
Coates' Canons Blog: Unexcused Absences

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Pat Sprat was elected to the town council but just after being sworn in, a sudden illness landed her in the hospital. Pat couldn't drive for several months, but was able to keep up with town matters by email and phone calls. On top of that Pat was transferred to a new position at work, with lots of travel out of the state. And then there are the family demands. Pat's daughter is a top contender in the **National Rubix Cube competition** (the 3x3 blindfolded is her event) and those tournaments keep Pat on the road in between business trips. As a result of all this, Pat has missed 10 of the last 12 council meetings, and will be unable to attend the budget workshops and the public hearing on the budget. Board members are concerned that Pat is not fulfilling the duties of the office and they are frustrated that they sometimes don't have enough members constitute to a quorum. What can a city or county governing board do when one of its members won't or can't come to meetings? As a practical matter, not very much.

Excused vs. Unexcused Absences

There is no legal requirement or authority for excusing board members from attending meetings. Statutes deal with excusing members from voting on particular matters (**G.S. 153A-44**; **G.S. 160A-75**), but none deal with excusing members from attending a meeting entirely. There are statutes that provide for temporary or long-term transfer of the power to preside over meetings in cases of short- or long-term absence of the mayor or chair. See, **G.S. 153A-39** and **G.S. 160A-70**. None of these statutes, however, allow for the removal of the board member and they don't distinguish between excused or unexcused absences. The general laws do not set a minimum number of meetings members must attend.

Boards may establish policies or practices regarding absences. For example, board members may be asked to let the clerk or the chair know if they will be unable to attend a meeting. This is useful to avoid a situation where lots of people show up for matters on the agenda but there aren't enough board members to hold the meeting. Some boards may even vote on or classify absences as excused or unexcused. These steps have practical, but not legal, effects. There is no general legal standard for what would constitute an "excused" absence, as opposed to some other kind. There is, in fact, no legal difference between an excused and an unexcused absence. More importantly, there is no legal penalty for excessive absences, whether excused or unexcused.

Counties can compel attendance by "ordering the sheriff to take the member into custody" (**G.S. 153A-43**) but that's not very practical if the member is incapacitated or out of town. There is no comparable provision for cities.

Leaves of Absence

A city or county board member may obtain a leave of absence for protracted illness or "other reason satisfactory to the governing body" of the city or county under **G.S. 128-40 (counties)** or **G.S. 128-41 (cities)**. This appears to be an option that is rarely exercised. It must be initiated by the board member seeking the leave of absence and is approved by the governing body. While on leave the board member does not receive a salary but retains any sick leave to which he or she is entitled. The leave does not extend the term of office. These statutes also authorize the governing board to appoint a temporary replacement who must be qualified to hold the office and who has all of the "authority, duties, perquisites, and emoluments" of the official who is temporarily replaced.

No Specific Authority for Sanctions or Removal

As noted in this **blog post** there is no statutory authority for removal or sanctioning of elected city or county governing board members. So even if an ethics code or other locally adopted policy requires regular attendance at board meetings, such a provision should be viewed as a standard to strive for, but not one that can be enforced. The board can adopt a resolution of censure or reprimand, expressing disapproval and documenting a violation of the local code or policy. This

provides notice of the problem and gives the board an opportunity to express its concern, but it has no legal consequences.

Docking Their Pay

Although there is no authority to withhold payment for board service as a penalty for missing meetings, it is possible to create a system of compensation that rewards regular attendance. Governing boards have broad authority to establish the basis and amount of compensation for their members. See, **G.S. 153A-28, 160A-64**. One option is to compensate members in whole or in part on a per meeting basis, with no payment for missed meetings. It is important to note however, that the statutes limit the board's ability to reduce pay for elected officials during the fiscal year. A change in the method of payment would likely have to be made for all board members and would have to be approved when the budget is adopted. For more on this issue, see **Kara Millonzi's blog post here**.

Extreme Cases

In the case of serious illness or other extraordinary circumstances resulting in the long term inability or unwillingness to attend meetings, a board might consider **amotion**, a common law basis for a board to remove one of its members. As noted in my blog post **about a North Carolina amotion case**, it's possible that a court would allow removal under this theory, provided there is ample evidence to support it and process is fairly undertaken. Another option would be to request legislative removal, or legislative delegation of authority for removal.

A Local Modification

A 2005 local act provides an example of a city charter provision authorizing in one specific jurisdiction the removal or sanction of board members for failure to attend meetings. (Thanks to **Gerry Cohen** for the tip.) The provisions in this act illustrate the challenges of creating a rule for attendance. The act sets an expectation for attendance at all regular meetings, except for "occasional, unavoidable conflicts." It sets a 60% attendance requirement but does not count as absences any failure to attend based on illness or death of an immediate family member, military service, or activities necessary to the performance of the member's official duties. The provision includes a process for enforcement, which includes a hearing and presentation of evidence, and authorizes sanctions including removal by majority vote, and censure or reprimand.

Attending by Calling In

Pat Sprat suggests that some of the board's concerns could be alleviated if they would allow board members to call in to participate in meetings. The board isn't sure if they can allow that. I've addressed this issue in a blog post **here**. A board is not required to, but may decide to allow such participation. The risk of allowing participation by phone or other electronic method arises if the person participating remotely is the deciding vote, or is necessary to create a quorum. If it's just a matter of allowing participation in discussion, it's really a matter of board preference since there would be nothing to invalidate in a legal challenge. The local act discussed above specifically acknowledges the option of participating by phone, but by its terms a person who calls in is still counted absent for purposes of the attendance requirement.

The Value of Being There

Ultimately, Pat Sprat's failure to attend raises ethical and philosophical questions about what it means to fulfill the role of a board member. These questions are perhaps more important than the legal ones. Presence at meetings may be important for developing working relationships, for interacting with citizens, and supporting staff when key decisions need to be understood and addressed. As I note in the second blog post on electronic participation, certain kinds of proceedings may require physical presence as a matter of due process.

On the other hand, even the most valuable and committed elected officials may experience periods when absences can't be avoided, and technology has increased the capacity for contributions that can be made remotely. Furthermore, it's not so easy to decide what constitutes a justifiable reason for failure to attend, and a legislatively approved power of a majority to remove a board member could easily be subject to abuse.

Rules for Appointed Boards

This discussion has focused on city and county elected governing boards. Other statutorily mandated boards may have their own rules. For example, county commissioners have authority under **G.S. 130A-35** to remove members of local boards of health for, among other things, "habitual failure to attend meetings."

Cities and counties have more flexibility in setting attendance requirements for locally created and appointed boards. The ordinances or resolutions that create these boards may set requirements for attendance and electronic participation, and may include provisions for sanctions or for removal.

Links

- www.cubingusa.com/usnationals2012/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-44
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-75
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-39
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-70
- www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_153a/gs_153a-43.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=128-40
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=128-41
- canons.sog.unc.edu/?p=1139
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-28
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- canons.sog.unc.edu/?p=3653
- canons.sog.unc.edu/removing-an-elected-official-by-amotion-judge-says-it-can-be-done/
- www.ncleg.net/enactedlegislation/sessionlaws/html/2005-2006/sl2005-188.html
- ncbilldrafting.wordpress.com/
- canons.sog.unc.edu/remote-participation-in-meetings/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-35