



Commonwealth of Kentucky
Office of the Attorney General

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OAG 20-07

Subject: Whether Executive Order 2020-178 validly removed two commissioners from the Department of Fish and Wildlife Resources Commission.

Requested by: Karl Clinard and Paul Horn
Kentucky Fish & Wildlife Commission

and

Edwin Nighbert
League of Kentucky Sportsmen

Written by: Carmine G. Iaccarino, Executive Director
Office of Civil & Environmental Law

Syllabus: Because the Governor may remove members of the Commission in only limited circumstances, the purported removal of Commissioners Clinard and Horn in Executive Order 2020-178 is without legal effect.

Opinion of the Attorney General

On February 21, 2020, Governor Andy Beshear issued Executive Order 2020-178 (the "Executive Order"), which purported to rescind the appointments of two members of the Department of Fish and Wildlife Resources Commission, Karl Clinard

and Paul Horn.¹ For the reasons that follow, it is the opinion of this Office that the Executive Order is void and without any legal effect. Commissioners Clinard and Horn remain members of the Commission.

The Department of Fish and Wildlife Resources Commission is established by KRS 150.022 and is, among other duties, charged with keeping a “watchful eye upon the Department of Fish and Wildlife Resources[.]” KRS 150.023. Under KRS 150.022(1), the Commission consists of “nine (9) members, one (1) from each wildlife district . . . and not more than five (5) of the same political party.” The Governor appoints these members subject to confirmation by the Senate. KRS 150.022(2).

On August 5, 2019, Commissioners Clinard and Horn were appointed under Executive Order 2019-590.² On February 13, 2020, the Senate confirmed both Commissioners Horn and Clinard.³ On February 21, 2020, Governor Beshear purported to rescind those two appointments and declare them “null and void” on the basis that the Commission was composed of “seven (7) Republicans and two (2) Independents.” Thus, the Executive Order claims those appointments were “void ab initio.” The Executive Order states no further reason or authority for removing the two Commissioners.

On the date the Governor issued the Executive Order, however, the Commission was comprised of five individuals registered as Republicans and four individuals registered as Independents.⁴ Thus, there were “not more than five (5) [members] of the same political party” when the Governor issued the Executive Order. Even assuming that the Governor has the authority to remove commissioners for the reason stated in the Executive Order, it is this Office’s opinion that there is no factual basis to support the purported removal of Commissioners Clinard and Horn, memorialized in the Executive Order, because the Commission’s composition complied with KRS 150.022(1) on the date each of the Commissioners was appointed, the date on which the Senate confirmed them, and on the date of their attempted

¹ Executive Order 2020-178, *available at* <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2020-MISC-2020-0178-266195.pdf> (last accessed April 7, 2020).

² Executive Order 2019-590, *available at* <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2019-COMM-262286.pdf> (last accessed April 7, 2020).

³ Senate Resolution 95, *available at* <https://apps.legislature.ky.gov/record/20rs/sr95.htm>; Senate Resolution 106, *available at* <https://apps.legislature.ky.gov/record/20rs/sr106.html> (last accessed April 7, 2020). Both Commissioners were confirmed unanimously.

⁴ With their request for an opinion, Commissioners Clinard and Horn provide the most recent voter registration of each of the members of the Commission. This Office also requested and was provided records from the State Board of Election that confirmed that information.

removal.⁵ This Office’s analysis could conclude here, but—in addition to the inaccurate factual premise relied upon by the Governor—there are also legal impediments to his action.

Importantly, the Governor’s power to appoint commissioners under KRS 150.022(2) does not confer the power to remove. *McChesney v. Sampson*, 23 S.W.2d 584, 587 (Ky. 1930) (“In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power of removal. . . . The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power.”); *Bell v. Sampson*, 23 S.W.2d 575, 580 (1930) (“It was plainly the purpose of the Legislature to provide by this section that, unless otherwise provided, the title to office of one appointed to such office by the Governor finally vests in the appointee when his appointment has been confirmed by the Senate.”); *Votteler v. Fields*, 23 S.W.2d 588, 590 (Ky. 1926) (“It is perfectly clear from the history of our state and an examination of our Statutes, that the people, as a fundamental proposition, did not mean to vest their Governor with the right to remove from office those appointed thereto in the manner prescribed by the people acting through their Legislature, unless and until such power was expressly or by the clearest implication given to the Governor.”); *Commissioners of Sinking Fund v. Byars*, 180 S.W. 380, 381 (Ky. 1915) (“[I]t is the law of this state, and the generally accepted doctrine, that in the case of a state or other officer whose term is fixed by statute, the right of removal, even for cause, is not an incident of the power of appointment, in the absence of a statute conferring such right.”). Rather, the General Assembly may vest in the Governor the authority to remove commissioners, as it did in KRS 150.022(7). See *Johnson v. Laffoon*, 77 S.W.2d 345, 350 (Ky. 1934).

In KRS 150.022(7), the General Assembly provided the specific set of preconditions that must be met and procedures that must be followed before the Governor may invoke his or her limited authority to remove a Commissioner from the Department of Fish and Wildlife Resources Commission:

The Governor shall remove any member of the commission for cause under subsection (2) of this section and may remove any member of the

⁵ Because a decision may be reached on narrow grounds due to the applicable facts, this Opinion does not address whether a Governor may rescind an Executive Order appointing a member to a board or commission on grounds that the order is purportedly “*void ab initio*” after the Senate has taken action to confirm the member.

commission for inefficiency, neglect of duty, or misconduct in office; but shall first deliver to the member a copy of all charges in writing and afford to him an opportunity of being publicly heard in person or by counsel in defense of the charges, upon not less than ten (10) days' notice. If a member shall be removed, the Governor shall file in the office of the Secretary of State a complete statement of all charges made against the member and his findings thereon, together with a complete record of the proceedings.⁶

Here, Commissioners Clinard and Horn were appointed by the Governor on August 4, 2019, and confirmed by the Senate on February 13, 2020. The February 21, 2020 Executive Order does not rely upon nor reference any of the specific statutory bases for which a commissioner may be removed, namely "inefficiency, neglect of duty, or misconduct in office." And there is no indication that the Governor complied with the procedural requirements to afford the "member[s] a copy of all charges in writing" and "an opportunity of being publicly heard" with "not less than ten (10) days' notice." KRS 150.022(7).

Because the Governor has no authority to remove a commissioner apart from the specific circumstances listed in KRS 15.022(7) and none of the procedural requirements under KRS 150.022 were observed, the Executive Order is void and without any effect. *McChesney*, 23 S.W.2d at 587 ("Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld. No valid appointment can be made to an office in possession of an incumbent whose tenure has not terminated.").

For these reasons, this Office finds that Executive Order 2020-178 is void and without any legal effect.

Daniel Cameron
ATTORNEY GENERAL

Carmine G. Iaccarino, Executive Director

⁶ There is no suggestion that "subsection (2)," which addresses felony convictions, is relevant to the analysis in this matter. KRS 15.022(2).