statutes Supp. 1933 to hold a hearing upon the matters set out in the affidavits and if Arbogast were found guilty to remove him from office. The board thereupon directed the city solicitor to prepare the necessary charges but before doing so the board called upon Arbogast; informed him of what had happened and told him that unless he resigned they would have to have the charges heard. Arbogast declined to resign. After the city solicitor had prepared the formal charges, they were signed by the mayor and a day was set for hearing. The petition and exhibits set out the foregoing. The petition further avers that unless the injunction prayed for be granted, the commissioners intend to conduct the hearing and are threatening to unlawfully remove the plaintiff from his office as commissioner and will do so to the plaintiff's great and irreparable injury and damage. On this hearing before me, the plaintiff insists that his petition and exhibits state a good cause of action and warrant the relief sought, first, because section 3235dd-45 under which the defendants, the mayor and three remaining commissioners and the city solicitor, are purporting to act, is unconstitutional, and, secondly, that conceding such section to be constitutional, yet in this case the board having prejudged the plaintiff, it is not entitled to sit in judgment upon him. Disposing of these contentions in their order, we find that the plaintiff's assault upon the constitutionality of section 3235dd-45, which vests in the board of commissioners the right to hear charges against a fellow commissioner of misconduct, inability or willful neglect in the performance of his duties of his office and to remove him if found guilty is based on the contention that such

statute vests in the board of commissioners judicial power contrary to sections 14, 68 and 27 of the Constitution. In support of his position, the plaintiff cites *Lowe v. Commonwealth, 3 Metc.* 237. It is sufficient to say that plaintiff's contention has been met and answered in at least two cases from this court, one of which is directly in point, it being that of *Gibbs v. Board of Aldermen of the City of Louisville,* 99 Ky. 490, 36 S.W. 524, 18 Ky. Law Rep. 341, wherein it was held that under section 160 of the Constitution, which in part provides that the General Assembly shall prescribe the manner in and causes for which municipal officers may be removed from office, the legislature has full power to vest in the board of aldermen of the City of Louisville power to hear charges and to remove from office a park commissioner. In that case it was pointed out that the power of removal of city officers at common law was an administrative function. This principle was followed and formed the basis of the opinion in the case of *Holliday v. Fields,* 207 Ky. 462, 269 S.W. 539, wherein we said that the power to remove from office is essentially

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an executive or administrative function and the determination of the facts upon which the right to remove from office is based is not the exercise of a judicial function. As was pointed out further in the Holliday Case, even if it be conceded arguendo that the removal from office after a hearing on charges preferred be the exercise of a judicial function, yet where the Constitution specifically provides for an executive or ministerial office or body to exercise such function, there is no violation of constitutional rights since section 28 of the Constitution, which prohibits the exercise by one department of the powers of another department of government, expressly exempts from such prohibition the instances in the Constitution wherein such exercise of power of one department by another is expressly directed or permitted. Clearly that part of section 160 of the Constitution, the substance of which we have quoted above, so permits. The case of Lowe v. Commonwealth, supra, is not in conflict with these views. That case itself relies on *Gorham v. Luckett, 6 B. Mon.* 146, where the court recognizes that ordinarily the power of removal from office is an administrative function, although the legislature may by the terms of an act make it a judicial act. All the Lowe Case decides is that in a case of a county office under the Constitution as it then stood the legislature was without power to prescribe any method of removal from office other than indictment or impeachment. But in the case before me section 160 of the Constitution plainly gives the Legislature a free hand in this matter. We are of the opinion that section 3235dd-45 is constitutional.

Coming now to the second contention of the plaintiff, it is extremely doubtful whether the facts as set out in the petition and the exhibits filed therewith, show or establish that the members of the board of commissioners disqualified themselves to try plaintiff because of prejudice or a pre-judgment of his case. It is true the petition avers that the charges were preferred at the instigation of the board, but the exhibits filed with the petition show that these charges originated in the filing of two affidavits with the city manager. There was nothing improper in the city manager referring these affidavits to the city solicitor for action, nor anything improper on his part in calling the board's attention to its duty to formally prefer charges based on these affidavits and to hear them. The act of the board in offering to permit the plaintiff to resign does not show any prejudice on the part of the board, but was rather a friendly act inasmuch as in the absence of such resignation the board could scarcely escape its duty of hearing these charges. Plaintiff states no facts in his petition upon which he bases his conclusion that if the board hears these charges it will unlawfully remove him from office. This attack upon the qualification of the board to hear the charges is analogous to an affidavit filed by a litigant to require a presiding judge to vacate the bench. It is well settled in such state of case that an affidavit to require a judge to vacate the bench to be effective must state facts and not conclusions. The petition in the instant case by no means measures up to the requirements of such an affidavit. But even conceding arguendo that the petition is sufficient to show bias or prejudice on the part of the commissioners, that does not warrant the injunction in the instant case. It is true the plaintiff has no appeal from any judgment adverse to him which the commissioners may find on the hearing of these charges. But in this the plaintiff is in no different position from that which the plaintiff Henderson in the case of *Henderson v. Com.,* 199 Ky. 798, 251 S.W. 988, found herself. That was a case wherein the county judge sought to remove from office of oil inspector Mrs. William Henderson on charges preferred before him by two citizens. She filed an affidavit to compel the county judge to vacate the bench, which he declined to do. We held that his declination to vacate the bench did not render the judgment of ouster which he entered void, but that if he had acted on the hearing arbitrarily and capriciously, Mrs. Henderson would have a remedy to protect herself in office, even though the statute conferred no remedy by appeal. That Mrs. Henderson availed herself of this right and retained herself in office though removed by the county judge may be seen from a reading of the case of *Henderson v. Lane,* 202 Ky. 610, 260 S.W. 361. It follows from these cases that the board has a right to hear these charges even though perhaps they may be prejudiced in the matter, the plaintiff having a full remedy to protect himself even though the statute gives him no appeal if the board acts arbitrarily or capriciously on the hearing. It follows, therefore, that the circuit court did not err in declining to grant the temporary

injunction and the motion made before me to grant such injunction refused by the trial court must be and it is hereby overruled."

After this the plaintiff filed an amended petition in which he made these allegations: The information filed by defendant against plaintiff was based upon affidavits obtained by the dominance and instigation of Fred C. Weber, mayor, Harry Roth, John Berninger, and Fred G. Otto, commissioners of the city of Newport, from the affiants H. S. Berlin and A. F. Lorenz, and, at the time the information was so prepared and affidavits procured from Berlin and Lorenz, the said defendants well knew that they would pass judgment as such official upon the sufficiency and adequacy of the affidavits of Berlin and Lorenz, and, notwithstanding these facts, they wrongfully and without right had the affidavits of Berlin and Lorenz prepared and

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filed, knowing that they would sit in judgment as to the sufficiency of the affidavits; no part of the information contained in the affidavits was properly obtained or was competent to be used at plaintiff's trial, because of its having been improperly so obtained; and that all the acts of the defendants were illegal, without right or authority, and that, unless restrained by the court, the defendants would remove him from office.

The court sustained the demurrer to the petition as amended, and dismissed the action. The plaintiff appeals.

Section 3235dd-45, Kentucky Statutes Supp. 1933, provides: "In case of misconduct, inability or wilfull neglect in the performance of the duties of his office, the mayor or any commissioner may be removed from office by a unanimous vote of the other four members of the board of commissioners. But no such officer shall be so removed without having been given the right to have a full public hearing with representation by counsel, and with witnesses summoned in his behalf and required to testify. The findings of fact at any such hearing, and the reasons for any such removal, shall be stated in writing and filed as matter of public record."

The Legislature created the office and had full power to provide how and by whom the officer might be removed. It has not provided that bias or prejudice on the part of the other members of the board shall disqualify them from acting. Even as to judges, under such circumstances, the common-law rule was this:

"In order to disqualify a judge there must exist a ground authorized by law to disqualify him; it is not for the courts to add other grounds of disqualification." 33 C.J. § 133, p. 991.

"At common law a judge might properly, of his own will, retire from the case on the ground of his bias or prejudice, it being discretionary with him to do so. While there are dicta to the effect that at common law a judge may be disqualified on the ground of his bias or prejudice, it is generally held, in the absence of statutory provision, that bias or prejudice on the part of a judge, which is not based on interest, does not disqualify him." 33 C.J. § 150, p. 998.

The amended petition stated no facts not alleged in the former pleadings. It was filed before there had been any action by the board. As was held in the former opinion, the appellant may not enjoin the board from acting on the ground of bias or prejudice, but, if they act arbitrarily and without cause shown, he has his remedy, as in other cases of improper action by the administrative officers. Here the board had taken no action, and the demurrer to the petition as amended was properly sustained.

Judgment affirmed.