

DEALING WITH A NON-PERFORMING ELECTED OFFICER

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Disclaimer...

- ✓ This presentation contains my thoughts, research, and experience from nearly 25 years work in and with county government. It does not reflect the policy or position of the Iowa Attorney General's Office.
- ✓ Information in this presentation is general in nature and is not intended to be relied upon as legal advice. Your county attorney is your legal advisor, and you should consult with your county attorney to review the specific facts facing your county prior to taking any action regarding information presented here today.

My brief career as an unelected-elected county officer...

Iowa Code Sec. 331.754: If absence, sickness or disability of county attorney and all assistants-Court may appoint acting temporary county attorney on application of county attorney or attorney general.

No similar provision exists for the other county elected officers

The big picture

county government, by design, grants authority to elected officers with discretion in defined areas- only answer to the voters.



What is an officer?

- 1. Created by constitutional or legislative authority
- 2. Delegated a portion of government sovereign power.
- 3. Defined duties.
- 4. Performed independently of a superior power other than law.
- 5. Permanency and continuity (not ad hoc).

What is an officer?

- Most county officers are appointed by the board...
 - ▣ Conservation Commissioners
 - ▣ County Health Board
 - ▣ County Hospital Trustees
- Board can generally remove such appointees – Iowa Code Sec. 331.321(3)
 - ▣ Written order with hearing before the board.
- Not so with elected officers.

McMurray v. Bd. of Supervisors of Lee County (Iowa Supreme Court, 1978)

- Elected Clerk of Court appointed a deputy clerk
- Bd. Supervisors by resolution set standards for deputies
 - Required 2-year experience
 - Salary 60% officer-with 5% annual raise
- Rejected appointment for lack of experience

The Iowa Supreme Court says...



“The board appears to have proceeded as though our system of county government consisted of central management with subsidiary departments. With few exceptions, however, our statutes establish autonomous county offices, each under an elected head”

What if elected officer isn't performing duties?

- Ask yourself...

Is this a failure to do a duty, or a disagreement over discretion afforded the other officer?

There are duties and then there are **DUTIES!**

- Significant impact on other offices/public if not done
- Ex. — Payroll, Budget, Tax List

Setting priorities...

- Ex. County Attorney- Sect. 331.756- 85 subsections of duties (many more in other sections of the code).
 - ▣ Subsection 55- Commence proceedings to obtain maps of mines at request of state geologist.
- Officers will disagree what these priorities should be.
- Setting priorities –fundamental to the discretion of an office
- Except in the extreme- these are political questions

Does the elected officer have the resources to do the duty?

- Staff
- Equipment
- Expertise

Reaching out...

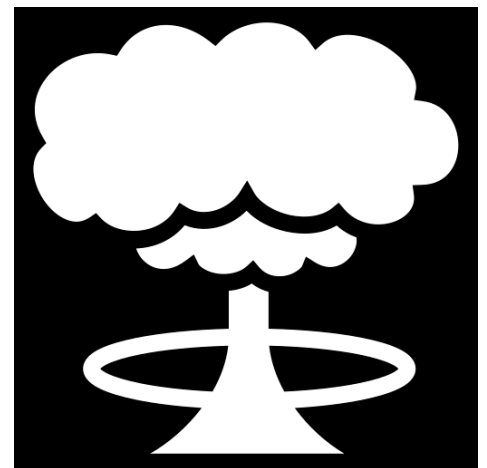
- How are you doing? How can we help?
- Mentoring- prior officeholder? other county? ISAC affiliate?
- Be careful inquiring in health/mental health/substance issues.
- Consult w/ county attorney (potential civil rights/ ADA issues)

Formal inquiry

- Iowa Code Sec. 331.323(2)(b):
 - The board of supervisors may require any county officer to make a report under oath on any subject connected with the duties of the office, and remove from office by majority vote an officer who refuses or neglects to make a report...
 - Prior AG opinion (#79-5-13): places limits on this procedure (sheriff not need to disclose identity of confidential informant to support payment).
 - I find no examples removal of elected officer in case law— see later process

Removal from office- Iowa Code Ch. 66

- Nuclear option
- Courts are hesitant to remove officials elected by the people



Allowed grounds

- Willful/habitual neglect of duty
- Willful misconduct
- Corruption
- Extortion
- Felony conviction
- Intoxication
- Campaign finance violations

“...grounds for removal must have been done knowingly, willfully, and with an evil or corrupt motive and purpose. Acts which are simply irregular, even if violative of statutes, are not in themselves grounds for removal from office unless an evil and corrupt motive on the part of the officeholder is shown. Op. 81-3-18

Very few cases- very bad facts

- Sherriff – multiple instances of beating prisoners (*Calloway*, 1978).
- Supervisors- free trips from county contractors, cash slush funds from sale of used equipment, falsified mileage claims. (*Bartz*, 1974)

...the remedy provided by statute for the removal of duly elected public officials is heroic in nature and relatively drastic in a system where the usual method of removing officeholders is by resort to the ballot. *Bartz*

Who brings action

- Filed by:
 - Public by petition
 - 5 voters
 - Bond to cover cost of suit plus attorney fees
 - County attorney for local officials
 - Attorney General
- County attorney- primary responsibility to prosecute

Process

- Court may suspend officer while pending without pay
- Court appoints temporary official while pending
- Hearing- set 10 to 20 days after judge is appointed to hear.
- If dismissed- pay expenses for defense and attorney fees
 - Political subdivision pays costs if not proven and filed by county attorney
 - State pays costs if filed by Attorney General
 - Private citizens pay if petitioned and court finds no probable cause



Red Flags



- Patterns of...
 - ▣ Reoccurring late charges
 - ▣ Tardy/missing required reports
 - ▣ Failure to keep current required records/books
 - ▣ Putting-off/ defensive responding to reasonable inquiries on books
 - ▣ Failure to correct audit irregularities (Iowa Code Sec.11.53)
- May alert State Auditor



Some issues I see...

Self Appointment Iowa Code 331.216

- Supervisor may serve on any appointive board of the state/political subdivision, non-profit , or agency receiving county funds- unless statute provides otherwise
- Waives incompatibility of offices, but...
- Does not waive conflicts of interest that may arise (Op. Atty. Gen. #01-4-4)
 - Conflict of interest requires abstention in discussion and voting
 - Problems serve on county board/commission
 - 3- person board and 1-1 tie?

When do we need to provide notice for boards we sit on?

Open Meetings-only applies to “Government Bodies” holding “meetings”.

Government bodies:

Board etc. created by statute/ executive order

Board/Commission of political subdivisions/tax-supported district

Multimember body formally/directly created by either of first 2

Board of non profit licensed to conduct gambling (boats/casinos)

Drainage/levy dist. board

Advisory board- created by executive order of state/political subdivision /28E entity to recommend/develop public policy

These are the tough ones. Review with your county attorney if in doubt.

When do we need to provide notice for boards we sit on?

- Meeting= in person/electronic of majority of members + deliberate/act on matter under scope of duties.
- IF MEETING- THEN 24 HR. NOTICE/ AGENDA- DESIGNATED BULLETIN BD. PRINCIPAL OFFICE/ MEDIA- NOTICE IF REQUESTED

What about non-profit we sit on?

Probably not a “government body”- (except casino licensee)

BUT...

Beware if you have a majority of your board on the non-profit.

Could easily slip into “deliberation” on matter regarding official county duties.

Coffee talk...



- No meeting unless majority of board.
- No meeting unless act or deliberate on matter under scope of duties.
- Deliberation is broader than making decision- includes discussion and evaluative process
- Mere receipt of information is not “deliberation”
- Very easily cross line into “deliberation”
- Stay clear of “shop talk” if majority of board.