

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

<p>DIANA L. BRODERSON,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>CITY OF MUSCATINE, IOWA, and CITY COUNCIL OF THE CITY OF MUSCATINE, IOWA,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. EQCV023989</p> <p>RULING ON PLAINTIFF’S WRIT OF CERTIORARI</p>
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The Writ of Certiorari now comes before the Court for consideration. After having considered the evidence presented, the written arguments of counsel, and the applicable law, the Court enters the following ruling.

BACKGROUND FACTS

In November 2015, Plaintiff, Diana Broderon, was elected Mayor of the City of Muscatine, Iowa. She took office in January 2016, and began to serve a two-year term which expires in January 2018. Throughout 2016, a number of issues arose with regard to the Mayor’s actions while in office. The Defendants allege that the Mayor exceeded her authority, repeatedly violated the City Code and Code of Ethics, and asserted false and baseless allegations exposing the City to potential liability.

Between February 18, 2016, and January 5, 2017, the City Council held seven closed meetings to discuss its frustration with the Mayor and what, if anything, the City Council could do to fix the problems it was having with the Mayor. The Mayor was present for the first three meetings, but was excluded from the remaining four after a change in Iowa’s closed meeting law

that permitted the Council to exclude her. *See* Iowa Code § 21.5(4) (2017). The City Administrator, Gregg Mandsager, was present for all seven closed City Council meetings.

Eventually, on January 12, 2017, the City Council held a vote in public, upon which they instructed the City Attorney, Matthew Brick, to file written charges of removal with the Council. The City Attorney filed the written charges of removal on February 17, 2017, accusing the Mayor of willful misconduct and/or maladministration and willful or habitual neglect or refusal to perform duties of office under Muscatine City Code § 1-7-6, which was enacted pursuant to Iowa Code chapter 66. The Mayor was served with the charges and a Notice of Hearing on March 9, 2017.

The City hired John Nahra to serve as its independent prosecutor. It is unclear from the record exactly when the City hired Nahra, but it appears he was retained sometime after January 5, 2017. The Defendants assert that prior to filing the written charges of removal, Nahra reviewed the charges to ensure that there was sufficient evidence to bring each charge, which led to the omission of some of the charges. Nahra looked over various documents, including emails, City Council minutes, reports, and mayoral press releases. After the charges were filed, he took sworn statements of witnesses who would be testifying at the removal hearing. Nahra then served as the prosecutor at the removal hearing.

The Mayor retained counsel to represent her at the removal hearing. Prior to the hearing, the Mayor filed a Motion to Remove the Proceedings to District Court, arguing that the hearing in front of the City Council would not protect her due process rights. The Council heard argument on the motion at the outset of the removal hearing and voted 4–3 in favor of denying the motion, thus allowing the proceedings to continue in front of the City Council.

The removal hearing took place over the course of two days, on March 23, 2017, and April 1, 2017, in front of the City Council. The hearing lasted over 20 hours. The City called 18 witnesses and the Mayor called 2 witnesses, including the Mayor herself. None of the City Councilmembers testified during the removal hearing. During the hearing, the City Council was advised by Douglas Fulton, an attorney at the City Attorney's law firm, Brick Gentry P.C. The City Attorney did not advise the Council as he was called as a witness during the hearing.

After the hearing, the City Council instructed the City and the Mayor to prepare briefs on the relevant law and to submit proposed decisions. Both the City and the Mayor provided their post-hearing briefs on May 2, 2017.

On May 11, 2017, the City Council held a three-minute public meeting, during which it unanimously voted to adopt the City's Proposed Findings of Fact in its entirety and issue an order removing the Plaintiff as Mayor. No public deliberation occurred prior to the vote. There do not appear to be any closed sessions that took place after the removal hearing but prior to the removal vote.

On May 16, 2017, Plaintiff filed a Petition for Writ of Certiorari with this Court, asserting that the City Council acted illegally and exceeded its jurisdiction when it removed her from office. Following a hearing on June 14, 2017, Judge Mark Smith ordered that the Mayor be reinstated during the pendency of the certiorari proceedings. Seventh Judicial District Chief Judge Marlita Greve then specially appointed the undersigned to preside over all further proceedings in this case. A writ of certiorari was issued by the Court directing the Defendants to produce the record of the removal hearing before the City Council.

On July 14, 2017, Plaintiff filed a Motion to Compel Discovery seeking the audio recording and transcripts of the closed meetings held prior to the filing of the charges of removal.

A final hearing on the writ of certiorari was held on July 17, 2017, which led to both Parties agreeing that the record was complete except for the resolution of the issues raised in the Motion to Compel Discovery. The Court left the record open only to the extent of any additional evidence that might come to light as a result of any later ruling on the Motion to Compel Discovery.

On August 11, 2017, this Court granted the Plaintiff's Motion to Compel and ordered the Defendant to provide the Plaintiff with the transcripts and audio recordings of closed meetings that took place prior to the Mayor's removal. On August 16, 2017, City Administrator Gregg Mandsager filed a Motion to Intervene in this proceeding. The following day, Mandsager filed a Motion to Stay and a Motion to Reconsider the ruling on the Plaintiff's Motion to Compel Discovery. The Defendants filed a Joinder in Intervenor's Motion to Stay as well as their own Motion to Stay. The Plaintiff filed a Resistance to the Motion to Stay and Motion to Reconsider and also filed two applications for further evidence.

On August 31, 2017, this Court granted the Intervenor's Motion to Intervene, denied Intervenor's Motion to Stay and Motion to Reconsider, denied the Defendants' Motion to Stay, denied the Plaintiff's First Application for Additional Evidence, and granted the Plaintiff's Second Application for Additional Evidence. The Court again ordered the Defendants to produce the transcripts and recordings of the closed meetings.

On September 7, 2017, Defendants filed an application for Interlocutory Appeal and an Application for Stay with the Iowa Supreme Court. On September 11, 2017, the Iowa Supreme Court granted the stay pending resolution of the interlocutory appeal. On September 28, 2017, the Iowa Supreme Court denied the Defendants' application for interlocutory appeal and lifted the stay, allowing the proceedings to resume in the District Court. The following day this Court

entered an order giving the parties until October 20, 2017, to seek permission to submit additional evidence. Neither party requested the presentation of additional evidence. The case is now fully submitted, and the matter now comes before the Court for consideration.

ANALYSIS

When a party believes “an inferior tribunal, board, or officer, exercising judicial functions, . . . exceeded proper jurisdiction or otherwise acted illegally,” the party may file a petition for a writ of certiorari within 30 days of the allegedly illegal action. I. R. Civ. P. 1.1401, 1.1402(3). The relief the petitioner is entitled to is “strictly limited to questions of jurisdiction or the legality of the challenged acts, unless otherwise provided by statute.” *Id.* 1.1403. Judgment “shall be limited to annulling the writ or to sustaining it, in whole or in part, to the extent the proceedings below were illegal or in excess of jurisdiction.” *Id.* 1.1411.

Certiorari proceedings are not for the correction of errors or to try the proceedings de novo. *Id.* 1.1411 official comment. The Court is not permitted to substitute its judgment for the lower tribunal, and should not examine the evidence in the lower tribunal except to determine the legality of the lower proceedings. *Id.* The burden of showing illegality rests on the party that alleges illegality. *Fisher v. Chickasaw Cty.*, 553 N.W.2d 331, 334 (Iowa 1996).

“When the [certiorari] action alleges violations of basic constitutional safeguards . . . [the Court] make[s its] own evaluation of the facts from the totality of the circumstances.” *Scott v. State*, 517 N.W.2d 718, 722 (Iowa Ct. App. 1994). Here, Plaintiff asserts that the City Council acted illegally and in excess of its jurisdiction and violated her state and federal due process rights when it removed her from office.

The Court notes that in addition to the claimed due process violation, the Plaintiff asserts there was not sufficient evidence to support her removal under Iowa Code chapter 66 because the

allegations against her did not rise to the level of willful misconduct and maladministration of office or to the level of willful or habitual neglect or refusal to perform her duties. The Plaintiff also contends that she did not engage in campaign finance ethical violations and that the statements of fact provided in the removal decision were inadequate. The City denies these allegations and claims there was sufficient evidence to support the removal. Because the Court finds that the resolution of the Plaintiff's due process claim is dispositive of the pending action, the Court will not address the Plaintiff's remaining arguments.

With regard to an individual's due process rights, the Iowa Supreme Court has stated:

The Fifth Amendment to the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment also states that no state shall "deprive any person of life, liberty, or property, without due process of law." Article I, section 9 of the Iowa Constitution states that "no person shall be deprived of life, liberty, or property, without due process of law." "Due process requires fundamental fairness in a judicial proceeding," so a trial that is fundamentally unfair violates the guarantees of due process in the United States and Iowa Constitutions.

More v. State, 880 N.W.2d 487, 499 (Iowa 2016).

Due process requires, at a minimum, "a fair trial in a fair tribunal." *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 848 (Iowa 2009). "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). Courts have recognized that "in some situations, such as those involving pecuniary interest or demonstrated personal bias, 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Botsko*, 774 N.W.2d at 848 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). In other instances, the plaintiff may be required to show actual bias or prejudice before the Court will find a due process violation. *Id.*

The Court concludes that the Defendants violated the Plaintiff's right to due process in two ways: 1) by intermingling investigatory, prosecutorial, and adjudicative functions during the removal process; and 2) by having an interest in the outcome of the removal proceeding. The Court will address these due process violations in turn.

1. Intermingling of Functions

One way an adjudicative body may violate an individual's due process rights is by intermingling investigative, prosecutorial, and adjudicative functions. In cases involving the intermingling of functions, Plaintiff's burden of proof to show a due process violation depends on the functions that were intermingled.

Intermingling prosecutorial and adjudicative functions on its own is fundamentally unfair and is sufficient to establish a due process violation without showing prejudice. *See Burke v. City Council of City of Lansing*, No. 15-1797, 2017 WL 706214 at *5 (Iowa Ct. App. Feb. 22, 2017); *see also Botsko*, 774 N.W.2d at 853 (“The combination of advocacy and adjudicative functions has the appearance of fundamental unfairness Further, because of the risk of injecting bias in the adjudicatory process, [the plaintiff] is not required to show actual prejudice.”).

“[T]he primary purpose of separating prosecutorial from adjudicative functions is to screen the decisionmaker from those who have a ‘will to win’—‘a psychological commitment to achieving a particular result because of involvement on the agency’s team.’” *Botsko*, 744 N.W.2d at 849 (quoting Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 773 (1981))¹. The Court in *Botsko* noted that “[i]t is difficult for anyone who has worked long and hard to prove a proposition . . .

¹ Although *Botsko* dealt with procedural due process and intermingling of functions in agency adjudications, the Court finds its reasoning to be on point with regard to the City Council's removal process in this case.

to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively.” *Id.* (quoting 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.9, at 681 (4th ed. 2002)).

When there is only a combination of investigative and adjudicative functions, however, there is a much higher burden of persuasion to show a due process violation:

[The plaintiff] “must overcome a presumption of honesty and integrity in those serving as adjudicators; and [she] must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

Id. at 848 (quoting *Withrow*, 421 U.S. at 47).

There are certain functions that courts do not classify as prosecutorial. For example, “a board must necessarily be exposed to facts or allegations” when it decides to make the initial decision to consider removal, and “[i]n the absence of evidence that a board has prejudged the facts of the case, we will not find a denial of due process by the combination of investigative and adjudicative functions.” *Wedergren v. Bd. of Directors*, 307 N.W.2d 12, 17 (Iowa 1981) (finding that a board of directors did not violate a superintendent’s due process rights when it voted to consider termination and then later voted to terminate). Additionally, the adjudicator’s counsel asking a question during an adjudicative hearing does not amount to a partisan activity. *Botsko*, 774 N.W.2d at 851. Adjudicators may also ask questions during an adjudicative proceeding “in order to clarify the record” without taking on a prosecutorial function. *Id.* Further, “the mere filing of a complaint by an executive director is considered ministerial in nature and does not give rise to a due process issue in the event the executive director participates in the final agency adjudication.” *Id.*

However, “when a staff member becomes involved in the plaintiffs’ litigation strategy or assumes a personal commitment to a particular result, he or she becomes an adversary with the ‘will to win.’” *Id.* at 852. The Court in *Botsko* noted that in determining what kind of involvement constitutes a procedural due process violation, “the question is one of line-drawing and balancing.” *Id.*

Here, in order to understand the functions the City Council undertook in the Mayor’s removal, the Court must consider the transcripts of closed meetings the Council held prior to initiating the removal process. The five closed meetings the Court considered in this certiorari action were held on February 18, 2016; June 23, 2016; October 13, 2016; December 15, 2016; and January 5, 2017.

At multiple closed meetings, the City Attorney and City Council discussed allegations regarding the Mayor’s actions. At first, these concerns were addressed in conversations regarding resolving conflict and moving forward. However, as time passed, the focus shifted from resolving conflict to finding something they could do about what they believed was the Mayor’s wrongful conduct. During multiple closed meetings, the City Attorney would discuss with the City Council all of the Mayor’s alleged transgressions, and these allegations were eventually used to form the factual basis for the charges of removal.

The Iowa Code chapter 66 removal process was first discussed at the meeting held June 23, 2016. At the end of this meeting, the City Council authorized the City Attorney to further research the removal process. This research was presented to the Council at its October 13, 2016, closed meeting. The City Attorney informed the Council that the removal proceedings could take place in either the district court or in front of the City Council, but that the Council would have more control if it presided over the hearing. The City Attorney noted that due process would not

allow the Council or the City Attorney to actually prosecute the case, but the City Attorney mentioned he would be able to provide the prosecutor with all of the information he had. The City Attorney walked through the potential charges of removal and talked about strategy with the Council regarding whether it should include certain allegations because some of the potential witnesses might not be willing to testify at a removal hearing. The City Attorney, however, assured the Council that most, if not all, of the allegations they had discussed during the closed meetings would be included in the removal charges.

At the December 15, 2016, closed meeting, the City Attorney informed the Council that he had spoken with a number of public relations experts about what the Council could do to restore its image in the community. Based on the advice of the public relations experts, the City Attorney told the Council that it needed to decide what the end goal was with regard to the Mayor: whether it was to remove her or just to weaken her to ensure that she would lose the next election. The Council discussed a number of options, which included filing an Iowa Public Information Board complaint, filing the removal charges but never holding a hearing, or filing charges and holding the removal hearing. The City Attorney noted that the next steps would vary greatly depending on the Council's end goal.

The Council then decided to take a straw poll to determine its end goal. The Councilmembers went around the table, each stating his opinion with regard to the path forward. After most of the Councilmembers had stated their opinion, the City Attorney clarified and asked what the consensus was with regard to the end goal. The Council again decided to go around the table for a vote. At the end of this vote on December 15, 2016, all but two Councilmembers had voted in favor of removing the Mayor from office.

During the January 5, 2017, meeting, the City Attorney presented the Council with a draft of the charges of removal. The City Council discussed whether it should file all of the charges, or if it should leave certain charges out until the Councilmembers were able to see what the Mayor's response was and then amend the charges to add more later if needed. During this meeting, the City Attorney discussed the number of charges included in the removal document, noting that the Mayor would have to disprove each and every charge and if she was unable to do so, she would be removed. The City Attorney followed up by noting that they wanted to make sure they won.

During the January 5, 2017, meeting, the City Attorney also again asked about the end goal. In response, one of the two Councilmembers who had not voted in favor of removal during the December 15th meeting stated that he was now in favor of removing the Mayor from office. At that point, the vote by the City Councilmembers was at least 6–1 in favor of removing the Mayor from office. It is important to note that this vote took place prior to the hiring of an independent prosecutor, prior to filing the charges of removal, and prior to the removal hearing.

The Defendants contend that there was no intermingling of prosecutorial and adjudicative functions because the City Council hired an independent prosecutor, made express findings of fact and conclusions of law, gave the Mayor the ability to present evidence and a meaningful opportunity to be heard, and only performed ministerial procedural actions to commence the evidentiary hearing. The Defendants contend that to succeed in showing a due process violation, the Plaintiff must overcome the presumption of honesty and integrity in the adjudicators.

The City relies heavily on the fact that it hired a special prosecutor for the Mayor's removal hearing. The City did in fact retain Mr. Nahra as a special prosecutor, and provided him with all of the documents it had regarding the investigation into the Mayor's actions. Mr. Nahra

reviewed the charges of removal, interviewed witnesses the Council identified, and was the prosecutor at the removal hearing. However, prior to hiring Mr. Nahra the City had already completed a substantial amount of the investigation and essentially all of its strategizing. This is clear from the City Attorney drafting removal charges prior to the January 5, 2017, closed meeting and from the Council having already discussed which charges to include.

Moreover, the record clearly demonstrates that the Council had prejudged the issues. The Council had voted at least 6–1 to remove the Mayor from office before the removal hearing had even been scheduled. In sum, the record shows that the Council had a “will to win” the removal hearing and that the Mayor’s removal was a foregone conclusion.

Due process requires a fair trial before a fair tribunal, not simply the empty appearance of fairness. Upon review of the record in this case, and based on the totality of the circumstances, the Court reaches the inescapable conclusion that the City Council impermissibly intermingled investigative, prosecutorial, and adjudicative functions which rendered the Mayor’s removal proceedings fundamentally unfair, and thus violated her due process rights.

2. City Council’s Interest in the Outcome

“[N]o man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.” *In re Murchison*, 349 U.S. at 136; *Turnis v. Bd. of Ed.*, 109 N.W.2d 198, 203 (Iowa 1961) (adopting *In re Murchison* in Iowa).

In *Turnis*, a joint school board voted unanimously to create a new school system. The plaintiffs in *Turnis* challenged the vote on due process grounds because two of the board members who participated in the vote had also signed a petition in support of creating the new school system. The Iowa Supreme Court in *Turnis* found no due process violation because the

two interested members of the Board of Education “were not the sole judges of the plan and their votes were not decisive. In addition, no special, personal, or pecuniary interest which would be sufficient to disqualify them appears.” *Turnis*, 109 N.W.2d at 203.

In *Burke v. City Council of City of Lansing*, No. 15-1797, 2017 WL 706214 (Iowa Ct. App. Feb. 22, 2017), the county attorney had filed a petition against the city council alleging two violations of the open meetings law. The city attorney worked out a potential settlement that would require councilmember Burke to resign in exchange for the county attorney dismissing the petition against the council. The city council held a closed session and thereafter the mayor filed a petition for Burke’s removal citing his violations of the open meetings law. After a special council meeting, the other four councilmembers voted to remove Burke from office.

The Iowa Court of Appeals found a due process violation “because the four city council members who voted to remove him understood they would have no financial exposure for possible violations of the open meetings law if they removed Burke.” *Id.* at * 4. The Court of Appeals found that “the four city council members’ statements that ‘the pending suit had no bearing on their decision’ to remove Burke” were self-serving and unpersuasive, and further that Burke was not required to show actual prejudice in order to establish a due process violation. *Id.* The Court of Appeals held that the council members’ pecuniary interest in removing Burke rendered the proceedings fundamentally unfair. *Id.* at *5.

The record in this case contains many examples of how both individual Councilmembers and the Council as a whole had an interest in removing the Mayor from office. By the time the Council held the June 23rd meeting, the City Attorney was aware that Gregg Mandsager was considering bringing a defamation suit against the Mayor. The City Attorney also discussed how the Mayor had allegedly defamed numerous people—including the City Councilmembers

themselves—and that all of these individuals could bring defamation suits. The City Attorney discussed his concern that the City’s insurance policy might not cover the Mayor if she were sued, and that it could get to the point that the insurance provider might take the position that the City Council was not acting within the scope of its duties, was not honoring its fiduciary obligations, and should have done more. The City Attorney warned the Councilmembers that the City’s insurance policy might not protect them from personal liability if the City or the City Council were sued unless they took action, including initiating a removal proceeding. The City Attorney mentioned multiple times during the closed meetings that the Councilmembers needed to protect themselves in case there was a lawsuit.

In addition to possible personal liability, it is clear from the record that the City Council believed that the Mayor had damaged the Council’s reputation in the community. The Mayor publicly accused the City Council of being bullies and good ol’ boys, of not supporting her as Mayor, of taking away her powers and not preserving democracy, and of sullyng the names of the individuals she selected for appointments. The Mayor alleged that the City Council had discriminated against her based on gender, was against diversity, and was a “D.C. style closed door, back-room government.” The Mayor also accused the Council of criminal activity. The Mayor spoke to the City Attorney about one Councilmember allegedly breaking the law with regard to certain city ordinances. Additionally, the Mayor filed complaints with the Iowa Public Information Board accusing the Council of violating the open meetings law. The Mayor contacted the County Attorney about pressing criminal charges against all of the Councilmembers for violating the Civil Service Statute, and contacted the Iowa Attorney General’s office for an opinion on that matter.

The Defendants assert that no due process violation exists because there was no pecuniary liability exposure at the time of the removal. The IPIB complaints had been dismissed by the time of the removal, the City Attorney had already declined to file criminal charges against any Councilmember, and neither the Attorney General, the EEOC, IPERS, or the State Ombudsman's office were pursuing claims against the Councilmembers at the time of the removal. The Defendants contend all of these facts show that they had no pecuniary personal interest in removing the Mayor from office, and that the Plaintiff is therefore unable to establish a due process violation.

The Court makes no determination as to the accuracy and soundness of any or all of the Mayor's statements, allegations, or complaints, as they were known to the Defendants at the time of the removal hearing. However, when the Council made the decision to remove the Mayor from office the Councilmembers had a strong interest in shielding themselves from potential personal liability, in preventing the Council from being the focus of further accusations, and in restoring its image in the community while negatively impacting the Mayor's image. Thus, the City Council had a personal interest in the proceeding at the time it removed the Mayor from office which rendered the removal proceedings fundamentally unfair. Moreover, the Councilmembers' vote on the Mayor's removal was decisive in that the Councilmembers were the sole judges who determined whether the Mayor would remain in office or be removed. The Court therefore concludes that the City Council's interest in removing the Mayor from office constituted an additional due process violation.

RULING

For all of the above-stated reasons, it is the ruling of the Court that the Plaintiff's Writ of Certiorari is SUSTAINED. The City Council's May 11, 2017, decision removing Mayor Diana Broderon from office is vacated. Costs are assessed to the Defendants.

All of the above is SO ORDERED.



State of Iowa Courts

Type: OTHER ORDER

Case Number EQCV023989
Case Title DIANA L. BRODERSON V. CITY OF MUSCATINE, ET.AL

So Ordered

A handwritten signature in black ink, appearing to read "Mark D. Cleve", written over a horizontal line.

Mark D. Cleve, District Court Judge,
Seventh Judicial District of Iowa