

SOCIAL SERVICES

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THE COUNTY BOARD OF SOCIAL SERVICES (PART III): APPOINTMENT, TERMS, TERM LIMITS, AND REMOVAL FROM OFFICE

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For more than eighty years, county boards of social services have played an important role in the governance and administration of social services in North Carolina.

This is the third in a series of *Social Services Bulletins* describing the structure and role of county social services boards in North Carolina.¹ *Social Services Bulletin No. 32* (June 2001) summarized the history of county social services boards in North Carolina; discussed the legal status of county social services boards; described the size, composition, and structure of these boards; and described two alternative models of social services governance used by North Carolina's two most-populous counties (Mecklenburg and Wake). *Social Services Bulletin No. 33* (January 2002) discussed the legal qualifications for appointment to the county social services board; examined some of the factors that might disqualify a person from serving as a social services board member; and identified some of the other factors that might be considered in deciding whether to appoint someone to the social services board.

This *Social Services Bulletin* is written primarily for county social services directors; current and prospective social services board members; county social services attorneys; and public officials (county commissioners, Social Services Commission members, and senior resident superior court judges) who are responsible for appointing county social services board members. This bulletin

1. summarizes the legal authority and procedures for appointing county social services board members;
2. discusses the terms of office and term limits that apply to county social services board members; and
3. examines the legal basis and procedures by which social services board members may be removed from office during their terms.²

Subsequent *Social Services Bulletins* in this series will examine—

- the social services board's role, powers, and duties;
- rules of procedure for social services board meetings; and
- the potential legal liability of the county social services board and its members.

Appointment

Legal Authority to Appoint Board Members

Under state law, members of a county social services board are appointed to office by

- the board of county commissioners;³
- the state Social Services Commission;⁴ and
- the other members of the county social services board (or by the county's senior resident superior court judge).⁵

Collectively, these public agencies and officials are referred to as the "appointing authorities" for social services board members.⁶

Legal authority to appoint members of the county social services board is divided among these three appointing authorities so that no single appointing authority has the ability to appoint a majority of the members of a county social services board.⁷

In counties that have three-member boards of social services, the board of county commissioners appoints *one* member of the county social services board, the state Social Services Commission appoints *one* board member, and the *third* member is appointed by the other two social services board members (or by the senior resident superior court judge if the other two social services board members cannot agree with respect to the appointment of the third member).⁸

About ninety of North Carolina's one hundred counties, however, have five-member boards of social services.⁹ In these counties, the board of county commissioners and the state Social Services Commission each appoint *two* members of the social services board and the *fifth* member is appointed by a majority of the other four board members (or by the senior resident superior court judge if a majority of the other four social services board members cannot agree with respect to the appointment of the fifth member).¹⁰

The legal authority of the Social Services Commission and boards of county commissioners to appoint county social services board members is *exclusive* and *non-delegable*. This means that they are the only public agencies that may exercise their legal authority to appoint social services board members and their authority may not be usurped by, or delegated to, other public agencies or officials. The appointment authority of the "other" social services board members is *primary* and *non-delegable*. They are primarily responsible for appointing the third or fifth social services board member and may not delegate that authority to another public agency or official. The appointment authority of senior resident superior court judges is *non-delegable* and *contingent*. They may appoint the third or fifth social services board member only if a majority of the other social services

board members are unable to agree with respect to the appointment.

Each appointing authority is responsible for exercising its own sound discretion and independent judgment in appointing qualified individuals to the social services board.¹¹

Appointments to Fill Vacancies on the Board

The legal authority to make an appointment to fill a vacancy on the social services board caused by the death, resignation, or removal of a social services board member before the end of her term is identical to the authority (discussed above) to make "regular" appointments to the board.¹²

For example, if a social services board member who was appointed by the Social Services Commission dies before the end of his term, the state Social Services Commission has the sole legal authority and responsibility to appoint a new board member to serve the remainder of the former board member's term. Similarly, if a social services board member who was appointed by the board of county commissioners resigns from the social services board before the end of her term, the vacancy may be filled only through an appointment by the board of county commissioners. Likewise, vacancies resulting from the death, resignation, or removal of the "third" or "fifth" social services board member are filled by the other board members.¹³

Appointments by the County Commissioners

Boards of county commissioners often appoint an incumbent county commissioner to serve as one of the commissioners' appointees to the social services board. State law, however, does not *require* that a county commissioner serve on the county's social services board.¹⁴ Instead, state law provides that a social services board member appointed by the board of county commissioners "may be a county commissioner or a citizen selected by the board."¹⁵ When a board of county commissioners chooses to appoint an incumbent county commissioner to the county's social services board, the appointment is presumed to be an *ex officio* appointment.¹⁶ But the fact that a county commissioner serves as an *ex officio* appointee to the social services board does *not* affect (a) the commissioner's legal authority as a county commissioner or as a social services board member, or (b) the commissioner's term as a social services board member.¹⁷ Instead, the primary consequence of an *ex officio* appointment of a county commissioner to the social services board is to bring the appointment within an exception to the state's restrictions regarding multiple office holding.¹⁸

Legal Procedures Governing Appointment

State law says almost nothing with respect to the procedures for recruiting or nominating county social services board members.¹⁹ Each appointing authority, therefore, is free to develop its own procedures and policies regarding the recruitment and nomination of social services board members.²⁰ At a minimum, however, an appointing authority's procedures regarding the recruitment and nomination of social services board members should

- be in writing; have been validly adopted by the appointing authority; and be publicly accessible;
- indicate the means through which potential nominees will be identified and recruited, and the procedures and time-frames for making and accepting nominations;
- allow sufficient time for soliciting nominations, recruiting nominees, and considering nominations;
- specify the qualifications for appointment and identify what is expected of appointees; and
- ensure that all potential appointees are qualified; are able and willing to serve if appointed; and understand the role and responsibilities of county social services board members.²¹

State law, however, does impose some limits with respect to the legal procedures that appointing authorities must follow in considering nominations and making appointments to the county social services board.

Official Action: Meeting, Quorum, Majority Vote, Resolution, and Minutes

When the Social Services Commission, boards of county commissioners, and county social services boards exercise their legal authority with respect to social services board appointments they must do so through the adoption, by majority vote, of a motion or resolution at an official meeting at which a quorum is present. Adoption of the resolution appointing a social services board member should be properly recorded in the minutes of the appointing authority.

In the case of the Social Services Commission, state law defines a quorum as a majority of the commission's members.²² In the case of boards of county commissioners, state law defines a quorum as a majority of a board's membership without regard to vacancies.²³

State law does not expressly address the question of what constitutes a quorum of a county social services board. In the absence of a controlling state statute, a

quorum should be three members in the case of a five-member board (or two members in the case of a two-member) unless a high quorum is required under local rules of procedure adopted by the board.

Appointment of the third or fifth social services board member, however, requires a majority vote of the other (two or four) social services board members rather than a majority vote of the social services board members who constitute a quorum.²⁴ An incumbent third or fifth social services board member is *not* entitled to vote with respect to his or her reappointment or with respect to the selection of his or her successor (even if the other board members are deadlocked with respect to the appointment).²⁵

State law, therefore, effectively requires the *unanimous* vote of *both* of the other social services board members (without regard to vacancies) for the appointment of the third member of a three-member board, and an affirmative vote of *at least three* of the other four board members (without regard to vacancies) for the appointment of the fifth member of a five-member board.²⁶

In order to vote with respect to the appointment of the third or fifth board member, a social services board member must be present at the meeting at which the vote is taken; proxy or absentee voting is *not* allowed.²⁷

Open Meetings Law

The Social Services Commission, boards of county commissioners, and county social services boards are subject to North Carolina's Open Meetings Law, and must comply with the Open Meetings Law's requirements when considering nominations and making appointments to the county social services board.²⁸

The Open Meetings Law requires

1. that a public body's consideration of the qualifications, competence, fitness, or appointment of a member of that body or a member of another public body be conducted during an open session at an official, public meeting of the public body; and
2. that final action regarding the appointment of a public official by a public body having final authority for appointment of that official be taken in an open session of an official, public meeting of the public body.²⁹

What this means is that *all discussions and actions* by the Social Services Commission, boards of county commissioners, and county social services boards with respect to the appointment of county social services board members must take place in an *open session* of an official, public meeting of the appointing authority. Social services appointments

may *not* be considered or made during a *closed session*.

The Open Meetings Law also prohibits the appointment of social services board members by “secret ballot.”³⁰ Instead, each member of the appointing authority who votes with respect to a social services appointment must do so by voice vote, show of hands, or signed ballot (and if signed ballots are used each member’s vote must be publicly announced when the ballots are counted).

Appointments by the Senior Resident Superior Court Judge

As noted above, state law requires the senior resident superior court judge for a county to appoint the third or fifth member of the county social services board if a majority of the other board members are unable to agree on the appointment.³¹ State law, however, does not specify the procedure that must be followed in this situation. Given the absence of a controlling statute, county social services boards should consider adopting a local policy governing the procedures that will be followed when the other board members are deadlocked and must ask the senior resident superior court judge to appoint the third or fifth member.³²

Because the judge’s appointment of the third or fifth member is an administrative, rather than judicial, act and because the judge’s decision is not subject to the Open Meetings Law’s requirements, the judge is *not* required to hold a public hearing or meeting with respect to the appointment, make findings of fact, explain the basis for his or her decision, or make the appointment by entering a formal order of court. The judge’s decision, however, should be documented in writing, communicated to the county social services board, and recorded in the board’s minutes.

Once the judge makes a decision with respect to the appointment, the judge’s decision is final and binding on the social services board and cannot be “undone” by the social services board even if all of the board members subsequently agree to appoint someone other than the person appointed by the judge.

Authority to Revoke an Appointment

Once an appointing authority takes legal action making a valid appointment to the county social services board, the appointing authority’s action is final and binding, and the appointing authority may *not* subsequently revoke or rescind the appointment.³³

Oath of Office

As public officers, members of county social services boards are required to take an oath in which they swear or affirm that they will faithfully discharge the duties of their office and will support and maintain the constitutions and laws of the United States and of North Carolina.³⁴

Although newly-appointed social services board members often take their oaths of office at the first social services board meeting following the beginning of their terms, the oath may be taken at any time between the date a member is appointed and the date he assumes office after the beginning of his term.

The oath of office may be administered anywhere within the state by a judge, a magistrate, a clerk of superior court, a state legislator, a county or city clerk, a mayor, a chair of a board of county commissioners, a notary public, or other specified public officials.³⁵ A written copy of the oath subscribed by a newly-appointed social services board member must be filed with the clerk of the board of county commissioners.³⁶

A person who assumes office as a social services board member without taking the required oath of office is subject to a fine of \$500 and may be removed from office.³⁷ Failure to take an oath of office, however, does not affect the validity of a social services board member’s appointment or the actions she takes as a social services board member.

Term of Office

The “regular” term of office for all persons appointed to the county social services board is three years.³⁸

The regular terms of county social services board members are staggered on a three-year cycle.

In counties with three-member social services boards, the Social Services Commission will appoint one member in 2002 (and every third year thereafter), the other social services board members (or senior resident superior court judge) will appoint one member in 2003 (and every third year thereafter), and the board of county commissioners will appoint one member in 2004 (and every third year thereafter).³⁹

In counties with five-member boards, the Social Services Commission and board of county commissioners will each appoint one member in 2002 (and every third year thereafter), the other social services board members (or senior resident superior court judge) will appoint one member in 2003 (and every third year thereafter), and the Social Services Commission and board of county commissioners will each appoint one member in 2004 (and every third year thereafter).⁴⁰

Regular terms of county social services board members begin on July 1 (or on the date of appointment if the appointment is made after July 1).⁴¹

Regular terms of social services board members generally end on June 30 of the third year following their appointment.⁴² If, however, the appropriate appointing authority fails to make an appointment to the social services board prior to the end of a social services board member's term (or if a newly-appointed social services board member has not assumed office as of July 1), the incumbent board member continues to hold office as a social services board member after June 30 and until a successor is appointed and assumes office.⁴³

Terms of Ex Officio Appointees

When the board of county commissioners appoints a county commissioner to serve on the county's social services board, the appointment is usually considered (at least for purposes of North Carolina's multiple office holding law) to be an ex officio appointment.⁴⁴

The term *ex officio* means "by virtue of one's office." When a person who holds Office A is appointed to Office B solely by virtue of the fact that she holds Office A, her appointment to Office B is an ex officio appointment. A person who holds an office ex officio does so without any warrant or appointment other than that resulting from the holding of another particular office, and performs the duties of the ex officio office as part of her responsibilities with respect to the office by virtue of which the appointment was made.⁴⁵

If the county commissioners' appointment of a county commissioner to the social services board is really an ex officio appointment in the traditional sense of the term noted above, the appointed commissioner's term on the social services board would be concurrent with her term as a county commissioner. So if this is the case, a county commissioner who is appointed ex officio to serve on the county social services board would continue to serve as a social services board member, without reappointment, as long as she continues to be a county commissioner, and, conversely, her term on the social services board would end immediately and without any action by the appointing authority as soon as she ceases to hold office as a county commissioner.⁴⁶

This, however, does not appear to be the case.

Instead, the regular term of a county commissioner who is appointed to serve on the social services board is three years (as are the regular terms of other social services board members) regardless of whether the commissioner's appointment to the social services board is considered ex officio.

This means that the term of a county commissioner who is appointed to the social services board is *not* concurrent with his term as a county commissioner, and her term on the social services board is unaffected by his continuation or termination in office as a county commissioner. For example, if Mr. White is elected to a two-year term as a county commissioner in 2000 and the board of county commissioners appoints him to a regular (as opposed to unexpired) term on the social services board beginning July 1, 2001, his term on the social services board continues until June 30, 2004, regardless of whether he is reelected as a county commissioner in the 2002 election.

There are at least two reasons why this is so.⁴⁷ First, the appointment by the board of county commissioners of a particular county commissioner to the social services board is *not* an ex officio appointment in the narrow and traditional sense of that term. Second, the North Carolina Supreme Court has held that state law expressly and unambiguously provides a three-year term for *all* county social services board members, including county commissioners who are appointed to serve on the social services board.⁴⁸

Unexpired Terms

When a person is appointed to fill a vacancy on the social services board resulting from the death, resignation, or removal of a social services board member before the end of the former board member's term, the newly-appointed board member's appointment is for the remainder of the former board member's term.⁴⁹

The term of a social services board member who is appointed to fill an unexpired term on the social services board begins on the date of his or her appointment or the date of the vacancy, whichever is later.

When a social services board member is appointed to fill a vacancy resulting from the death, resignation, or removal of a former board member during the former member's term, the newly-appointed board member's term ends on June 30 of the year in which the former board member's term would have ended.

For example, if Ms. White is appointed to the social services board for a term ending June 30, 2004, and resigns from the board effective June 5, 2002, and Mr. Black is appointed to fill the vacancy on June 15, 2002, Mr. Black's term on the social services board begins June 15, 2002, and ends June 30, 2004.

As discussed below, when a social services board member is appointed to serve an unexpired term following the death, resignation, or removal of a former board member, the unexpired term does not count as a term in determining the number of

consecutive terms she may serve on the social services board.

Term Limits

State law limits the number of consecutive terms that a county social services board may serve.⁵⁰

In general, a person may not serve more than *two* consecutive three-year terms on the county social services board.⁵¹

The two consecutive term limit applies regardless of whether the current appointment is made by an appointing authority other than the one that made the initial appointment. For example, if Ms. Greene was appointed to the social services board by the Social Services Commission for a three-year term beginning July 1, 1996, and was reappointed by the commission for a second three-year term beginning July 1, 1999, neither the commission nor the county commissioners may appoint her to the board for a third three-year term beginning July 1, 2002.

As noted above, the two consecutive term limit applies only with respect to appointments to serve *consecutive three-year terms* on the social services board. When a social services board member is appointed to serve the remainder an unexpired term of a former board member, the unexpired term is *not* counted in applying the two consecutive term limit.⁵² For example, if Ms. Black was appointed on September 1, 1997 to fill a vacancy resulting from the resignation of Mr. White (whose term would have expired on June 30, 1999) and was reappointed to the board for a regular three-year term on July 1, 1999, she may be reappointed for a three-year term on July 1, 2002 (her second, consecutive three-year term), but may not be reappointed for a third three-year term beginning July 1, 2005.⁵³

Term Limits of County Commissioners Who Serve on the Social Services Board

The term limit imposed by G.S. 108A-4 does not apply to some county commissioners who serve as social services board members. State law provides that the two consecutive term limit does not apply to the reappointment of a social services board member who

1. was a county commissioner at any time during his first two consecutive terms on the social services board;⁵⁴ *and*
2. is a county commissioner at the time he is reappointed to the social services board.⁵⁵

As long as a social services board member continues to meet *both* of these conditions, there is *no limit* on the number of consecutive terms he or she may serve. For example, if Mr. Black was appointed to the social services board in 1997, was reappointed to the social services board in 2000, and was elected (for the first time) as a county commissioner in 2001, he may be reappointed to a third consecutive three-year term on the social services board in 2003 *if* he is still a county commissioner at that time, and may be reappointed for additional three-year terms in 2006 and 2009 *if* he is still a county commissioner when he is reappointed to the board. On the other hand, if Mr. Black has already served two or more consecutive terms under this exception and is not reelected (or resigns or chooses not to run for election) as a county commissioner, he may complete his current term on the social services board but may not be reappointed to another consecutive three-year term on the social services board if he is not a county commissioner.

Resignation

North Carolina law does not expressly address issues regarding the resignation of county social services board members.

In the absence of any express legal provisions governing resignation from the county social services board, a county social services board member has a legal right to resign from the board if she chooses to do so.

Although a social services board member may be asked by the board, public officials, the media, or others to resign, she cannot be forced to resign. A board member, however, *should* resign if she is unable to fulfill her duties as a social services board member, if there is a significant and irreconcilable conflict between her personal, family, or business interests and her official duties, or if her continued service on the board is not in the public interest.

A social services board member who decides to resign should give notice of her resignation to the appropriate appointing authority (that is, the authority that will be responsible for filling the vacancy). Although a verbal resignation may be legally effective, resignations by social services board members should be submitted in writing and noted in the appointing authority's minutes or files.

Formal acceptance of a resignation by the appointing authority is not required. Once a social services board member submits her resignation, she may not withdraw the resignation without the appointing authority's permission.

The resignation of a social services board member should be considered effective immediately upon

receipt by the appointing authority unless the board member indicates that the resignation will become effective at some time in the future.

Removal from Office

May a social services board member be removed from the board during her term?⁵⁶ If so, under what circumstances may a social services board member be removed from the board and what procedures must be followed?

Removal by the Appointing Authority

North Carolina's social services law is silent with respect to the removal of county social services board members from office during their terms.⁵⁷ Nonetheless, it is clear that, under general legal principles, the appropriate appointing authority may remove a social services board member from office during her term if

1. there is *good cause* to remove the member from the social services board, *and*
2. the procedures that are used to remove the member from office provide her with *due process* of law.

Legal Authority to Remove

As a general rule, the legal authority to remove a public official from office is incident to the legal power to appoint the official.⁵⁸

Thus, legal authority to remove a social services board member from office during her term is vested in the commission, board, or public officials who appointed the board member. This means, for example, that a social services board member appointed by the Social Services Commission may be removed by the Social Services Commission, while a board member appointed by the county commissioners may be removed by the board of county commissioners.

The social services board itself has no inherent general authority to remove board members from office. A majority of the social services board members appointed by the county commissioners and the Social Services Commission, however, may remove the third or fifth board member for good cause.⁵⁹

Public officials and agencies other than the appropriate appointing authority generally have no legal authority to remove members of the social services board or to review, approve, or disapprove an appointing authority's decision to remove or not remove a social services board member.⁶⁰

Legal Grounds for Removal

As a general rule, appointed public officials serve "at the pleasure" of the relevant appointing authority and may be removed from office either *with or without cause*. This rule, however, generally does not apply if

1. a statute expressly limits the appointing authority's right to remove an appointed official from office, *or*
2. the appointment is for a definite, fixed term of office.

Instead, individuals who are appointed to public office for a definite, fixed term generally may not be removed from office during their terms unless there is *good cause* for their removal.⁶¹

It therefore follows that because social services board members are appointed for a definite, fixed term of office (either a regular three-year term or the remainder of an unexpired term that ends on a date certain) and no statute allows them to be removed from office during their terms without cause, an appointing authority may remove a social services board member from office during her term only for good cause.⁶²

Good Cause for Removal

Unlike North Carolina's public health law, the state's social services law does not provide a list of grounds that constitute good cause for removing a board member from office during his or her term.⁶³

Good cause for removing a public official, however, generally implies the existence of facts that indicate a substantial shortcoming with respect to a public official's performance or other grounds that render the official's continuance in office contrary to the public interest.

Removal from public office, therefore, may not be based on frivolous, technical, or inconsequential grounds that do not relate to or affect the officer's qualifications or performance in office. Instead, good cause for removal from office must be based on "reasons which the law and sound public policy recognize as sufficient warrant for removal from office."⁶⁴

Good cause for removing a social services board member from office, therefore, may include:

- conviction of a felony or a crime involving moral turpitude, even if the crime is unrelated to the official duties of a social services board member;
- bribery, corruption, extortion, or other criminal misconduct in office;
- other unlawful or grossly inappropriate conduct in office (including unlawful disclosure of confidential information);

- significant, persistent, or irreconcilable conflicts of interest;
- holding another public office that is incompatible with service on the social services board;
- misfeasance or malfeasance in office (willful or intentional neglect or failure to discharge official duties);
- neglect, inefficiency, or incompetence in performing official duties (including persistent, unexcused absences from board meetings);⁶⁵
- failure to meet the legal qualifications for holding office;⁶⁶
- physical or mental incapacities that preclude the performance of official duties;
- holding office pursuant to a legally invalid appointment;
- any other act or omission that brings one's public office into disrepute or that significantly and detrimentally affects a member's ability to carry out her official duties or that significantly and detrimentally affects the ability of the social services board, the county director of social services, or other government agencies to carry out their official duties.

On the other hand, good cause does not include

- differences between a board member's political affiliation or social, economic, or political views and those of the board of county commissioners, the Social Services Commission, the other members of the social services board, or the county director of social services;
- disagreements between a board member and the board of county commissioners, the Social Services Commission, the county director of social services, or other members of the county social services board about particular social services issues; or
- problems, difficulties, or personality clashes encountered in communicating, relating, or dealing with a board member that do not unduly disrupt the board's work.

Legal Procedures for Removal

If one or more members of an appointing authority believe that there may be good cause to remove a social services board member from office, the appointing authority should determine, first, whether the potential ground for removal, if established, would constitute good cause for removing the board member,

and, second, whether there is a reasonable factual basis to support the potential ground for removal.

If an appointing authority determines that there is good cause to remove a social services board member, it may remove the member from the board *if* it follows the appropriate *legal procedures* for removing a social services board member from office.

North Carolina's social services law is completely silent with respect to the legal procedure for removing a social services board member. Other state and federal laws, however, provide some guidance and impose a number of requirements with respect to the procedure for removing an appointed local government official.

Official Action: Meeting, Quorum, Majority Vote, Resolution, and Minutes

When the Social Services Commission, boards of county commissioners, and county social services board members exercise their legal authority with respect to the removal of social services board members, they must do so through the adoption, by majority vote, of a motion or resolution at an official meeting at which a quorum is present.⁶⁷ Adoption of the resolution removing a social services board member should be properly recorded in the minutes of the appointing authority. Unless the resolution itself provides otherwise, a resolution removing a board member is effective upon adoption.

Open Meetings Law

As public bodies, the Social Services Commission, boards of county commissioners, and county social services boards are required to comply with North Carolina's Open Meetings Law when exercising their legal authority to remove a social services board member.⁶⁸

As noted above, the Open Meetings Law does not allow a public body to hold a closed session to consider the qualifications, competence, or fitness of a member of a public body.⁶⁹ Thus, *all* of an appointing authority's deliberations and actions with respect to the removal of a social services board member (including its initial deliberations and determination that there may be good cause to remove a board member, hearings to consider removing a board member, and final action to remove a board member) must take place during an *open session* of a public meeting.

Due Process

Statutory and constitutional requirements regarding *due process* prohibit state and local government

agencies from depriving an individual of life, liberty, or property without due process of law.

In general, due process requires the use of legal procedures that provide:

1. timely and adequate *notice*;
2. a reasonable and fair *opportunity to be heard*; and
3. a fair *decision* by an impartial decision-maker.

Legal requirements regarding due process may prohibit the removal of a public official without first giving the public official adequate notice of the grounds for his removal and a meaningful opportunity to be heard. For example, North Carolina's public health law expressly provides that a member of a local board of public health may be removed from office only after he "has been given written notice of the basis for removal and has had the opportunity to respond."⁷⁰

North Carolina's social services law, by contrast, does not address due process with respect to the removal of social services board members. Nonetheless, constitutional due process requirements *may* require that public officials be given adequate notice and an opportunity to be heard in connection with their removal from office if they (a) are appointed for definite, fixed terms, and (b) may be removed from office only for cause.⁷¹

Appointing authorities, therefore, should follow legal procedures (similar to those outlined below) that provide due process if they decide there may be good cause to remove a social services board member from office.

Timely and Adequate Notice

If an appointing authority determines that there may be good cause for removing a social services board member from office, it should provide *timely* and *adequate* notice to the board member.⁷²

Notice is timely if it gives the board member *sufficient time* to respond to the notice. A notice that gives a board member only 24 or 48 hours to submit a written response, request a hearing, or appear for a hearing with respect to his removal from office might not provide him sufficient time to respond; a notice that gives a board member ten days to respond might be sufficient.⁷³

The content of the notice is adequate if it provides the board member with *sufficient information* to respond to the notice.

When an appointing authority determines that there may be good cause to remove a social services board member from office, it should provide the member with a written notice (delivered to the member in person, by certified mail, or by another method that

is reasonably calculated to provide actual and timely notice to the member) that

1. informs the board member that he may be removed from office;
2. states the grounds that the appointing authority believes constitute good cause for removal;
3. provides a summary of the alleged facts that support the claimed grounds for removal;
4. gives the board member sufficient time to respond to the notice; and
5. informs the board member of the procedures by which he may respond to the notice or contest his removal from office.

Reasonable and Fair Opportunity To Be Heard

In addition to timely and adequate notice, due process requires a reasonable and fair *opportunity to be heard* at a meaningful time and in a meaningful manner.⁷⁴

Due process requires an *opportunity* to be heard. In cases involving the removal of social services board members, this opportunity for a hearing may be provided by (a) allowing the board member to request a hearing before the appointing authority within a specified period of time, or (b) advising the board member that the appointing authority will hold a hearing on a specific date and time to consider removing the board member from office. If the board member fails to make a timely request a hearing or fails to appear for the scheduled hearing, the appointing authority may remove the board member from office without a hearing.

If the board member requests a hearing or appears for a scheduled hearing, due process requires the appointing authority to conduct "some sort of hearing" with respect to the board member's removal.⁷⁵ Due process, however, does not require that the appointing authority conduct a *formal* administrative hearing at which it proves that there is good cause to remove the board member, hears sworn testimony from witnesses, follows formal rules of evidence, allows cross-examination of witnesses, or makes a recording or transcript of the hearing.⁷⁶ At a minimum, though, the hearing must afford the board member a reasonable and fair opportunity to present relevant evidence, testimony, statements, and arguments contesting his removal from office.

Fair Decision by an Impartial Decision-maker

Due process also requires that a decision be rendered by an *impartial and unbiased decision-maker* who has

fairly considered the relevant facts, followed applicable legal procedures, and applied the governing law in reaching a decision.

The fact that members of an appointing authority have made a preliminary determination that there is good cause to remove a social services board member from office prior to holding a hearing with respect to the board member's removal does *not* mean that the members of the appointing authority are not impartial decision-makers.⁷⁷ The appointing authority's members, however, must base their decision to remove a social services board member solely on the relevant facts and law rather than personal bias, prejudice, or immaterial considerations, and must keep open minds with respect to the member's removal until they have heard and fairly considered all of the facts and arguments, including those presented by the board member at a hearing.⁷⁸

If the appointing authority decides after hearing and fairly considering the evidence that there is good cause to remove a social services board member from office, it should give the board member written notice of its final action removing him from office and of the factual and legal bases for its decision.

Administrative Procedure Act

North Carolina's Administrative Procedure Act does *not* apply to the removal of county social services board members by a board of county commissioners or by the other social services board members. It does, however, apply with respect to the administrative and judicial review of decisions of the state Social Services Commission to remove a social services board member.

A county social services board member who is removed from office by the state Social Services Commission may seek administrative review of the commission's decision by filing a petition with the Office of Administrative Hearings within 60 days of the commission's decision.⁷⁹

Contested cases involving the removal of a county social services board by the Social Services Commission are heard by an administrative law judge employed by the state Office of Administrative Hearings pursuant to the procedures set forth in Article 3 of the state's Administrative Procedure Act.⁸⁰ After holding an administrative hearing, the administrative law judge makes findings of fact and conclusions of law and issues a recommended decision regarding the board member's removal.⁸¹ The commission retains the legal authority to make a final administrative decision regarding the board member's removal, but it must adopt the administrative law judge's recommended decision unless the

recommended decision is not supported by a preponderance of the admissible evidence in the official record.⁸²

A board member who is removed from office by a final decision of the Social Services Commission and has exhausted his right to administrative review may seek judicial review of the commission's final decision by filing a petition in the superior court within 30 days after he is served with a copy of the final agency decision.⁸³ A superior court judge may reverse the commission's decision if the judge determines that the commission's decision was not based on substantial evidence in the record, was legally erroneous, was arbitrary or capricious, or was an abuse of discretion.⁸⁴

Other Proceedings for Judicial Review

The removal of a social services board member by an appointing authority is a quasi-judicial action that may be reviewed by a superior court judge through a writ of recordari or certiorari.⁸⁵

A social services board member who has been removed from office also may seek judicial review of his removal through (a) a *quo warranto* proceeding (an action brought to try his successor's right to hold office) in superior court,⁸⁶ (b) a civil action seeking a declaratory judgment regarding the board member's removal from office, or (c) a civil action claiming a denial of due process or civil rights in connection with a board member's removal from office.⁸⁷

Removal by Court Order or Statutory Forfeiture

Two North Carolina statutes provide that a person may be removed from public office if she is convicted of a criminal offense.

Under one of these statutes, a social services board member (or other public officer) who willfully and corruptly fails to discharge her duties as a public official may be charged with a criminal misdemeanor and must be removed from office as part of her punishment if she is convicted.⁸⁸

Under the other statute, a social services board member or other public official who assumes office before she qualifies for office by taking the required oath may be charged with a criminal misdemeanor is automatically ejected from office if she is convicted.⁸⁹

A social services board member also may be removed from office by a superior court judge in a *quo warranto* action brought by the state's Attorney General, a citizen or taxpayer, a public official, or a person who claims the office if the court finds that the board member

is holding office unlawfully (for example, the board member is not legally qualified to serve on the board or her appointment was legally invalid).⁹⁰

If a person is appointed to the county social services board in violation of North Carolina's laws limiting multiple office holding, her appointment to the board is absolutely and automatically null and void as a matter of law, as is any action she takes by virtue of the prohibited appointment.⁹¹ State law provides no other basis for a social services board member's "automatic" forfeiture of office.⁹²

Notes

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¹ This series of *Social Services Bulletins* regarding the county board of social services replaces the loose-leaf *Handbook for Social Services Board Members* that was published by the Institute of Government and the state Department of Health and Human Services in 1992. It also updates and supplements the Institute's *Guidebook to Social Services in North Carolina* (4th edition, 1989). Although this series is written primarily for county social services board members, it also may be of interest or use to county commissioners, county managers, county social services directors, and others who are interested in the subject of social services.

² This *Social Services Bulletin* supersedes two previous *Social Services Bulletins* that addressed issues involving the appointment and removal of social services board members: John L. Saxon, Removal of Members of County Social Services Boards from Office During Their Terms, *Social Services Bulletin No. 17* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1993), and John L. Saxon, Appointment of County Social Services Board Members, *Social Services Bulletin No. 25* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

³ Each North Carolina county has an elected board of county commissioners. G.S. 153A-34. The size of boards of county commissioners, the terms of county commissioners, and the manner in which county commissioners are elected vary from county to county. See Joseph S. Ferrell, Counties and County Governance, Ch. 1 in A. Fleming Bell, II and Warren Jake Wicker (eds.), *County Government in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1998), 10–11.

⁴ The state Social Services Commission is a thirteen-member state commission whose members are appointed by the Governor for four-year terms. G.S. 143B-153, 143B-154.

⁵ G.S. 108A-3(a), (b). The "other" social services board members are those appointed by the board of county commissioners and the Social Services Commission.

⁶ The county social services director has no express legal authority or responsibility with respect to recruiting, nominating, or appointing members of the county social services board. State law, however, does not expressly prohibit the county social services director's providing assistance, making recommendations, or offering nominations to an appointing authority with respect to social services board appointments. But if the social services director is asked or chooses to be involved in recruiting or nominating social services board members, the director's involvement should be exercised in a way that does not compromise the appointing authority's or board's independent judgment.

⁷ The legal history of the state law governing appointment of county social services board members is discussed in more detail in John L. Saxon, The County Board of Social Services (Part I): Introduction and Overview (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001).

⁸ G.S. 108A-3(a). The "other" board members are the two incumbent social services board members appointed by the Social Services Commission and the board of county commissioners. An incumbent "third" board member may not vote with respect to her reappointment or the appointment of her successor.

⁹ See G.S. 108A-2.

¹⁰ G.S. 108A-3(b). The "other" board members are the four incumbent social services board members appointed by the Social Services Commission and the board of county commissioners. An incumbent "fifth" board member may not vote with respect to his reappointment or the appointment of his successor.

¹¹ Legal qualifications and disqualifications of social services board members are discussed in more detail in John L. Saxon, The County Board of Social Services (Part II): Qualifications and Disqualifications, *Social Services Bulletin No. 33* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2002).

¹² G.S. 108A-6. The expiration of a board member's term also creates a vacancy on the social services board, but this type of vacancy is filled by a "regular" appointment for a three-year term rather than appointing a new member to fill the unexpired term of a board member who died, resigned, or was removed from office before the end of her term.

¹³ This is probably true even if the "third" or "fifth" member whose death, resignation, or removal created the vacancy was appointed to the board by the senior resident superior court judge when a majority of the other board members were unable to agree with respect to the appointment. Of course, if a majority of the other board members are unable to agree on an appointment to fill the

vacancy, the appointment again would be made by the senior resident superior court judge.

¹⁴ By contrast, state law does require that a county commissioner serve on multi-county area mental health boards and local public health boards. G.S. 122C-118(e)(1); G.S. 130A-35(b); G.S. 130A-37(b).

¹⁵ G.S. 108A-3(a), (b).

¹⁶ See G.S. 128-1.2 and G.S. 153A-76.

¹⁷ Issues regarding *ex officio* appointments to the county social services board are discussed in more detail in John L. Saxon, "Stay or Go? County Commissioners on Social Services Boards," *Popular Government* 65(Winter 2000): 27-31.

¹⁸ See G.S. 128-1.2.

¹⁹ A Social Services Commission rule requires the state Division of Social Services' regional directors to submit, upon the recommendation of a local organization, interest group, or individual, at least one nomination for each social services board appointment that the commission must make. See 10 N.C. Admin.Code 24A.0303. The commission, however, was not bound by the regional directors' recommendations (and the division subsequently eliminated the regional directors' positions).

²⁰ The state Social Services Commission has developed a form (DSS-SSC-3-02) for nominating appointees to county social services boards.

²¹ A pamphlet produced by the Institute of Government and the state Department of Health and Human Services, *Serving on the County Board of Social Services* (available from DHHS or electronically at <http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/socservbds.pdf>) may be a useful resource for appointing authorities and potential social services board appointees.

²² G.S. 143B-154.

²³ G.S. 153A-43. State law also requires all county commissioners who are present at a board meeting to vote on all matters unless they are excused by the board from voting on questions involving their own financial interest or official conduct. G.S. 153A-44. When a commissioner is not excused from voting but abstains or refuses to vote, his or her vote may be recorded as an affirmative vote, a negative vote, or a vote with the prevailing side as determined by the board's rules of procedure.

²⁴ See G.S. 108A-3(a), (b). Because state law is silent with respect to abstentions from voting, social services boards may address this issue through local rules of procedure.

²⁵ The third or fifth member, however, may participate in the board's *deliberations* regarding his reappointment or the appointment of his successor.

²⁶ The fifth member may not be appointed on a two to one vote in which three of the other four social services board members participate even if the three voting members constitute a quorum. The fifth member, however, may be appointed on a vote of three to zero if one of the other

members is absent or has died, resigned, or been removed from office and a successor has not been appointed. Prior to June 4, 1997, G.S. 108A-3(b) required the *unanimous* agreement of the other four social services board members for the appointment of the fifth member. S.L. 1997-135.

²⁷ 49 N.C.Atty.Gen.Op. 67 (1979); see also G.S. 143-318.13(a).

²⁸ See G.S. 143-318.8 through 143-318.18. The state Open Meetings Law is discussed in more detail in David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1998). The Open Meetings Law's requirements do not apply with respect to the appointment of a county social services board member by a senior resident superior court judge.

²⁹ G.S. 143-318.11(6).

³⁰ Lawrence, *Open Meetings and Local Governments in North Carolina*, 35.

³¹ G.S. 108A-3. State law does not establish an alternate appointment procedure if the Social Services Commission or the board of county commissioners is unable to agree with respect to a social services board appointment.

³² These local procedures might address the number of votes that might be taken before the board decides that it is deadlocked; the deadline for the board's reaching agreement with respect to the appointment; the manner in which the board will ask the judge to make an appointment (the request may be made orally or in writing, but does not have to be in the form of a formal petition, writ, or legal proceeding filed with the clerk of superior court); and the information that the board will provide to the judge with respect to the appointment process.

³³ Unpublished opinion of the state Attorney General to the North Carolina Board of Public Welfare (July 29, 1966). The appointing authority, however, may be able to remove the appointee from the social services board if it has good cause to do so and follows the proper procedure for removing the board member. Removal of social services board members from office during their terms is discussed in the text accompanying notes 56 through 87.

³⁴ North Carolina Constitution, Art. VI, § 7; G.S. 128-5. Although this requirement applies to all county social services board members, a county commissioner who is appointed by the board of county commissioners to serve *ex officio* on the county social services board is not required to take a separate oath of office as a social services board member. In this situation, the county commissioner is deemed to serve on the social services board as part of his duties as a county commissioner and the oath of office that he took as a county commissioner covers his service on the social services board as well. But if a county commissioner is appointed by the board of county commissioners to serve *ex officio* on the county social services board, does not take a

separate oath of office as a county social services board member, and ceases to hold office as a county commissioner before the end of his term on the social services board, he should take a separate oath of office as a social services board member immediately following the expiration of his or her term as a county commissioner. *See* State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963).

³⁵ See G.S. 11-7.1.

³⁶ G.S. 153A-26.

³⁷ See G.S. 28-5.

³⁸ G.S. 108A-4.

³⁹ G.S. 108A-5(a).

⁴⁰ G.S. 108A-5(b).

⁴¹ See G.S. 108A-5.

⁴² G.S. 108A-5.

⁴³ See North Carolina Constitution, Art. VI, §10.

⁴⁴ G.S. 128-1.2; *see also* G.S. 153A-76.

⁴⁵ Ex officio appointments are discussed in greater detail in chapter 6 of A. Fleming Bell, II, *Ethics, Conflicts, and Offices: A Guide for Local Officials* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

⁴⁶ The “ex officio position” regarding terms of county commissioners on the social services board is discussed in more detail in John L. Saxon, “Stay or Go? County Commissioners on Social Services Boards,” *Popular Government* 65(Winter 2000): 29.

⁴⁷ See Saxon, “Stay or Go? County Commissioners on Social Services Boards,” 30–31.

⁴⁸ See State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963); G.S. 108A-4.

⁴⁹ G.S. 108A-6.

⁵⁰ Terms are consecutive when one term begins immediately following the end of a prior term.

⁵¹ G.S. 108A-4.

⁵² G.S. 108A-6.

⁵³ Appointing authorities should not try to evade the legal restrictions regarding term limits by honoring only the letter, but not the spirit, of the law. Although the law does not impose a minimum one-year or one-term “waiting period” prior to the reappointment of a social services board member following her completion of two consecutive three-year terms, the law’s purpose nonetheless would be violated if a social services board member served two consecutive terms, another person was appointed to succeed that board member with the understanding that he would resign from the board within a few weeks or months, and the former board member was reappointed to the board following the appointee’s resignation for the remainder of the unexpired term.

⁵⁴ The first condition of this exception is satisfied if a social services board member was a county commissioner *at any time* during his first two consecutive terms on the social services board. The law does not require that the social services board

member have been a county commissioner when he was *first appointed or reappointed* to the social services board. And while most county commissioners who serve on social services boards are appointed to the social services board by the board of county commissioners, the term limit exception applies to *any* county commissioner who is appointed to the social services board, regardless of whether the commissioner was appointed by the board of county commissioners, the Social Services Commission, the other social services board members, or the senior resident superior court judge.

⁵⁵ As long as a social services board member is a county commissioner at the time he is reappointed to the social services board, it doesn’t matter whether the board member’s service as a county commissioner has been continuous or whether his reappointment to the board is made by the board of county commissioners, the Social Services Commission, the other social services board members, or the senior resident superior court judge.

⁵⁶ This section supersedes a prior *Social Services Bulletin* on removal of social services board members: John L. Saxon, Removal of Members of County Social Services Board Members from Office During Their Terms, *Social Services Bulletin No. 17* (Institute of Government, The University of North Carolina at Chapel Hill, February, 1993).

⁵⁷ Situations involving the removal of a social services board member from office during her term are qualitatively different from those involving a decision not to reappoint a social services board member following the expiration of her term on the board.

⁵⁸ In re Hennen, 38 U.S. 230 (1839).

⁵⁹ The other members probably have the legal authority to remove the third or fifth board member for good cause even if the third or fifth member was appointed by the senior resident superior court judge.

⁶⁰ See notes 73 through 87 and accompanying text regarding administrative and judicial review of decisions to remove social services board members.

⁶¹ See State ex rel Bryan v. Patrick, 124 N.C. 415 (1899); *cf.* State ex rel. Kinsland v. Mackey, 217 N.C. 508, 8 S.E.2d 598 (1940).

⁶² By contrast, members of area mental health boards serve “at the pleasure” of the county commissioners who appoint them to office and may be removed from office during their terms either “with or without cause.” G.S. 122C-118(c).

⁶³ G.S. 130A-35(g) and 130A-37(h) provide that a local public health board member may be removed from office for commission of a felony or other crime involving moral turpitude; violation of a state law regarding conflict of interest; violation of a written policy adopted by the board of county commissioners; habitual failure to attend public health board meetings; conduct that brings the office into disrepute; or failure to maintain statutorily-required qualifications for appointment as a public health board member.

⁶⁴ See State ex rel. Nagle v. Sullivan, 40 P.2d 995 (Mont. 1935).

⁶⁵ A board member's persistent, unexcused absence from social services board meetings may be good cause for removing him or her from the social services board, especially in those instances in which the social services board has adopted a policy regarding members' attendance at board meetings and the circumstances under which absences are excused or unexcused. But regardless of whether the appointing authority or social services board has adopted an attendance policy and regardless of whether a member's absences are considered excused or unexcused, a board member's absence from board meetings may constitute good cause for removing her from the board if her absences are so frequent or excessive that they significantly and detrimentally affect the member's ability to carry out her responsibilities as a social services board member or adversely affect the ability of the social services board to carry out its responsibilities and duties.

⁶⁶ As discussed in *Social Services Bulletin No. 33*, while county residency is a legal qualification for appointment to the social services board in the sense that a person must be a bona fide county resident at the time she is appointed to the board or assumes office, it is not entirely clear whether county residency is a legal requirement for *continuing* to hold office as a social services board member or whether failure to remain a county resident constitutes "good cause" for removing a social services board member (assuming she chooses not to resign from the board following her move to another county).

⁶⁷ Legal requirements with respect to the quorum and vote necessary to remove a social services board member are identical to the requirements regarding the appointment of social services board member discussed in the text accompanying notes 22 through 27.

⁶⁸ See G.S. 143-318.8 through 143-318.18. The state Open Meetings Law is discussed in more detail in David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1998).

⁶⁹ G.S. 143-318.11(6). Although the Open Meetings Law allows a public body to hold a closed session to consider the performance of or charges against a public officer or employee, the exception for consideration of "personnel issues" does *not* apply to a public body's deliberations with respect to the performance or removal of a member of the public body or a member of another public body. See also notes 28 through 30 and accompanying text.

⁷⁰ G.S. 130A-35(g), 130A-37(h).

⁷¹ Although it is not entirely clear whether an appointed official's legal rights with respect to the public office she holds constitute a legal right to *property* protected by constitutional due process requirements, legislatures and

courts sometimes require that public officials and employees be afforded due process before they are removed from office or fired from their jobs.

⁷² As noted above, *all* of an appointing authority's deliberations regarding the removal of a social services board member must take place in an open session of an official meeting. Formal notice of the appointing authority's decision should be provided to the board member even if the board member was present at the meeting at which the appointing authority's decision was made.

⁷³ See James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

⁷⁴ See Peace v. Employment Security Comm'n, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998).

⁷⁵ It is not clear whether giving a social services board member the opportunity to submit a *written response or statement* to the appointing authority contesting his removal would satisfy the due process requirement for "some sort of hearing."

⁷⁶ The appointing authority, however, may allow the board member to be represented by legal counsel, make a tape recording or transcript of the hearing, present evidence in support of the board member's removal, examine or cross-examine the board member or other witnesses, or allow the board member to call and cross-examine witnesses.

⁷⁷ See Hearne v. Sherman, 128 N.C.App. 533, 496 S.E.2d 849 (1998).

⁷⁸ See Bishop v. Department of Human Resources, 100 N.C.App. 175, 394 S.E.2d 702 (1990); Crump v. Hickory Board of Education, 326 N.C. 603, 392 S.E.2d 579 (1990).

⁷⁹ G.S. 150B-23.

⁸⁰ See G.S. 150B-23 through 150B-37.

⁸¹ G.S. 150B-34.

⁸² G.S. 150B-36.

⁸³ G.S. 150B-43, 150B-45.

⁸⁴ G.S. 150B-51.

⁸⁵ G.S. 1-269; Russ v. Brunswick County Board of Education, 232 N.C. 128, 59 S.E.2d 589 (1950).

⁸⁶ G.S. 1-515 through 532; State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963).

⁸⁷ A removed board member may ask the court to issue an injunction prohibiting the member's removal from office or requiring that she be reinstated on the board.

⁸⁸ G.S. 14-230.

⁸⁹ G.S. 14-229.

⁹⁰ G.S. 1-515 through 1-532; State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963).

⁹¹ G.S. 128-2; 43 N.C. Atty. Gen. Op. 306, 308 (1974); A. Fleming Bell, II, *Ethics, Conflicts, and Offices: A Guide for Local Officials* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997), 99-103. Disqualifications related to multiple office holding are discussed in more detail in John L.

Saxon, The County Board of Social Services (Part II):
Qualifications and Disqualifications, *Social Services
Bulletin No. 33* (Chapel Hill, N.C.: Institute of

Government, The University of North Carolina at Chapel
Hill, 2002).
⁹² See G.S. 122C-118(c1); G.S. 143B-13(b).

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