

## Can A School Board Member Be

# REMOVED FROM OFFICE?

*By Lisa F. Tanselle, Esq., General Counsel*



Occasionally ISBA staff members have been asked whether a school board member can ever be removed from office. The answer is yes, but the circumstances in which a member may be removed are very limited, as you will see below. Furthermore, the school board itself does not have the authority to remove a member. Only a judge may remove a school board member from office. Finally, the burden that is placed on the party seeking removal is extremely high because, as the Indiana

Supreme Court has said, “[t]urning to the judiciary to remove a duly-elected public official from office is a radical departure from our usual democratic process because it risks silencing the collective voice of the people, spoken in each election.”<sup>1</sup>

### **REMOVAL FOR CONDUCT RELATED TO DUTIES**

IC 5-8-1-35 provides that an officer may be removed if the officer is guilty of (1) charging



and collecting illegal fees for services rendered or to be rendered in the office or (2) refusing or neglecting to perform the official duties pertaining to the office.<sup>2</sup> Procedurally, the statute requires the filing of a written accusation that is verified by any person with a circuit court, superior court, or probate court. Usually the accusation is verified by the county prosecutor on behalf of the state since the state is the party adverse to the accused.<sup>3</sup> The judge must then give notice of the charge to the officer and conduct a hearing before determining whether the officer should be removed from office. By statute, this process takes less than 30 days, unless continuances are granted.

Substantively, the more difficult issue for the judge is determining whether the officer refused or neglected to perform his/her official duties. While there has been no reported case in Indiana regarding the removal of a school board member for refusing or

neglecting to perform the official duties of the position, there have been some cases involving other elected officials that offer some guidance on this question.

To begin with, it is important to note that our courts have stated the removal statute must be strictly construed since the penalty for malfeasance as defined in the statute is forfeiture of an office.<sup>4</sup> Additionally, the Indiana Supreme Court has stated the power to remove an officer who has been elected to an office must be exercised with caution, and for reasons based upon willful or malicious failure or neglect to perform the duties pertaining to the office.<sup>5</sup> Lastly, it appears from several court decisions that the failure to perform one duty or inconsequential

matters is not sufficient grounds for removal. For instance, in *State v. McRoberts*,<sup>6</sup> a county superintendent alleged that the members of the county council failed, refused, and neglected to appropriate funds for the traveling expenses of the superintendent, as required by law. In that case, the Indiana Supreme Court distinguished between “nonfeasance” and “malfeasance,” noting that “nonfeasance is an omission to perform a required duty at all or total neglect,” whereas “malfeasance is the doing of an act wholly wrongful and unlawful.”<sup>7</sup> In the opinion of the Court, the one instance of an alleged failure to perform the duties of the office constituted nonfeasance and did not warrant removal of the members of the county council. A similar conclusion was reached in *State ex rel. Ayer v. Ewing*,<sup>8</sup> wherein it was alleged that a township trustee required teacher applicants to make political contributions in order to be considered for employment. Because there was no “averment of general abandonment of [the] office,” the case was dismissed.

In 2019, the Indiana Supreme Court considered whether the clerk- treasurer of Yorktown should be removed from office. This case clearly demonstrates the difficulty in determining when an officer refuses or neglects to perform the duties of the office. In *State v. Neff*,<sup>9</sup> the State Board of Accounts conducted two examinations of the town’s financial records and noted significant deficiencies in the clerk-treasurer’s keeping of financial records. Based on those examinations, the town council hired an outside accounting firm, which found over 150 errors affecting over 30 accounts and totaling over \$3 million. The State sought to remove the clerk-treasurer for failing to (1) complete monthly accounting reconciliations; (2) follow the directions of the State Board of Accounts; and (3) use the accounting and financial reporting systems adopted by the State Board of Accounts. The trial court found in favor of the clerk-treasurer, noting that despite these deficiencies in maintaining the financial records, she was completing the other work of her office. In the opinion of the trial court, the removal statute applied in only three situations: complete failure to act, the inability to act due to mental conditions, or crimes. The State appealed to the Court of Appeals, alleging that the statute did not require the State to show a failure to fulfill all duties, all the time, in order to remove a public official. The appellate court agreed with the State and found that pervasive failures involving critical duties would suffice for removal. The clerk-treasurer appealed to the Indiana Supreme Court.

After reviewing several of the cases cited above, the Court opined that an officer can only be removed from office if (1) the

officer failed to perform multiple duties; (2) the officer’s failures constitute “nonfeasance” rather than “malfeasance of misfeasance,” meaning only complete failure to perform required duties will suffice; and (3) the officer’s nonfeasance significantly impacts the day-to-day operations of the office.<sup>10</sup> Applying this standard, the Court found that while the clerk-treasurer failed to perform multiple duties, and may even have committed nonfeasance in connection with her financial duties, her failure to carry out these duties did not have a significant impact on the day-to-day operations of the office. In reaching this conclusion, the Court noted at least 14 statutory duties of the office of clerk-treasurer and concluded she was only deficient in carrying out three of her duties. Because she was carrying out other aspects of her office duties, the failure to maintain appropriate financial records did not have a significant impact on the day-to-day operations of her office. Since there was no “general failure” to carry out the duties of the office, the Court concluded she should not be removed from the office.

The only known case in Indiana wherein a person filed an accusation against a school board member occurred in 1994. The accusation alleged that the school board member, who was also president of the board, (1) engaged in a pattern of conduct by either not attending or canceling meetings related to collective bargaining that prevented the school board from fulfilling its statutory duties under the bargaining laws; (2) abstained from voting and voted against ‘the fulfillment of mandatory requirements and obligations of the school corporation’; (3) refused or neglected to consider refunding of bonds; (4) took action outside of a properly called meeting to purportedly rescind a board resolution; and (5) unilaterally directed the athletic director to issue life-time athletic passes to all school board members without authorization from the board and outside of a properly called meeting. According to a newspaper article, the board member resigned from office the day before the hearing, as part of an agreement with the prosecutor to drop his investigation of the board member’s conduct.

### REMOVAL FOR FELONY CONVICTION

Additionally, IC 5-8-1-38 provides for the removal of a public officer if the individual is convicted of a felony during the officer’s term of office. The definition of “public officer” includes an elected or appointed school board member.<sup>11</sup> Under this provision, the officer is removed from office by operation of law when a jury or judge publicly announces a verdict against the officer for a felony

or when the person pleads guilty or nolo contendere to a felony. Any subsequent reduction of the felony to a Class A misdemeanor does not affect the removal of the officer unless the felony was not related to action taken as a public officer. If, however, the felony conviction is subsequently reversed, vacated, set aside or not entered because the court did not accept the guilty plea, and the officer’s term has not yet expired, the officer must be reinstated to the office. There are no reported cases involving the removal of a school board member for a felony conviction.

### REMOVAL FOR INTOXICATION

A lesser known statute that allows for removal of an officer can be found at IC 5-8-2-1. It states that a person holding any office under the state’s constitution or laws who voluntarily becomes intoxicated during the business hours of the office, or is in the habit of becoming intoxicated by the use of intoxicating liquors shall be removed from office. For a school board member, there may be a question as to what are the business hours of the office, but clearly if a school board member would come to a school board meeting under the influence of alcohol, the board member could be charged with this offense. This statute requires the prosecutor to file information against the officer in a circuit court, superior court, or probate court. There are no reported cases wherein an officer has been removed for being intoxicated.

While these cases demonstrate that legally it is difficult to remove a school board member from office, school board members need to remember the high responsibility of serving on the board. The oath of office taken by all board members requires members to support the U.S. Constitution, the Indiana Constitution, and all federal and state laws. Additionally, the oath requires a school board member to faithfully execute the duties of the office. The execution of these duties impacts employees, students, and patrons, and leads to the betterment of our citizenry only when executed legally and ethically. 🍀

### REFERENCES

- 1 State v. Neff, 117 N.E.3d 1263, 1264-1265 (Ind. 2019)
- 2 There is an additional ground for removal if the officer is the executive of a township.
- 3 Rowe v. Bateman, 153 Ind. 633 (Ind. 1899), modified 153 Ind. 633 (Dec. 1899)
- 4 Beesley v. State, 219 Ind. 239 (Ind. 1941)
- 5 Bateman v. State, 214 Ind. 138 (Ind. 1938)
- 6 207 Ind. 293 (Ind. 1934)
- 7 Id. at 295
- 8 213 Ind. 1 (Ind. 1952)
- 9 117 N.E.3d 1263 (Ind. 2019)
- 10 Id. at 1270
- 11 See IC 5-8-1-38(a)(2)