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## Coates' Canons Blog: Removing an Elected Official by Amotion: Judge Says It Can Be Done

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In 2009 I wrote a **blog post** summarizing the common law doctrine of “amotion” which was recognized in several old North Carolina cases as an inherent power of a board to remove one of its members. Since there had been no legislative or judicial sanction of board removal of an elected official since the last case involving amotion (decided in 1935), I said it was “unclear” whether a court would uphold a local government board’s removal of one its members by amotion.

Last week, Special Superior Court Judge James Gale issued **an order** in a case involving the removal of New Hanover County Commissioner Brian Berger. Reviewing the board’s 3-2 decision to remove Mr. Berger, the judge ruled that “[a]n amotion procedure remains a lawful procedure that may be utilized for the purpose of removing an elected official so long as such procedure includes notice and hearing and is based upon sufficient competent evidence demonstrating reasonable and just cause for removal.” *Brian Berger v. New Hanover County Board of Commissioners*, 13 CVS 1942 (Sept. 5, 2013), *slip op.* at 30. Although the judge upheld the validity of the process that New Hanover developed for the amotion proceeding in general, he voided the Commissioners’ decision because it was based, in part, on findings of fact that relied on personal experiences and impressions of two commissioners, rather than on objective evidence presented at the hearing. The judge’s order restores Commissioner Berger to his elected office, but the order’s “remand” leaves open the possibility that the board could redo the amotion proceeding. The order provides specific guidance on the standard for removal, as well as the essential elements of a valid amotion process. This blog post summarizes Judge Gale’s blueprint for removal by amotion.

### Amotion is a Viable Power for Local Government Boards

Judge Gale concluded that 1) the North Carolina Supreme Court has recognized the validity of amotion as a method of removing an elected official; 2) the trial court is bound to follow the holdings in those cases; 3) state law (G.S. 4-1) provides that common law principles are in full force absent extraordinary circumstances; and 4) the power is equally available to cities and counties. The judge concluded, “In sum, the court finds no basis to conclude that the amotion procedure recognized at common law has become archaic or has been expressly or impliedly withdrawn by either North Carolina’s appellate courts or the Legislature.” *Slip op.* at 17.

### Requirements for a Valid Amotion Proceeding

#### Due Process

A valid amotion proceeding must include notice, a hearing, and fact finding by an impartial decision-maker based on evidence presented at the hearing. This may sound familiar as they are the basic requirements of a quasi-judicial hearing. The judge drew these standards from the earlier North Carolina amotion cases. These protections typically accompany a government action that implicates a constitutionally protected property or liberty interest. It’s important to note (as the county argued) that an elected official does not have a property right in his or her office. This has been the consistent rule in cases where removal occurs because the office itself is eliminated. See, *Mial v. Ellington*, 134 N.C. 131 (1903). Elimination of an office is a legislative decision. The removal for cause while in office, however, is considered a quasi-judicial action, and courts have consistently required that the basic elements of due process must be afforded.

#### Notice and Hearing

Since amotion is not a statutory procedure, the few existing amotion cases, and the general case law about quasi-judicial hearings, provide the only guidance about what process is legally required. New Hanover County’s process consisted of 1) adoption of a “Petition in Amotion to Remove Brian Berger,” which included the basic allegations in support of removal,

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as well as affidavits and exhibits relating to those allegations, 2) delivery of the Petition to Commissioner Berger along with a Notice of Hearing and Rules and Procedures for the hearing, which was scheduled about a month later, and 3) conduct of a hearing at which Mr. Berger was represented by counsel. Both the board and Mr. Berger had the opportunity to present evidence and cross-examine witnesses. The court concluded that this procedural structure was legally sufficient.

#### Burden of Proof and Rules of Evidence

The order makes clear that the burden of proof rests with the board. The board lays out the basis for removal in the petition or motion for removal and provides evidence in support at the hearing. The board member then has the opportunity to rebut the evidence and provide additional evidence, and the board must, in the end, make an unbiased decision about whether there is a sufficient case, supported by the evidence, for removal.

Consistent with other cases involving quasi-judicial hearings, the court rejected Berger's assertion that the board was required to follow the North Carolina Rules of Evidence.

#### Impartial Decision-Maker

The court made two important findings regarding the impartiality requirement.

First, the very same board that initiates removal by a motion is considered to be an impartial decision-maker, as long as its decision is unbiased and based on the objective evidence presented at the hearing. It may seem a tall order for board members who voted to initiate removal to maintain an open mind about the evidence presented at the hearing. The order notes that a person is not considered to be biased merely because he or she has prior knowledge of the situation. Despite the challenge of remaining open to the possibility that the evidence does not support removal, the board is the only body that can make the final decision.

Second, the decision is invalid if any board member's vote is based on or affected by personal opinions or impressions that are not supported by evidence in the record. To say a person is biased, in the context of a quasi-judicial proceeding, means that he or she has a predisposition to a particular result and is unable or unwilling to apply the legal standard to the evidence presented. As a separate matter, decision-makers must also be careful to apply only the evidence, and not their personal impressions about the matter at hand. The judge did not find that any board member was biased. Instead, he invalidated and remanded the case solely because two of the findings of fact were based on board members' statements of personal experience rather than evidence from the hearing. The order concludes: "The single fact that the decision was not on its face limited to the evidence presented but extended to personal experiences of the fact finders requires that the court remand the matter for such further proceedings as the Board may choose to implement." *Slip op. at 21.*

#### Standard for Removal

What evidence or behavior must be presented to make the case for removing an elected official from office? Judge Gale concludes that there is no categorical or definitive answer to this question. Cases have used the concept of "just cause" – a standard that is familiar to those who deal with due process hearings in the context of employee dismissals. It's clear from the prior North Carolina cases and from Judge Gale's order that removing an elected official requires more than simply poor performance. It may be appropriate to think of the standard as just cause "plus." The order articulates a good reason for a heightened standard: "[I]t seems clear that a court called upon to [review an amotion decision] will necessarily be faced with achieving the balance between the extraordinary concept of overturning the results of an election and a set of facts which can also be extraordinary in its presentation of how an elected official has acted or failed to act so as to hamper the functioning of the office to which he or she was elected or create safety, security, or liability concerns arising from his or her action or inaction in office." *Slip op. at 25.*

The order emphasizes that the "sufficiency and competency" of the evidence presented must *relate to the duties of the elected office*. The order states, "[T]he standard must be flexible enough that the governmental body has a reservoir of power to respond to that extreme set of facts that challenges the integrity of the governmental process. Ultimately, a court may be unable to draw precise dividing lines that define when a motion may or may not be appropriate. The court concludes, however, that in all cases, a finding of cause to remove an elected official from office will depend upon conduct that is sufficiently tied to the duties of the elected office from which an elected official is being removed." *Slip op. at 26.* The court went on to give suggestions about evidence that may be more or less important, which I've paraphrased and

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quoted below:

- Evidence about one's personal life, viewed in isolation, may not seem relevant, but may provide context for issues that relate to the person's behavior in office.
- Evidence about criminal charges that do not result in convictions will not be particularly strong.
- The connection between the evidence and the duties of office should be explicit in the record. "[T]he burden of showing sufficient competent evidence in most instances would impose on the fact finder an obligation to make clear how it has measured the underlying evidence as against the duties and abilities expected of the office." *Slip op. at 27.*

The order also notes, almost as a suggestion to the county, that boards have options short of removal to address the behavior of board members whose actions don't meet the appropriately high standard for removal. "In addition to removal, a governmental body may in appropriate instances be within its powers to implement extraordinary restrictions on an elected official's access to government facilities, processes, computers, and e-mail systems." *Slip op. at 28 (citations omitted).*

### Conclusion

Elected boards sometimes perceive one of their members in a bad light. The prospect of being able to remove an uncooperative, annoying, absentee, or even truly misbehaving member may seem appealing. Judge Gale's careful analysis provides a helpful reality check for those considering such a process. Although this trial court level decision is not binding beyond this case, it provides support for the notion that removal through amotion is an option, but also for the notion that it must be undertaken only in an extreme case, with sufficient evidence to support an impartial decision.

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