The Ability of Local Governing Boards to Discipline Their Members

By Suzanne Blum Alford

Local governing boards (city councils, county boards of commissioners, and local boards of education) occasionally have to cope with a troublesome member. If a duly elected or appointed 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 in the absence of North Carolina law on the subject. However, it is possible to discern from North Carolina statutes and from the case law of other jurisdictions a set of rules regarding a governing board's ability to discipline members. This article explores the statutory and constitutional issues surrounding a board's power to punish members by censure or by expulsion from a meeting. It concludes that, in certain circumstances, a governing board has the authority to take these steps. It touches on, but does not address, the issue of removing an elected member from office.

May a board censure or expel a member who causes problems?

Although North Carolina statutes do not explicitly grant local governing boards the power to discipline their own members, they do imply such a power.[1] G.S. 115C-41(a) directs local boards of education to hold an organizational meeting no later than sixty days after the swearing in of new members and as often thereafter as the board shall determine is appropriate. The statute is silent on the rules of procedure the board is to adopt, so presumably, a school board is free to adopt any rules that enable it to fulfill all its responsibilities. The statutory provision for cities states more specifically 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 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 can create procedures enabling it to censure or expel a member as long as they do not contradict accepted parliamentary procedure. In fact, any such procedure would be consistent with accepted parliamentary procedure, for two reasons.

First, a governing body's ability to discipline members is long established in parliamentary tradition. Members of the English Parliament could not be "impeached or questioned in any court or place out of parliament" for their speech within Parliament, though they could be censured by their parliamentary colleagues.[4] The American colonies continued this tradition of protecting legislators' official speech from judicial scrutiny, and the states codified this tradition in ratifying the U.S. Constitution: "[F]or 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

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1. While there is no North Carolina case law on the subject, the Arizona Supreme Court has 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 that a board has an implicit and inherent power to discipline its members.

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

3. G.S. 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. I, § 6, cl. 1 (emphasis added)].

English 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 city and county governing boards have the statutory authority to form their own procedures as long as such procedures are consistent with "generally accepted principles of parliamentary procedure," boards can discipline their own members. School boards, which have no explicit restrictions on their procedures, may discipline their members as well.

Second, legal scholarship and case law support the traditional understanding that local governing boards 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 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, given that a board cannot function effectively with a disruptive member and that expecting constituents to remove a member is impractical.[8]

In the 1883 case of *Ellison v. Alderman of Raleigh*, the North Carolina Supreme Court accepted the power of a board to remove a member from office for cause through the common law procedure of "amotion" (removal from office of a corporate officer).[9] Relying on English common law and 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 office. The court reiterated the inherent nature of the power to amove in the 1908 case of *Burke v. Jenkins*, 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.'"[10] The court further noted the impractical nature of having the constituency, rather than the council, remove the troublesome member, asserting that, while this practice had been somewhat common in earlier English cases, "in those days the electorate of a town was very small, the franchise being greatly restricted."[11]

Thus it is clear that North Carolina long ago accepted a local governing board's ability to remove members for cause.[12] This ability logically includes a board's lesser power to censure members or expel them from a meeting.

This conclusion is consistent with the holding in *Whitener v. McWatters*, in which the Fourth Circuit held that "a legislative body's discipline of one of its members is a core legislative act."[13] In that case, the Loudoun County (Va.) Board of Supervisors disciplined one of its members for confronting other members with abusive language. The board censured the member and stripped him of committee assignments for one year. That member then sued, alleging violations of the First Amendment and procedural due process.[14] The plaintiff wanted the court to enjoin the other board members from voting in ways he thought were detrimental to him; from the board's point of view, the issue was its right to police violations of its own ethical standards. The court explained that the power to punish members "is the primary power by which legislative bodies preserve their 'institutional integrity' without compromising the principle that citizens may choose their representatives." The court noted that, consistent with history and long practice, "absent truly exceptional circumstances, it would be strange to hold that such self-policing is actionable in a court."[15]

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

7. JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 464 (1872; 5th ed. 1911).

8. *Id.* at § 465.

9. 89 N.C. 125, 127 (1883). For a thorough analysis of amotion, see David M. Lawrence, *Removing Local Elected Officials from Office in North Carolina*, 16 WAKE FOREST L. REV. 547, 552–58 (1980).

10. *Burke,* 148 N.C. 25, 27 (1908) [quoting DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 240 (4th ed., 1890)].

11. *Id.*

12. G.S. 115C-39 governs removal of a local school board member: "If the State Board of Education has sufficient evidence that any member of a local board of education is not capable of discharging, or is not discharging, the duties of his office as required by law, or is guilty of immoral or disreputable conduct," the State Board of Education shall notify the chairman of such board of education, unless such chairman is the offending member, in which case all other members of such board shall be notified." After the notice is received, the local board meets to investigate the charges, and if they are found to be true the board must declare the office vacant. A board member is entitled to a hearing before removal.

13. 112 F.3d 740, 741 (4th Cir. 1997).

14. The court noted that "[e]ven if, at some level, there is a judicially enforceable First Amendment constraint on a legislature's power to discipline one of its members, we certainly do not approach it in this case." *Id.* at 745.

15. *Id.* at 744.

Under what circumstances may a board discipline a member?

While local governing boards, including school 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 disruptive speech or conduct. There is no North Carolina precedent on the subject, but U.S. Supreme Court decisions and decisions of lower courts without jurisdiction over North Carolina offer some guidance for North Carolina boards.

In deciding whether they may discipline a colleague, board members should first determine whether their sole reason for doing so is the content of the member's speech during a board meeting. Pure speech, which includes speech that is objectionable only for its content, is granted the highest protection under the First Amendment.[16] To restrict pure speech, a board must have a compelling governmental interest and must act in a manner that is narrowly tailored to advance that interest. The effective functioning of a governing body has been held to be such a compelling governmental interest.[17] (For example, a board may require its members to vote by speaking the words "aye" or "no.") That compelling interest, however, has been interpreted narrowly, severely limiting a board's power to discipline a member for pure speech.[18]

A board's ability to discipline a member for the content of speech that occurs outside of official meetings is also very limited. In *Bond v. Floyd*, the Supreme Court held that the Georgia House of Representatives could not keep Julian Bond, a duly elected member, from assuming his seat because of his public statements in opposition to United States involvement in Vietnam.[19] However, a board has wider discretion if it merely wishes to censure a member rather than exclude him or her from taking office.[20] In *Silano v. Sag Harbor Union Free School District*, the Second Circuit found no First Amendment violation when a board censured a member for conduct in a classroom. The court emphasized that a school board can place restrictions on classroom speech as long as they are "reasonably related to legitimate pedagogical concerns."[21]

A board has much broader discretion in disciplining members for their manner of speech or for speech accompanied by certain kinds of conduct, rather than solely for the content of their speech. For example, in the landmark case of *Cox v. Louisiana*, the Supreme Court held that speech "intermingled" with conduct—in that case, protesting at a demonstration near a courthouse, in violation of a state statute—is entitled to less protection than pure speech.[22] To restrict "speech plus"—that is, speech accompanied by some kind of physical action that is "more than just an unobtrusive means to communicate the idea"—a board does not need to have a compelling governmental interest; it need only show that a substantial societal interest will be affected by the speech plus.[23]

Consequently, a board has the power to expel from a meeting a member who is being disruptive through the conduct accompanying the speech. For example, the *Kucinich* court found that if council member "Gary Kucinich [had] 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."[24]

Similarly, the Fourth Circuit held that a board may discipline a member for speech-plus conduct that occurs outside of official meetings. In *Whitener v. McWatters*, the court held that a council had appropriately censured a member for using profanity in chastising other members after a meeting.[25] The court explained that

> 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 official meeting. Such abusiveness, even when it occurs "behind the scenes," can threaten the deliberative process.[26]

Thus, a board may discipline a member for speech content if it has a compelling governmental interest, and it may discipline a member for "speech plus" if it has a substantial societal interest.

16. *See, e.g.*, Kucinich v. Forbes, 432 F. Supp. 1101, 1111 (N.D. Ohio 1977).

17. Wreski v. City of Madison, Wisconsin, 558 F. Supp. 664, 667–68 (W.D. Wis. 1983).

18. *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).

19. 385 U.S. 116, 137 (1966).

20. *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 approved by the board).

21. 42 F.3d 719, 722 (2d Cir. 1994) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988).

22. 379 U.S. 559, 564 (1965) ("the fact that free speech is intermingled with [protesting in a demonstration] does not bring with it constitutional protection").

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

24. *Id.* at 1114 n.18.

25. 112 F.3d 740, 745 (4th Cir. 1997)

26. *Id.*

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

The Constitution requires a body or person infringing another's interest in liberty or property to follow due process. A member being expelled from a board meeting for cause does not lose a property interest, because North Carolina does not recognize property rights in elected positions.[27] The member is, however, denied the right to speak as a duly elected board member—thus losing a liberty interest in freedom of speech. In these circumstances, procedural due process requires that the member be given notice of the loss of liberty interest and an opportunity to present arguments on his or her own behalf.[28] This requirement may be fulfilled informally.[29] For instance, the board may warn the disruptive member that continued misconduct will result in expulsion from the meeting and give him or her a few minutes to argue against expulsion before the board votes.[30]

Assessing the due process implications of censuring a board member is a more difficult task, even though a member's right to participate and speak freely in meetings may not be affected by censure. A censured member may argue that censure has resulted in loss or damage to the member's liberty interest in reputation. However, the Court held that damage to reputation by itself is not a loss of liberty interest that warrants due process.[31] This principle was applied by the court recently in a school board context to find that the stigma suffered from a censure was insufficient to entitle the member to due process.[32] Nonetheless, that stigma, if combined with another injury or harm to a person's professional and personal reputation, may be sufficient to warrant due process.[33] Thus, although procedural due process may not always be required when censuring a board member, a prudent board chair should provide the member with notice of the censure and an opportunity to make arguments on his or her own behalf.

In addition to procedural due process, there may be substantive due process implications when a member is deprived of a liberty interest. Even when a board uses the correct procedures to discipline a member, it may violate due process if it acts for an inappropriate reason. Substantive due process does not protect individuals from all infringements of their 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.[34] For example, a board may violate substantive due process if it disciplines a member for vindictive reasons.[35] So, in addition to following the correct procedures mandated by due process, a board must refrain from using its disciplinary powers for improper purposes.

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 as well as ancient tradition. A board may expel or censure a member for the content of his or her speech if it has a compelling governmental interest in doing so 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 under the First Amendment. A board has broader powers to discipline a member when the member's speech is combined with some form of objectionable conduct. To discipline a member for such speech plus, a board need only have a substantial societal interest rather than a compelling government interest in its repression.

In any instance of discipline, a board would be wise to always follow procedural due process, even if it is not clear that the board member has a property or liberty interest at stake. Due process requires that a board informally give the member notice of expulsion or censure and an opportunity to argue on his or her own behalf before discipline is initiated. The board must also follow the mandates of substantive due process by refraining from using its disciplinary powers in a vindictive, oppressive, or otherwise abusive manner. If a board follows these guidelines in exercising its inherent power to discipline unruly members for cause, it should be able to carry out its responsibilities effectively. ■

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

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

29. *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).

30. *Id.*

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

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

33. *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).

34. Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988).

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