

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

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IN REPLY REFER TO:

August 13, 1999

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OPINION OF THE CORPORATION COUNSEL

SUBJECT: What Authority, if any, Does the D.C. Board of Education Have to Remove a Sitting President? Assuming the Board Has Authority, What Process Must Be Followed to Effect the Removal?

All Members of the D.C. Board of Education
825 North Capital Street, N.E.
Washington, D.C. 20002

Dear Members of the Board of Education:

This is in follow-up to the August 2, 1999, memorandum from me to you advising that this Office would prepare a formal opinion on the above-noted subjects. This responds to the July 28, 1999, memorandum from Ms. Wilma Harvey, the putatively dismissed President, requesting a formal opinion concerning this issue and to the oral and written requests from other Board Members for written advice on this matter. It has also been reported in the newspapers that this Office has formed a view on the issue of the lawfulness of Ms. Harvey's removal. In addition, it appears resolution of the issue may be of considerable importance to this and future Boards. Therefore, this Office has decided to issue a formal opinion¹ and to distribute it to all Members of the Board.

¹In an August 4, 1999, memorandum to me, Board Member Don Reeves inquired as to the weight to be given a formal opinion from this Office. In response, I refer him to Part II of Reorganization Order No. 50 (June 26, 1953), D.C. Code Title 1 App. at 180 (1973) which states the following regarding formal opinions of this Office: "Such opinions, in the absence of specific action by the Board of Commissioners [now the Mayor and the Council] to the contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all District officers and employees in the performance of their official duties."

BACKGROUND

On July 22, 1999, the Board voted, six to five, to remove Ms. Harvey as its President. This Office is aware of no specific delineation of formal charges that any member of the Board brought against Ms. Harvey before the July 22, 1999, meeting. Indeed, the first formal allegation of wrongdoing on Ms. Harvey's part, of which we are aware, occurred at the July 22, 1999, meeting itself. See, Transcript of the Sixteenth (Special) Meeting of the D.C. Board of Education, July 22, 1999, pgs.13-15. Thus, we assume for purposes of this opinion that Ms. Harvey had no advance written notice of the charges levied against her and, consequently, that she lacked a full opportunity to prepare and to present a formal response to these charges at the July 22, 1999, meeting.

ANALYSIS

The Legislative History of the Enabling Law and the Board Rules

In 1906, Congress exercised its plenary power to create the Board of Education by enacting the 1906 Act to Fix and Regulate the Salaries of School Officers and Other Employees of the Board of Education, approved June 20, 1906, Pub. L. No. 254, 34 Stat. 316, ch. 3446, §2 (1906 Act). In 1968, Congress amended the 1906 Act by enacting the District of Columbia Elected Board of Education Act, approved April 22, 1968, Pub. L. No. 90-292, 82 Stat. 101, 102 (Elected Board Act), now codified at D.C. Code § 31-101 (e) (1998 Replacement Volume).

The Elected Board Act amended section 2 of the 1906 Act by, among other things, inserting a Section 2 (e) as follows:

The Board of Education shall select a President from among its members at the first meeting of the Board of Education held on or after the date (prescribed in paragraph (3) of subsection (b) of this section³) on which members are to take office after each general election. ...

Consistent with the language of the enabling legislation, Board Rules 101.1 and 101.2 (5 DCMR §§ 101.1 and 101.2 (1997)) provide:

101.1 The Board of Education shall annually elect from among its members a President and Vice President who shall serve

³ Paragraph (3) of subsection (b) states: "The term of office of a member of the Board of Education elected at a general election shall begin at noon on the fourth Monday in January next following such election. A member may serve more than one term."

until their successors are elected in accordance with this section. (Emphasis added).

101.2 The annual election of the President and Vice President of the Board shall be the first order of business conducted at the first regular or special meeting held after those members elected in a general election take office in accordance with D.C. Code § 31-101(c), or at the first meeting held after the regular meeting in December in a year when no positions on the Board are filled in the general election. (Emphasis added).

However, these Rules do not, either explicitly or implicitly, provide guidance regarding whether and how the Board may remove a sitting President or Vice-President during the term for which they were elected. Nor does the legislative history of the Elected Board Act shed light on the question of whether a sitting President may be removed as President -- while nevertheless remaining a member of the Board -- prior to the conclusion of the term for which he or she was elected.⁴

On the other hand, sections 116.1 and 116.15 of the Board Rules concerning the removal of the student member are instructive concerning whether the Rules contemplate the removal of the Board President and Vice-President before the end of their full terms. Sections 116.1 and 116.15 provide, in pertinent part:

116.1 There shall be elected on an annual basis pursuant to §§ 166.2 and 166.3, for a term of office to commence as of the conclusion of the Stated Board Meeting in June, a Student Member of the Board of Education.

116.15 The Board of Education, by vote of a majority of the full membership of the Board taken in public session, after providing notice and an opportunity for a hearing, may remove a Student Member from office, prior to the expiration of his or her term for any of the following reasons:

- (a) Failure to maintain eligibility in accordance with §116.2;
- (b) Misconduct in office; or
- (c) Willful neglect of duty.

⁴ Of course, District law does provide for removal of a sitting board member, whether or not that person is currently serving as President, by the general electorate through the recall process. D.C. law 2-46, 24 DCR 199 (July 8, 1977), now codified at D.C. Code §1-291 et seq. (1999 Replacement Volume).

Based on these sections, it might be argued that the specific provision for the removal of the student member in section 116 and the silence with respect to the removal of the President or Vice-President in section 101 lends credence to the proposition that the framers of the Board Rules intended for the President and Vice-President to serve their full terms without removal. However, sections 116.1 and 116.15 concerning the removal of the student member, while instructive, are not dispositive of the issues before us as they were created for a different purpose. Unlike the removal of the Board President, the removal of the student member would be a removal from the Board entirely. As previously discussed, there is already a statutory mechanism (the recall) covering the comparable removal of an elected member of the Board; thus, the Board Rules did not need to address such a removal. Further, given the rule of construction cited in Robert's Rules (see below), section 116.15 of the Board Rules was necessary to avoid an absolute right of a student member to serve "for a term of office", whereas nothing like section 116.15 was necessary for the Board President, given the language in section 101.1 of the Board Rules, providing that the President and Vice-President "shall serve until their successors are elected."

It is evident, then, that the controlling statute and the Board Rules cited above are not dispositive concerning this issue. Therefore, given the lack of relevant guidance in the statutory and regulatory provisions that deal with election actions by the Board, we necessarily look to Board Rule 108.1, which states that, "[d]ebate and proceedings of the meetings of the Board of Education and its committees shall be governed by the provisions of Roberts Rules of Order, Newly Revised, except as provided otherwise by the Board Rules". (Emphasis added). The question which must be asked, however, is what is meant by the term, "debate and proceedings." Does the term encompass only procedural issues, or was it intended to address substantive issues of authority? Section 42 of Robert's Rules⁵ provides the following explanation of "debate":

Debate, rightly understood, is an essential element in the making of rational decisions of consequence by intelligent people. In a deliberative assembly, this term applies to discussion on the merits of a pending question - that is, whether the proposal under consideration should, or should not, be agreed to.

While no definition is provided for the word "proceedings", Robert's Rules does contain the following language regarding the importance of the bylaws of a society with respect to its proceedings:

Except for the corporate charter in an incorporated society, the bylaws ... comprise the highest body of rules in societies as normally established today. Such an instrument supersedes all other rules of the society, except the corporate charter, if there is one. ...

⁵ Henry M. Robert III, William J. Evans, Robert's Rules of Order Newly Revised (9th Ed. 1981).

The bylaws, by their nature, necessarily contain whatever limitations are placed on the powers of the assembly of a society... with respect to the society as a whole. Similarly, the provisions of the bylaws have direct bearing on the rights of members within the organization - whether present or absent from the assembly. (Emphasis added.)

"Proceeding" may be defined as an action done by the authority or direction of an agency for the regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.⁶ The method, or means, by which one would remove a sitting President certainly falls within the definition of "proceeding". Further, during any removal process there would necessarily be deliberations and discussions on the merits of the question before the Board (previously defined as "debate"). Therefore, as Board Rule 108.1 requires debate and proceedings of the Board to be governed by Robert's Rules (unless provided otherwise in the Board Rules) and as there is no Board Rule provision for the removal of a sitting President, Robert's Rules should be applied to such a removal. The fact that Robert's Rules do in fact squarely address the removal of officers confirms the appropriateness of their application. Accordingly, we must look to Robert's Rules for further guidance.

Section 60 thereof, which is the only section pertaining to the removal of officers, provides, in pertinent part:

Except as the bylaws may provide otherwise, any regularly elected officer of a permanent society can be deposed from office for cause - that is, misconduct or neglect of duty in office - as follows:

If the bylaws provide that officers shall serve "for ___ years or until their successors are elected," the election of the officer in question can be rescinded and a successor can thereafter be elected for the remainder of the term. ...

If however, the bylaws provide that officers shall serve only a fixed term, such as "for two years" ... or if they provide that officers shall serve "for ___ years and until their successors are elected," an officer can be deposed from office only by following the procedures for dealing with offenses by members outside a meeting; that is, an investigating committee must be appointed, it must prefer charges, and a formal trial must be held. (Emphasis added).

Under the rule of statutory construction known as "expressio unius est exclusio alterius" (which means that the express provision of one thing should be understood as

⁶ Henry Campbell Black, Black's Law Dictionary (5th ed. 1979).

the exclusion of other related things), courts have recognized that except where there is some strong indication of a contrary legislative intent,

[w]here a form of conduct, the manner of its performance and operation and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. 'When what is expressed in a statute⁷ is creative, and not in a proceeding according to the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provision, that mode must be followed and none other, and such parties only may act.' The method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive.

See 2A Sutherland Statutory Construction, §47.23, pp. 216-217 (5th ed. 1992) citing, *inter alia*, National Rifle Association v. Potter, 628 F. Supp. 903, 909 (D.D.C. 1986) and McCray v. McGee, 504 A.2d 1128, 1130 (D.C. App. 1986). Here, given the fact that Robert's Rules expressly provides only one process for the removal of a President whose term is defined, any other process for such removal should be presumed to be excluded and to result in unauthorized, and thus void, actions.

In summary, assuming -- as I do-- that Robert's Rules are applicable, the removal of an elected officer of the Board could not occur except "for cause." Furthermore, under Robert's Rules, even if cause exists, the removal of an officer must be accompanied by the appropriate procedural due process. Here, under the specified process, the President of the Board could be removed from office only following the appointment of an investigating committee, the placing of charges, and a formal trial resulting in a decision to effect the removal.

OTHER FACTORS RELATING TO DUE PROCESS

We would arrive at the same conclusion regarding the removal of the Board President even in the absence of the reference to Robert's Rules in the Board Rules, as a matter of common law and Fifth Amendment procedural due process rights. The general proposition for addressing removal questions with respect to public officers is set forth in 43 Am. Jur. Public Officers, §§ 183 and 184 (1960):

When the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provision, the general rule is that the power of removal is incident to the power to appoint.

⁷ In addition to statutes, this maxim of interpretation has been applied to numerous types of legal instruments including constitutions, treaties, wills, contracts and leases. Thus, its application to the Board Rules, which are municipal regulations, is appropriate. Sutherland, supra, §47.24, p. 228.

Inasmuch as the tenure has not been declared by law, the office is held during the pleasure of the authority making the appointment, and no formal charges or hearings are required in the absence of some statute on the subject. ...

But the power of removal is not incident to the power of appointment where the extent of the term of office is fixed by statute. In the absence of any provision for summary removal, appointments to continue for life or during good behavior -- which in contemplation of law is for a fixed term -- or for a fixed term of years cannot be terminated except for cause. It is the fixity of the term that destroys the power of removal at pleasure. For the purposes of this rule, the term of persons appointed to fill vacancies in office is considered definite when it is provided that they shall hold until the next general election and the qualification of their successors. (Emphasis added).

Therefore, as the President's office is for an annual term, removal therefrom can, under common law, be accomplished only for cause. Furthermore, public officers or employees who can be removed for cause only are deemed to be entitled to definite charges justifying the action against them, legal notice, a reasonable opportunity to be heard, and a finding or judgment. 4 McQuillin Municipal Corporations §12.230.10, pg. 347 (3rd ed. revised 1996). Members of boards of education are generally treated no differently than other public officials in this regard. McQuillin, supra, §12.230.10, pg. 232. Consequently, the common law supports my conclusion that the President of the D.C. Board of Education cannot be removed without adequate procedural due process.

To bring into play procedural due process under the Fifth Amendment -- which applies to the District and provides the same procedural protections as the Fourteenth Amendment provides to state and municipal employees -- a municipal employee must have a property interest in a particular government position that is grounded in an independent source, such as state law, an employment contract (either express or implied), or common practices which create an expectancy of continued employment in the position. Cleveland Board of Education v. Loudermill, 470 U. S. 532 (1984); Bishop v. W. H. Wood, 426 U.S. 341 (1976); Board of Regents of State Colleges v. Roth, 408 U. S. 564 (1972); Dodge v. Board of Education of Chicago, 302 U. S. 74 (1937). See also, McQuillin, supra, §12.299.10, pg. 356.⁸

⁸ Guidance concerning Fifth Amendment due process rights based on vested property interests is found in Roth, supra. There, the plaintiff was hired as an assistant professor at a university for a fixed term of one academic year. After completing that term, the plaintiff was informed that he would not be rehired for another term. The Court stated that under Wisconsin state law, a tenured teacher could be dismissed only for cause upon
(continued...)

Here, a property interest might be created in the term of office as President of the D.C. Board of Education through: (1) a Board Member's election as President for a term as provided by the governing statute and Board Rules, (2) an implied contract or practice (such as the apparent fact that most, if not all, previous Board Presidents have been permitted to finish their term), (3) the President's exercise of more control than other Board members over the operation and agenda of the Board, and (4) other benefits of the office of President. In this case, not only did Ms. Harvey enjoy the power and prestige incident to the office of President, but she also enjoyed a modest additional stipend for her services. See section 1110 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, D.C. Code 1-612.10 (1999 Replacement Volume) (which provides for an annual salary of \$16,000 for the Board President compared to a salary of \$15,000 annually for the other Board members). Accordingly, it appears that Ms. Harvey had a constitutionally-cognizable property interest in her position as President of the Board, which provides additional support -- based on the procedural due process requirements of the Fifth Amendment -- for my conclusion that she lawfully could not be removed as President without reasonable advance notice of the charges against her and a formal trial on such charges.

If you have any questions concerning this opinion, please do not hesitate to call me at 724-1520 or Wayne Witkowski of my staff at 724-5524.

Sincerely,



Robert R. Rigsby
Interim Corporation Counsel

written charges and pursuant to established procedures. On the other hand, a non-tenured teacher, such as Roth, had no right to reemployment after the conclusion of his term and thus no entitlement to the procedural protections provided by the Fourteenth Amendment to the Constitution. The Court noted, however, that the controlling regulations provided for a non-tenured teacher to have some opportunity for review of a dismissal which occurred before the expiration of the specified teaching term and suggested that any failure to provide such a review would violate the Fourteenth Amendment. 408 U.S. at 567. In addition, citing Perry v. Sinderman, 408 U. S. 593 (1972), the Court in Wood, supra, noted that property interests in employment can be created by ordinance or by an implied contract. In Perry, the Court held that the absence of a contractual or tenure right to re-employment, taken alone, does not defeat a claim of entitlement to procedural due process and that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke a hearing." 426 U.S. at 596, 601.

cc: Anthony A. Williams
Mayor

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