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David M. Lawrence, Editor

THE ABILITY OF LOCAL GOVERNING BOARDS TO DISCIPLINE THEIR MEMBERS

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One difficulty facing many local governing boards (city councils and county boards of commissioners) is how to cope with a problematic member. If a duly elected member acts in a disruptive manner during a board meeting, can the board vote to expel him from the meeting? If a member acts in a manner that is harmful or embarrassing to the board outside of a meeting, can the board censure her? These questions are not easily answered because of the absence of North Carolina law on the subject. However, a set of rules regarding a board's ability to discipline members is discernible from North Carolina statutes and case law from other jurisdictions. This bulletin explores the statutory and constitutional issues surrounding a governing board's ability to discipline a member through censure or expulsion from a meeting. It concludes that, in proper circumstances, a governing board may censure a member and may expel a member from a meeting. This bulletin does not address the issue of removing an elected member from office; it is limited to censure and expulsion from a meeting.

May a board censure or expel a problematic member?

North Carolina statutes do not explicitly grant boards the power to discipline their own members, but they do imply such a power.¹ The statutory provision for cities states that a "council may adopt its own rules of procedure, not inconsistent with the city charter, general law, or generally accepted principles of parliamentary procedure."² A similar provision

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1. While there is no North Carolina case law on the subject, the Arizona Supreme Court held that local governing boards cannot censure their members without express statutory authority. *Berry v. Foster*, 883 P.2d 470, 472 (1994). At first glance, it may appear that North Carolina governing boards would be subject to similar limitations. However, a more in-depth analysis reveals an implicit and inherent power of a board to discipline its members.

2. N.C. GEN. STAT. § 160A-71(c) (1999).

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applies to county boards of commissioners.³ Under these statutes, and in the absence of other statutory guidance, it appears that a city council or board of county commissioners could create a procedure that would enable it to censure or expel a member as long as it did not contradict accepted parliamentary procedure. For two reasons, such a procedure would not contradict accepted parliamentary procedure.

First, a governing body's ability to discipline a member has long been a part of parliamentary procedure. Members of the English parliament traditionally could not be "impeached or questioned in any court or place out of parliament" for their speech within parliament, but they could be censured by their parliamentary colleagues.⁴ The American colonies continued this tradition of protecting legislators' official speech from scrutiny in outside courts, and the United States codified this tradition into law with the ratification of the Constitution, which asserted that "for any Speech or Debate in either House, [the representatives and senators] shall not be questioned in any other Place."⁵ The Constitution also adopted the tradition of permitting members to discipline themselves, stating that Congress has the power to "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."⁶ Thus, because North Carolina permits local governing boards to form their own procedures that are not inconsistent with "generally accepted principles of parliamentary procedure," boards have the ability to discipline members.

Second, history shows that local governing boards were traditionally understood to have such disciplinary powers. In his authoritative treatise on municipal corporations, John Dillon affirmatively answered the question of whether a local governing board has the power to expel a member for cause:

The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our municipal corporations as

3. N.C. GEN. STATS. § 153A-42 (1999) ("[The] board of commissioners may adopt its own rules of procedure, in keeping with the size and nature of the board and in the spirit of generally accepted principles of parliamentary procedure.").

4. *Whitener v. McWatters*, 112 F.3d 740, 743 (4th Cir. 1997) (internal citations omitted).

5. *Id.* at 743-44 (quoting U.S. CONST. art. 1, § 6, cl. 1 (emphasis added)).

6. *Id.* at 744 (quoting U.S. CONST. art. 1, § 5, cl. 2).

ordinarily constituted, does possess, in the absence of any express or implied restriction in the charter or other statute, the incidental power, not only to make by-laws, but, *for cause, to expel its members, and, for cause, to remove or provide by ordinance for the removal for just cause of corporate officers, whether elected by it or by the people.*⁷

Indeed, Dillon considered a board's ability to expel a member from the board a necessary and inherent power, especially since a board could not effectively function with a disruptive member and it would be too impractical to require the represented constituents to remove a member.⁸

In the 1883 case of *Ellison v. Alderman of Raleigh*,⁹ the North Carolina Supreme Court accepted the power of a board to remove a member from office for cause through a common-law procedure of amotion.¹⁰ Relying on English common-law and on Dillon's treatise, the Court held that a municipal corporation has a limited power to remove one of its own members for cause after the member has assumed his office.¹¹ The Court reiterated the inherent nature of the power to amove in the 1908 case of *Burke v. Jenkins*,¹² holding that the "power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations."¹³ The Court further noted the impractical nature of the constituency, rather than the council, removing the problematic member, asserting that, while this practice had been somewhat common in past English cases, "in those days the electorate of a town was very small, the franchise being greatly restricted."¹⁴ Thus, history shows that North Carolina long ago accepted a local governing board's ability to remove a member for cause. This ability to remove

7. JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 464 (5th ed. 1911).

8. *Id.* § 465.

9. 89 N.C. 125 (1883).

10. *Id.* at 127; see also David M. Lawrence, *Removing Local Elected Officials from Office in North Carolina*, 16 WAKE FOREST L. REV. 547, 552-58 (1980) for a thorough analysis of amotion.

11. *Ellison*, 89 N.C. at 127 ("[T]here can be no serious doubt of the right of a corporate body to vacate the seat of a corporate officer for adequate causes arising subsequent to taking his seat . . .").

12. 148 N.C. 25 (1908).

13. *Id.* at 27 (quoting JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 240 (4th ed.)).

14. *Id.*

logically includes a board's lesser power to censure a member or expel her from a meeting.

Under what circumstances may a board discipline a member?

While local governing boards may have the power to discipline members, this power is not unlimited. The First Amendment protection of free speech severely limits a board's ability to discipline a member for his speech or conduct. There is no North Carolina precedent on the subject, but circumstances under which a board is permitted to discipline a member are discernible from Supreme Court precedent and case law from other jurisdictions.

In deciding whether it may discipline a member, a board must first determine whether it would be punishing a member solely for the content of her speech at a meeting. Pure speech, which includes speech that is objectionable only for its content, is granted the highest protection under the First Amendment.¹⁵ To restrict pure speech, a board must have a compelling governmental interest and must act in a manner that narrowly advances that interest.¹⁶ The effective functioning of a governing body has been held to be a compelling governmental interest that enables the body to restrict pure speech.¹⁷ For example, a board may require that its members vote by speaking the words "aye" or "no."¹⁸ However, this compelling interest has been interpreted narrowly, severely limiting a board's power to discipline a member for pure speech.¹⁹

A board's ability to discipline a member for the content of his speech that occurs outside of official meetings is also very limited. In *Bond v. Floyd*,²⁰ the Supreme Court held that the Georgia House of Representatives could not exclude Bond, a duly elected member, from assuming his seat in office because of his public statements made in opposition to the United States' involvement in Vietnam.²¹ However, a board

15. *Kucinich v. Forbes*, 432 F. Supp. 1101, 1111 (N.D. Ohio 1977).

16. *Wreski v. City of Madison, Wisconsin*, 558 F. Supp. 664, 667 (W.D. Wis. 1983).

17. *Id.* at 668.

18. *Id.*

19. *See Kucinich*, 432 F. Supp. at 1112 (holding that a council could not expel a member from a meeting for making allegations of impropriety against the council president because there were no factual findings that the member's remarks adversely affected the functioning of the council).

20. 385 U.S. 116 (1966).

21. *Id.* at 137.

has wider discretion if it merely wishes to censure a member, rather than expel him from a meeting.²²

A board has much broader discretion if it disciplines a member for the method of his speech or actions accompanying the speech, as opposed to disciplining him solely for the content of his speech. In the landmark case of *Cox v. Louisiana*,²³ the Supreme Court held that speech "intermingled" with conduct is entitled to less protection than pure speech.²⁴ To restrict "speech plus," which is speech accompanied by a physical action element that is "more than just an unobtrusive means to communicate the idea," a board does not need a compelling governmental interest, but rather must only show that a substantial societal interest will be affected by the speech plus.²⁵

Consequently, a board has the power to expel a member from a meeting who is being disruptive through his conduct accompanying the speech. For example, the *Kucinich* Court found that if council member "Gary Kucinich refused to yield the floor after being instructed to do so by Council President Forbes, or upon yielding the floor had he disrupted debate, for example, by screaming invectives at Forbes, then the Council might have been able to punish him without violating the First Amendment."²⁶

Similarly, the Fourth Circuit held that a board may discipline a member for "speech plus" conduct that occurs outside of meetings. In *Whitener v. McWatters*,²⁷ the Court held that a council appropriately censured a member for using profanity in chastising other members after a meeting.²⁸ The Court explained its decision:

Whitener was disciplined for his lack of decorum, not for expressing his view on policy. We cannot conclude that the Loudon County Board of Supervisors was without power to regulate uncivil behavior, even though it did not occur during an

22. *See, e.g. Phelan v. Laramie County Community College Bd. of Trs.*, 235 F.3d 1243 (10th Cir. 2000) (holding that a board did not violate the First Amendment by censuring a member for placing an advertisement in a local newspaper urging voters to oppose a measure that the board unanimously approved).

23. 379 U.S. 559 (1965).

24. *Id.* at 564 ("the fact that free speech is intermingled with [protesting in a demonstration] does not bring with it constitutional protection").

25. *Kucinich*, 432 F. Supp. at 1111.

26. *Id.* at 1114 n.18.

27. 112 F.3d 740 (4th Cir. 1997).

28. *Id.* at 745.

official meeting. Such abusiveness, even when it occurs "behind the scenes," can threaten the deliberative process.²⁹

Thus, a board may discipline a member for the content of his speech if it has a compelling interest, and it may discipline a member for speech plus if it has a substantial interest.

What procedures must a board follow when censuring or expelling a member?

Whenever a liberty or property interest is infringed upon, the Constitution requires that due process be followed. When a board chooses to expel a member from a meeting for cause, the member does not lose a property interest since North Carolina does not recognize property rights in elected positions,³⁰ but he does lose his right to speak as a duly elected board member. Thus, the member is losing a liberty interest in freedom of speech, so due process is implicated. Due process requires that a person be given notice of the loss of his liberty interest and that he have an opportunity to make arguments on his own behalf.³¹ However, this may be done very informally.³² For instance, a board may meet the requirements of due process by warning a disruptive member that he will be expelled from the meeting if he does not cease his disruptive behavior and by giving him a brief opportunity to argue on his own behalf before the board votes to expel him.³³

Assessing the due process implications of censuring a board member is a more difficult task because a member's right to participate and speak freely in meetings may not be affected by the censure. A member, however, may have a liberty interest in reputational harm by being censured. The Supreme Court held that when "a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."³⁴ The Court

29. *Id.*

30. *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903).

31. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

32. *See id.* at 582 (holding that before suspending a student from a public school the disciplinarian must inform the student of the reasons for his suspension and give him an informal opportunity to explain his version of the incident).

33. *See id.*

34. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

once held that a professor whose contract was not renewed by a public university may have been entitled to due process if he had shown that the university's act had damaged his reputation.³⁵ However, the Court subsequently held that reputational harm itself is not a liberty interest that guarantees due process.³⁶ This principle has been applied in a school board censuring case to find that the stigma suffered from the censure was insufficient to entitle the member to due process.³⁷ However, stigma plus another injury or harm to a person's professional reputation as well as personal reputation may be sufficient to warrant due process.³⁸ Thus, although due process may not always be warranted when censuring a board member, to be prudent a board should provide the member with notice of the censure and an opportunity to make arguments on his own behalf.

In addition to procedural due process, there may be substantive due process implications when a member is deprived of a liberty interest. While a board may use the correct procedures to discipline a member, it may still violate due process if it acts for an inappropriate reason. Substantive due process does not protect individuals from all infringements upon liberty interests, but it does prohibit abuses of governmental power that are motivated by oppressive purposes, that shock the conscience, or that are insufficiently linked to a legitimate governmental interest.³⁹ For example, a board may violate substantive due process if it disciplines a member for vindictive purposes.⁴⁰ So in addition to following the correct procedures mandated by due process, a board must refrain from using its disciplinary powers for inappropriate reasons.

Conclusion

While North Carolina law does not explicitly grant local governing boards the ability to discipline members for cause, such an inherent and necessary power is implied by statute and case law. A board may

35. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

36. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

37. *LaFlamme v. Essex Junction Sch. Dist.*, 750 A.2d 993, 999 (2000).

38. *See, e.g. Little v. City of North Miami*, 805 F.2d 962, 969 (11th Cir. 1986); *Marrero v. City of Hialeah*, 625 F.2d 499, 515-16 (5th Cir. 1980).

39. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 943 (1988).

40. *See Ciechon v. Chicago*, 686 F.2d 511, 517 (7th Cir. 1982).

expel or censure a member for the content of his speech if the board has a compelling governmental interest and acts in a manner narrowly tailored to advance that interest. It should be noted, however, that a board acts with its power at its lowest ebb when it disciplines a member for pure speech, since free speech merits special protection from the First Amendment. A board has broader powers to discipline a member where the member's speech is combined with some form of objectionable conduct. To discipline for such "speech plus" a board needs only a substantial interest rather than a compelling interest.

In any instance of discipline, a board must follow procedures warranted by due process, which require that a board informally give the member notice and an opportunity to argue on his own behalf before he is disciplined. The board must also follow the mandates of substantive due process by refraining from using its disciplinary powers in a vindictive, oppressive, or otherwise inappropriate manner. If a board follows these guidelines, it may ensure its ability to function by exercising its inherent power to discipline problematic members for cause.

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