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Boorish behavior not grounds for court to remove director

"Boorish and insulting behavior" toward other members of the board of directors of a nonprofit corporation does not constitute sufficient grounds for judicial removal of the director under the Pennsylvania Nonprofit Corporation Law, the state Commonwealth Court has held. While calling the conduct "deplorable," it said it does not constitute grounds for court intervention in the nonprofit's governance.

Zbigniew "Joe" Kowalski was one of nine directors of A Pocono Country Place Property Owners Association, who had difficult relations with the other directors during 2016. He directed multiple insulting remarks at the other directors, seven of whom were women. He criticized them as "dangerous," "cunning and conniving," "vindictive and spiteful," and "incoherent." He complained that there were too many women on the board and characterized their actions as based on the fact that they were women. He characterized homeowners who volunteered for committee work as alcoholics motivated by free alcohol at the volunteers' dinner.

In October, the board censured Kowalski for violation of the Association's Code of Conduct, and ordered him to attend sensitivity training. After the training, he continued a string of insulting emails, comparing the directors to Nazis, calling one "arrogant and abusive," accusing two of pathological lying, calling two others "control freaks" and "poster children for dysfunctional behavior." In January, 2017, the board suspended Kowalski and petitioned the court to remove him and bar him from serving in the future.

The corporate bylaws provided that the property owner members of the corporation could remove a director with a 2/3 vote. The bylaws also gave the directors the right to declare the position vacant if a director is declared of unsound mind by a court, is convicted of a felony, or fails to attend three consecutive meetings or six in a 12 month period.

The state's nonprofit corporation law gives the members the right to remove a director, the directors the right to remove "for any other proper cause" even if not specifically provided in the bylaws, and a court the right to remove in case of fraudulent or dishonest acts, or gross abuse of authority or discretion, illegal action, or "for any other proper cause."

The trial court found, however, that judicial removal "is a drastic remedy that cannot be granted for merely undesirable or offensive behavior." The Commonwealth Court agreed. It said that there is no

proper cause for judicial removal without showing that the director committed fraud, dishonesty, gross mismanagement, violation of the statute or other illegal or ultra vires conduct.

“Limiting court removal to such extreme cases does not render the phrase ‘for any other proper cause’ mere surplusage, as it encompasses misconduct beyond the grounds for removal” spelled out specifically in the statute, the Court said.

The Court rejected the Association’s argument that the behavior would be grounds for an employer to discharge an employee because discharging an employee does not involve issues of interference with corporate governance.

The Court went on to say that even though the phrase “for any other proper cause” is identical in both sections of the statute, “proper cause for board action against a director and proper cause for court removal of a director are not the same.” “The board of directors is charged with the management of the corporation’s affairs,” the Court said. “In contrast, court removal of a director is a judicial intrusion in the management of the corporation’s affairs. In addition, a board’s removal of a director does not interfere with rights of the members to the same degree as court action. If the members disapprove the board’s action, they may obtain its reversal by voting out the board members and re-electing the director; members, however, have no such redress against a court action with which they disagree.”

It concluded that Kowalski’s “boorish and unprofessional behavior does not constitute fraud, dishonesty, gross mismanagement, or illegal or ultra vires conduct” and affirmed the trial court’s refusal to remove him. (*A Pocono Country Place Property Owners Association v. Kowalski*, PA Commonwealth Ct., No. 904 C.D. 2017, 5/7/18.)

You Need to Know.... *The director removal provision of nonprofit bylaws is one of the most important provisions in the bylaws. (See Ready Reference Page: “Bylaws Function as ‘Constitution’ of Nonprofit Corporations”) We normally give the board the right to remove “with or without cause” if an absolute majority of the board thinks the director should go. It is almost never used, but it provides good leverage — if the board has the votes — to encourage the non-performing director to change his or her ways or to resign to avoid being voted off.*