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ORDER DISMISSING PETITION TO IMPEACH

INTRODUCTION

On January 13, 2021, the Speaker of the House of Representatives of the General Assembly of the Commonwealth of Kentucky appointed a committee of seven members to investigate the petition to impeach Robert Goforth, State Representative for House District 89, and upon completion of its investigation, to report its findings and recommendations to the House. The members included: Rep. George Brown Jr. of the 77th District, Rep. Angie Hatton of the 94th District, Rep. Kim King of the 55th District, Rep. C. Ed Massey of the 66th District, Rep. Suzanne Miles of the 7th District, Rep. Patti Minter of the 20th District, and Rep. Jason Nemes of the 33rd District who served as Chairman. Two alternate members were also appointed; Reps. Felicia Rabourn and Buddy Wheatley of the 47th and 65th districts respectively.

DISCUSSION

A. Factual History

On January 12, 2021, eight citizens filed a petition with the House of Representatives seeking to impeach Robert Goforth for engaging in various “misdemeanors in office” as defined by Section 68 of the Kentucky Constitution.

B. Section 68 of the Kentucky Constitution

Section 68 of the Kentucky Constitution provides that the “Governor and *all civil officers* shall be liable to impeachment for any misdemeanors in office” Ky. Const. § 68 (emphasis added). By the plain terms of the Kentucky Constitution, therefore, Rep. Goforth may only be impeached if he is deemed a “civil officer” by virtue of serving in the Kentucky House of the General Assembly. In our opinion, he is not.

Although the Kentucky Constitution does not explicitly state what constitutes a “civil officer,” its other sections provide more clarity on the matter. For example, Section 44 of the Kentucky Constitution provides that: “No Senator or Representative shall, during the term for which he was elected, nor for one year thereafter, be appointed or elected to any *civil office* of profit in this Commonwealth, which shall have been created, or the emoluments of which shall have been increased, during the said term” Ky. Const. § 44 (emphasis added). This provision makes evident that the Framers of the Kentucky Constitution intended to strike a clear contrast between membership in the General Assembly and appointment or election to a “civil office.”

Furthermore, the Kentucky Court of Appeals addressed an analogous situation in *Commonwealth ex rel. Attorney Gen. v. Howard*, 297 Ky. 488 (1944), where it considered the appropriate means to remove an Assistant Commonwealth Attorney. The Court determined that the prosecutor was a constitutional officer and could therefore be removed by impeachment pursuant to Section 68 of the Kentucky Constitution. Rep. Goforth, in contrast, is not a constitutional officer and therefore not subject to Section 68. As the *Howard* court noted, “wherever the constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration

of his term, it is beyond the power of the legislature to remove such officer . . . for any other reason or in any other mode” *Id.* at 489.¹

C. Section 39 of the Kentucky Constitution

The appropriate constitutional provision is neither Sections 66 nor 68 but rather Section 39 of the Kentucky Constitution. It provides that “[e]ach House of the General Assembly may determine the rules of its proceedings, punish a member for disorderly behavior, and, with the concurrence of two-thirds, expel a member. . . .” Ky. Const. § 39. It is clear from this provision that the Framers intended for each House to have the ultimate authority in punishing its respective members. Allowing impeachment of a member of the General Assembly would thus contradict these intentions as it would allow the House to bring impeachment charges against a Senator, but would provide the Senate with no such mechanism against members of the House.

On February 11, 2021, the Committee called upon Professors Joshua Douglas and Paul Salamanca of the University of Kentucky J. David Rosenberg College of Law to give expert testimony on the constitutionality of impeaching members of the General Assembly. The Committee notes that the expert witnesses concluded that legislators are not impeachable.²

Therefore, it appears to the Committee that Rep. Goforth may be subject to expulsion from the General Assembly pursuant to Section 39, but he may not be impeached under Sections 66 and 68. The history of impeachment in Kentucky strengthens this conclusion as no member of the General Assembly has ever been impeached.³

¹ See also Frederick B. Karl and Marguerite Davis, *Impeachment in Florida*, 6 Fla. St. L. Rev.1, 2 (1978) (“Unlike executive and judicial officeholders, Florida legislators are not subject to impeachment.”)

² See *2021 Regular Session Impeachment Committee (H): Meeting Materials*, KENTUCKY GENERAL ASSEMBLY (Feb. 11, 2021), <https://apps.legislature.ky.gov/CommitteeDocuments/343/>.

³ See Anita Taylor, *Impeachment in Kentucky*, Legislative Research Comm’n, Informational Bulletin No. 176 (1991).

COSTS OF INVESTIGATION

KRS 63.070(1) provides in pertinent part that, upon the decision of this Committee to report against the petitioners' petition of impeachment, and provided the Committee's report is not overruled by the House, "the petitioner(s) shall be liable *to witnesses* and *to the accused* for the costs of investigation before the committee." (Emphasis added). However, since Rep. Goforth—"the accused"—did not submit a defense, there appears to be no costs of investigation for which he could recover.

A different situation arises with respect to the statute's provision of costs for "witnesses." Professors Paul Salamanca and Joshua Douglas testified before the Committee as expert witnesses on an important point of law. Pursuant to KRS 63.070(1), these witnesses may recover their costs from Petitioners.

Although no case law has applied KRS 63.070(1) in precisely these circumstances, there is no basis to preclude the Committee from allowing recovery of such costs. Indeed, KRS 63.030(2) explicitly provides that the Committee is granted the "power to send for person and papers." There is also relevant legal scholarship suggesting that inclusion of such fees is precisely the intent of the Kentucky legislature in implementing KRS 63.070.⁴ The Committee also notes that the text of KRS 63.070(1) uses the word "witnesses" without limitation as to who called the witness. It is therefore irrelevant that the Committee, rather than Rep. Goforth, called the witnesses. Nor does the statute distinguish between lay and expert testimony. Accordingly, the text of the statute favors that expert witnesses' costs may be recovered from the unsuccessful Petitioners.

⁴ See Shawn D. Chapman, *Removing Recalcitrant County Clerks in Kentucky*, 105 KY. L.J. 261, 284 (2016).

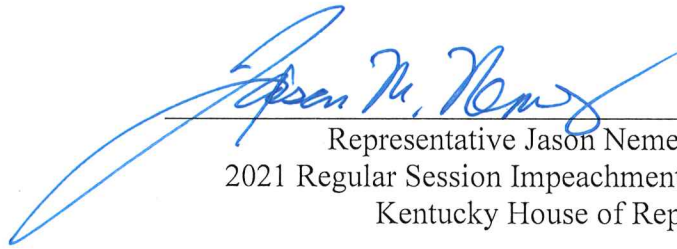
Finally, the Committee's own costs of investigation will be taxed to the Petitioners. Although no single statute or case exists explicitly permitting the Committee to do so, such authority may be inferred from the Kentucky Constitution and various statutory provisions. Section 39 of the Kentucky Constitution provides that "Each House of the General Assembly may determine the rules of its proceedings." Ky. Const. § 39. KRS 63.030(2) provides that "[t]he House shall refer the petitions to a *committee*, with power to send for person and papers, to report thereon." (Emphasis added). In addition, the fact that the House is required to form a committee and compensate its members shows that the committee was meant to be compensated for its services, and as previously mentioned, these kinds of costs are precisely the disincentives intended by the Kentucky legislature in implementing KRS 63.070. The Committee will provide Petitioners with a complete bill of costs at a later time.

CONCLUSION

Impeachment is an important legislative tool to remove from office public officials who act with true perfidy—far outside the bounds of decency or sound government. Historically, this tool has only been used by the legislature to check abuses of power emanating from the other branches of government. Never has it been used as a means of punishing those acts of misconduct from members of the legislature itself. Instead, the Constitution allows each House to make the decision of how it will punish its own members' disorderly behavior. Accordingly, the petition to impeach Rep. Goforth is dismissed.

Furthermore, as required by KRS 63.070, this Committee requests that the expert witnesses and the accused submit a bill of costs by a week from Wednesday, February 24, 2021, which will be taxed to the Petitioners unless objected to within five business days of its submission to this

Committee. If an objection is made, this Committee will consider any objections and order the Petitioners to pay a reasonable amount to the Clerk of the House of Representatives.



Representative Jason Nemes, Chairman
2021 Regular Session Impeachment Committee
Kentucky House of Representatives

February 23, 2021