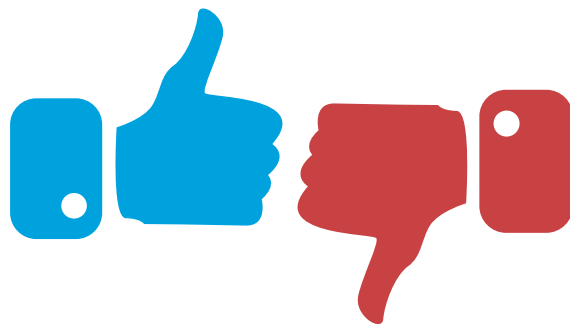


## Impeachment: How Not To Get Beat Up On The Process<sup>1</sup>



One of the most difficult times that any city can experience is when it becomes necessary to impeach the mayor, an alderperson or councilperson. This issue is compounded by statutes that provide little guidance as to how this process should take place. Fortunately, or unfortunately, there is a large body of case law explaining how a city should proceed when impeachment is on the horizon.

Impeachment applies only for certain officials. Most municipal officers are employees at will, meaning that they can be terminated at any time. Usually this power rests with the chief executive officer, such as a city manager, mayor or city administrator. Cause for termination is not required, nor does the employee have an opportunity for a hearing, in most cases. An important exception is chiefs of police. After 2013, they are no longer employees at will and may be removed only by a separate statutory process.

### Authority For Impeachment

For fourth class cities, the process of impeachment is set forth in § 79.240 RSMo. Although this statute has been placed by the revisor of statutes under the heading of “Officers” it does in fact also apply to the removal of elected officials. For the impeachment

of an alderperson, or other elected official (such as an elected marshal or collector), this section provides that the mayor may remove the alderperson with a consent of a simple majority of the alderpersons, following a hearing. The board of aldermen may also remove elected officials (including the mayor) without the mayor’s consent if there is a concurrence of a two-thirds majority of the board, also following a hearing. Appointed officials in fourth class cities may be removed at-will by the mayor, with a majority of the board, or by a two-thirds vote of the council without the consent of the mayor (also at-will).

For third class cities, the authority is similar. Section 77.340 authorizes the mayor to remove any elected or appointed official with the consent of the council. In addition, the council, by a two-thirds majority may remove any elected or appointed official without the mayor’s consent. As with fourth class cities, a hearing is required for elected, but not appointed, officials. In a city of the third class, that has adopted the city manager form, the council retains the power to remove elected officials even though the city manager may now have the sole power over removal of appointed officials.<sup>2</sup> It has been suggested that there is no process for impeachment in third class cities with a city manager form of government;

however, § 78.440 RSMo provides that they would use the impeachment procedure for regular third-class cities.

There is an alternative procedure for impeachment found in Chapter 106 of the state statutes.<sup>3</sup> However, the courts have declared that this procedure is only applicable when there is no other specific method of procedure.<sup>4</sup> Thus, it does not apply to impeachment in third and fourth class cities.

There is no specific procedure for impeachment of a member of the board of trustees of a village. Section 80.080 RSMo allows a trustee to be expelled from a particular meeting by a vote of four of the five trustees. This expulsion, however, is limited to that particular meeting, and those sections of the statutes do not authorize expulsion for the rest of the trustee’s term.<sup>5</sup> Therefore, impeachment in a village would be governed by Chapter 106. This procedure uses the county prosecuting attorney and a circuit judge. For the purposes of brevity, this article will not discuss impeachment in villages.

For charter cities, the power of impeachment is set forth in the charter. Charter provisions in this regard tend to be quite varied. Some charters have no provision for impeachment of council members or the mayor. Some have very

detailed procedures. Some even allow impeachment of council members but not the mayor. If the charter does not set out any method for impeachment, then, as with villages, Chapter 106 would control.

## Grounds For Impeachment

The statute governing impeachment in fourth class cities and the statute on the same subject for third class cities, require that impeachment can only be “for cause shown.”<sup>6</sup> Recently the Court of Appeals for the Eastern District of Missouri tried to clarify exactly what the term “for cause” means.<sup>7</sup> The Court said:

“the appropriate meaning of the ‘for cause’ standard for impeachment of the elected mayor here should not only ‘specifically [relate] to and [affect] the administration of [his] office, and ... be ... of a substantial nature directly affecting the rights and interests of the public,’ it should also be limited to objective reasons which reasonable people, regardless of their political persuasion, could agree would render any mayor’s performance ineffective.”<sup>8</sup>

This succinct definition contains a number of very important points. First, the cause must be related to and affect the administration of the accused’s office. Thus, personal conduct would ordinarily not be grounds for impeachment unless it was of such a nature as to affect the person’s ability to fulfill the duties of his or her office. Where the acts complained of, all took place before the accused took office, there is no basis for impeachment.<sup>9</sup> It is less clear whether acts that occurred during a previous term in office, would be grounds for impeachment in the current term.<sup>10</sup>

Second, the cause must substantially and directly affect the rights and interests of the public. Likely this means that minor offenses that have no impact on the public would not be sufficient to support an impeachment. Third, the reason must be objective and not based on a person’s political perspective. It would not be enough to say someone was a bad mayor or was

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not doing a good job. Rather, the reason must be such that any objective person would believe that the commitment of such an offense makes any person holding that office ineffective.

Of course, while this definition gives some criteria, it does not identify specific acts that would constitute cause for impeachment. There are a number of examples of grounds over the years that may help clarify what the courts view as sufficient grounds. In *Fitzgerald*

*v. City of Maryland Heights*, the court said that “acts of misfeasance, the improper performance of some act that may lawfully be done; malfeasance, the commission of some act wholly beyond actor’s authority; and nonfeasance, the failure to perform a required duty” would all be sufficient grounds.<sup>11</sup> A fair list of prior grounds used can be found in the case of *Mason v. City of Breckenridge Hills*.<sup>12</sup>

## Commencement Of Impeachment And Pre-Hearing Procedures

Except where otherwise provided by the statutes, the impeachment process is governed by the Administrative Procedures Act (APA), found at Chapter 536 RSMo.<sup>13</sup> It is a contested case, as that term is used in the APA, because a hearing is required.<sup>14</sup> Like all contested cases, the process is initiated by the filing of a “writing” requesting affirmative relief (in this case impeachment) and the reasons (charges) for which impeachment is sought.<sup>15</sup> In this case, such a writing is often called a Bill of Impeachment or Articles of Impeachment.<sup>16</sup> The reasons need not be set out with the technical precision of a criminal indictment, but must fairly appraise the accused of what he or she is charged with.<sup>17</sup> The complaint should be served on the accused by mail.<sup>18</sup> Personal service is permissible as well; however, it should not substitute for mailed service since that is what the APA requires. The accused can file an answer, although an answer is not required.

The notice should indicate when the hearing will take place. Generally, the APA requires 10 days’ notice of the hearing, but that time can be shortened if it is in the public interest. The courts have specifically found that expediting an impeachment hearing is in the public interest.<sup>19</sup>

Prior to the actual hearing, the ability of either side to conduct traditional discovery is limited. The APA allows parties to use only depositions, subpoenas of witnesses, and subpoenas duces tecum (a subpoena for documents).<sup>20</sup> Since both §§ 77.340 and 79.240 allow cities to adopt procedural rules for impeachment hearings, it is possible for the city to grant more expansive discovery (such as interrogatories and requests for admission). However, it may be impractical to try to adopt such procedures once impeachment has been commenced. Both the applicable statutes and the APA provide for the ability of both sides to call witnesses at

the trial. Unlike criminal trials, the accused may be called as a witness under the APA rules.

## The Board Of Impeachment

The impeachment hearing is conducted by the city council (or board of aldermen, but for brevity the term city council will be used herein to indicate both) sitting as a board of impeachment. If the accused is not the mayor, then the mayor presides over the meeting. If the accused is the mayor, then the mayor *pro tem* would be the presiding officer. In some of the reported cases the city has engaged a separate attorney to serve as a hearing officer. This is wise, since the board of impeachment may be faced with many evidentiary questions and technical procedural issues.

The accused may not block the hearing by use of a Writ of Prohibition from the circuit court.<sup>21</sup>

Considering the volatility of impeachment, it is likely that the issue of bias by the council members will arise. The accused is entitled to a hearing before a board that is impartial and “free of bias, hostility and prejudgment.”<sup>22</sup> If council members are biased they should be disqualified and not sit on the board of impeachment. Failure to disqualify biased council members can be grounds for overturning the impeachment.<sup>23</sup> In reviewing an impeachment case, a court will presume that the members of the board of impeachment are honest and acting with integrity.<sup>24</sup> Past conflict between the accused and board members, even borderline hostility, is not sufficient to prove bias.<sup>25</sup> The fact that the council both initiates the charges and conducts the hearing is not evidence of bias.<sup>26</sup> Rather, to show bias the accused must prove that the council member in question was incapable of fairly weighing the evidence. The accused is entitled to inquire as to bias at the beginning of the proceeding.

Obviously, excluding council members from sitting on the board of

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impeachment creates a problem; there may be too few council members left to render a decision. For example, if a city is impeaching its mayor and has four alderpersons, but two are disqualified, the board of impeachment could never reach the two-thirds majority (three votes) necessary to impeach. In those instances where the only forum authorized by statute would be unable to proceed, the Rule of Necessity could be invoked to permit a decision to be made by the adjudicating body in spite of its possible bias or self-interest.<sup>27</sup> However, while the Rule of Necessity allows the board of impeachment to proceed despite the bias of some members, it does not apply if those members can be disqualified and a vote can still occur, even if it would require a unanimous decision of the remaining members.

The majority required to convict the accused depends on the circumstances. If the impeachment is the result of a recommendation by the mayor, a simple majority of the council, sitting as the board of impeachment, is required. However, if the council is moving to impeach without the mayor’s recommendation, for instance when the mayor is being impeached, a two-thirds majority is required.<sup>28</sup> In both cases, the required majority is calculated based on all of the members elected to the council, not just those participating on the board of impeachment.<sup>29</sup> The mayor, if sitting on the board of impeachment,

does not count when calculating the required number of votes in a city where the mayor is not a voting member. However, where the mayor is authorized to vote in the instance of a tie, the mayor, or mayor *pro tem*, may vote to break the tie.<sup>30</sup>

Often the bill of impeachment will contain multiple counts. It is not necessary that the accused be convicted on every count. A conviction on a single count is sufficient to displace the accused from his or her office.<sup>31</sup> The decision of the board of impeachment must be in writing and must contain findings of fact and conclusions of law.<sup>32</sup>

### Effects Of Impeachment

If the board votes for impeachment, the accused is removed from office. At that point, the accused may be said to have been impeached. The office becomes vacant, even if an appeal is filed. The vacancy is filled in the usual

manner for vacancies. The accused cannot be appointed to the vacant office or be elected to that office during the same term. He or she may be elected back into office at the next term unless precluded by some other provision. If the accused is impeached, but the impeachment is overturned by the courts, the accused returns to office, unless his or her term has already expired.<sup>33</sup> In that case, the accused has no relief that can be granted.

The accused may appeal the impeachment to the circuit court. The court will “presume the correctness of the decision by a city council sitting as a board of impeachment and uphold that decision if it is supported by competent and substantial evidence that [the court will] view in the light most favorable to the council’s determination, disregarding all contrary evidence.”<sup>34</sup> In addition to considering any procedural defects in the process, the circuit court must find that there was competent

and substantial evidence of the “good cause” upon which the impeachment was based.

If the board does not vote for impeachment, the accused remains in office. If the court reverses the impeachment, the accused would be entitled to reimbursement of any pay missed while out of office.<sup>35</sup> The accused is not entitled to have his or her attorney’s fees reimbursed.<sup>36</sup>

**Nathan M. Nickolaus** is a principal at the firm of *Cunningham, Vogel, and Rost P.C.* He is a 1988 graduate of the University of Missouri – Columbia School of Law, former City Counselor for Jefferson City, former General Counsel of the Missouri Department of Economic Development, and 2012 Lou Czech Award recipient.

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