COMMONWEALTH OF KENTUCKY
BARREN CIRCUIT COURT
CIVIL ACTION NO. 20-CI-00264

D.T. FROEDGE — PLAINTIFF

v. **ORDER**

GLASGOW ELECTRIC PLANT BOARD,
JOHN M. "TAG" TAYLOR,
MARLIN G. WITCHER,
WILLIAM G. PRITCHARD, and
ELIZABETH "LIBBY" SHORT — DEFENDANTS

This matter comes before the Court pursuant to the Verified Complaint for Declaratory Judgment filed by Plaintiff (hereinafter "Froedge"); Plaintiff's Emergency Motion for Early Relief, a Speedy Hearing, and Advancement of This Matter on the Calendar; the Answer and Counterclaim filed by Defendants Taylor and Short; and the Motion for Leave to Intervene filed by Glasgow Electric Plant Board (hereinafter "GEPB") Superintendent Billy Ray (hereinafter "Ray"). After a videoconference on May 28, 2020, at which all parties were present, the Court permitted Ray to intervene in a limited capacity and entered a briefing schedule. All parties have timely filed briefs or memoranda in support of their positions. The Court having reviewed the record and applicable law, and being duly advised,

IT IS HEREBY FOUND, ORDERED, AND ADJUDGED as follows:

Froedge seeks a declaration of his status vis-à-vis the GEPB. Taylor and Short[1] ask the Court to rule that a special called meeting conducted on May 5, 2020 was not valid according to law, and that any action purportedly taken at that meeting should be deemed void. Ray joins in the request that the meeting be declared invalid and that the actions taken therein be held for naught.

[1] It appears that Defendants Witcher and Pritchard, who were both present at the hearing but did not actively participate, do not consider themselves to be represented by counsel for Taylor and Short.

All parties agree that the Little TVA Act (KRS 96.550 *et seq.*) and the Kentucky Open Meetings Act (KRS 61.800 *et seq.*) apply to the actions of the GEPB. However, there have been various ancillary issues raised by one or more parties to this action. In the interests of time, the Court will not spend an inordinate amount of time discussing them. Suffice it to say that all parties and counsel have standing to participate in these proceedings, and there are issues suitable for and amenable to resolution under KRS 418.040 *et seq.* and CR 57. The issues deserving of attention are as follows: First, is D.T. Froedge still a member of the GEPB? Second, was the May 5, 2020 special called meeting valid and, if not, what is the remedy?

IS FROEDGE A MEMBER OF THE GLASGOW ELECTRIC PLANT BOARD?

The facts are undisputed. In brief summary, Froedge verbally moved to resign from the GEPB during a meeting on or about May 28, 2019. His motion was voted upon, and it passed. Subsequently, he tendered his resignation in writing to Glasgow Mayor Harold Armstrong, who refused to accept it or, in any event, neither formally accepted it nor appointed a successor.

Under Kentucky law, "the resignation of a public officer does not become effective until accepted by the proper authority, or by equivalent action, such as the appointment of a successor."[2] This rule is codified in KRS 63.010: "All resignations of office shall be tendered in writing to the court or officer required to fill the vacancy, and received and recorded by the court or officer in its or his records."[3] Thus, "[o]ral attempts to resign from office are legally ineffective.[4]

Froedge's resignation was submitted to and accepted by the GEPB, but that entity was not the "proper authority" to accept it. In the case of a board member of a utility operating under the

[2] **Commonwealth ex rel. Wootton v. Berninger**, 255 Ky. 451, 452, 74 S.W.2d 932, 933 (1934). See also **Gearhart v. Kentucky State Board of Education**, 355 S.W.2d 667 (Ky.1962). "The rule is that the resignation of a public officer, in the absence of statute, does not become effective until accepted by the proper authority or by equivalent action, such as the appointment of a successor."

[3] KRS 63.010 is part of Kentucky Revised Statutes, Title VIII: Offices and Officers. As such, its provisions are applicable to the present controversy.

[4] **Lile v. City of Powderly**, 612 S.W.2d 762, 763 (Ky.App.1981)

Little TVA Act, such as the GEPB, the mayor is the official charged with the duty of appointing a replacement board member.[5] The mayor, therefore, is the proper authority under KRS 63.010 to accept the resignation of a GEPB member. In the present matter, Mayor Armstrong did not formally accept the resignation, and he did not appoint a successor. Therefore, the attempt at resignation was not effective.

Whether or not Froedge conducted himself in such a way that he implicitly gave up his post, as argued by Taylor and Short, he remains a member of the GEPB. To the extent that Froedge or any other GEPB member may have committed what amounts to "inefficiency, neglect of duty, misfeasance, nonfeasance, or malfeasance of office," that member would be subject to removal "upon a vote of a majority of the members of the governing body of the municipality."[6] The governing body is defined as "the board, council, commission, fiscal court, or other general governing body of the municipality."[7] Pursuant to the Glasgow Code of Ordinances, §§ 30.01 and 30.02, the municipality of Glasgow is governed under the "Mayor-Council plan," as described under KRS 83A.010 *et seq*. Under a Mayor-Council plan, the city council of a municipality is the elected legislative body.[8] In the City of Glasgow, the Glasgow City Council is the elected legislative body.[9]

Thus, the Glasgow City Council would be the entity with the authority to remove Froedge, or any other member of the GEPB, for inefficiency, neglect of duty, misfeasance, nonfeasance, or malfeasance. Implicit removal or forfeiture of one's position is not, except in circumstances not present here, cognizable under Kentucky law. Taylor and Short cite to *City of Williamsburg v.*

[5] KRS 96.740(1); KRS 96.760(1).
[6] KRS 96.760(2).
[7] KRS 96.550(9).
[8] KRS 83A.130(2).
[9] See KRS 83A.130(11) (stating "[t]he legislative authority of the city shall be vested in and exercised by the elected council of the city ..."). See also Glasgow City Code of Ordinances § 32.03(A)(1)-(2).

Weesner[10] in support of their argument that Froedge's conduct constitutes abandonment of his post. While at first blush that case seems to buttress their position, *Weesner* addresses itself to more extreme circumstances. According to *Weesner*, where officials can be deemed to have "abandoned and forfeited" their office such that the body is left without a quorum and cannot perform its duties to the public as imposed by law, *and* there is no adequate remedy at law, as a matter of equity those offices may be declared vacant.[11]

The instant case presents a different picture. Froedge did attempt to resign, but it was ineffective. His failure to attend some number of meetings thereafter is not tantamount to the complete abandonment of all duties as found in *Weesner*. Moreover, his conduct did not, by itself, render the body (in this case, the GEPB) completely unable to field a quorum and conduct business.[12] This is not a situation in which equitable relief is mandated because "the vacancies result in a reduction of the board below a majority of the entire membership, as authorized by law, [and] it is wholly without power to act as a board."[13] Further, as discussed above, there is an adequate remedy at law: the statutory framework provides a standard for which, and a process by which, a board member may be relieved of duties under circumstances such as these, if the legislative body deems it appropriate.

WAS THE MAY 5, 2020 MEETING CORRECTLY CONVENED?

As with the previous issue, the facts respecting this issue are uncontroverted. The parties agree on the applicable law. Compliance with the special meeting requirements of both the Little TVA Act (KRS 96.550 *et seq.*) and the Kentucky Open Meetings Act (KRS 61.800 *et seq.*) is

[10] 164 Ky. 775, 176 S.W. 224 (1915).
[11] **Weesner**, at 225.
[12] To the extent that the GEPB may have been left without a quorum at one or more meetings during the relevant time, the absence of Froedge, as one member of a five-person board, could not have been the sole cause.
[13] See **Glass v. City of Hopkinsville**, 225 Ky. 428, 9 S.W.2d 117, 118 (1928).

required for a special meeting to be valid. Accordingly, the question is whether, when the call was issued for a special meeting scheduled for May 5, 2020, there was compliance with those provisions.

The Court finds that there was not. It is important to realize at the outset that the provisions concerning special meetings, *i.e.*, meetings of a public agency held at a time or place other than the regularly scheduled meetings taking place in the ordinary course of business, recognize that special meetings should be the exception, rather than the rule, when conducting public business. The rules are geared towards minimizing surprise and maximizing notice to the public and others interested in the actions of the entity.[14] Taken together, the statutory provisions strongly suggest that the business of a public agency should generally be conducted during its regular meetings.

The Little TVA Act provides that two (2) members of a board can call a special meeting, and that notice of such meeting shall be sent to all members by the chairperson or the secretary-treasurer.[15] Neither of these prerequisites to a valid meeting was met. Froedge called the meeting. While his e-mail stated that he, Witcher, and Pritchard wished to convene a meeting, only Froedge issued the call. In his brief, Froedge argues that, after he sent the e-mail purporting to call a meeting, Witcher never notified anyone that he did not want a meeting, and neither did Pritchard. The statute, however, plainly does not provide for a rebuttable presumption that a member intended

[14] See KRS 96.770: "The board shall hold public meetings at least once each month, at such regular time and place as the board may determine. Changes in such time and place of meeting shall be made known to the public as far in advance as practicable." See also KRS 61.800, Legislative statement of policy: "The General Assembly finds and declares that the basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by KRS 61.810 or otherwise provided for by law shall be strictly construed." The Kentucky Supreme Court has stated that "[t]he express purpose of the Open Meetings Act is to maximize notice of public meetings and actions. The failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good." **Floyd County Board of Education v. Ratliff**, 955 S.W.2d 921, 923 (Ky.1997).

[15] KRS 96.770.

to call a meeting unless he or she opts out. Rather, it requires that an affirmative step be taken to call a meeting. Acquiescence through silence does not suffice.

The chair (Taylor) did not provide written notice of the meeting. The secretary-treasurer (Short) did not do so either. While Froedge understandably expresses frustration with this turn of events, the statutory framework explicitly establishes, as a prerequisite to a valid special meeting, that one of those two officers must send notice. Froedge characterizes this position as an overly legalistic view of the statute. However, strict application of the provisions regarding notice of special meetings is required, and there was not compliance with the letter of the law in this instance.

When a special meeting is called, notice must also be given to every member of the public agency as well as each media organization which has filed a written request at least twenty-four hours in advance.[16] Because notice in accordance with KRS 96.770 was not given, as described above, by definition sufficient notice was not given at least twenty-four hours in advance of the meeting time. In addition, the statute requires that the notice "shall be received" by the entities required to receive it "at least twenty-four (24) hours before the special meeting."[17] To be sure, Froedge's e-mail was sent more than twenty-four hours before the time set for the meeting. He did not send it to the media; instead, it was apparently sent to the GEPB members as a group. That e-mail clearly did not suffice as notice per the statutory framework. Thus, notice was not received in a timely fashion under the statute.

Moreover, official notice should be given "[a]s soon as possible," but in no event should it be received less than twenty-four hours before the meeting time.[18] There are emergency exceptions

[16] KRS 61.823(4)(a).
[17] *Id.*
[18] *Id.*

contained in the statute. They are inapplicable, largely because this special meeting was not prompted by an emergency. It was, however, convened *during* a state of emergency in the Commonwealth and throughout the country, when gatherings of individuals were prohibited or discouraged. That fact provides more, not less, impetus for the notion that the rules should be strictly construed. When a matter such as the present one, which has been festering for years, prompts a board member to request a special meeting, it can hardly be said that notice of twenty-four to thirty hours is as much notice as possible for that special meeting, even if the notice had been statutorily adequate.

In S.B. 150, the Kentucky General Assembly recognized that the COVID-19 pandemic demanded accommodations in certain aspects of the Open Meetings Act. Specifically, S.B. 150 provides that a public agency may conduct a meeting during the state of emergency by videoconferencing. In that event, the agency must "[p]rovide specific information on how any member of the public or media organization can access the meeting."[19] Assuming *arguendo* that Froedge's e-mail sufficed as official notice of the meeting, it contained no such specific information. A reference to a videoconference without a link to the videoconference, or directions concerning how to join in the videoconference, does not constitute specific information on how a member of the public or representative of a media organization would access the meeting. Further, while the e-mail referred to an alternative location—the board room—ultimately, the meeting did not occur there. Instead, it occurred in the parking lot, which was not one of the proposed locations for the meeting.

The Open Meetings Act protects the public's right to be informed of governmental activities by maximizing notice of public meetings and actions.[20] Apropos of meetings conducted

[19] S.B. 150, which was signed by Governor Beshear on March 30, 2020.
[20] **Floyd County Board of Education v. Ratliff**, 955 S.W.2d 921, 923 (Ky.1997).

by public agencies, "failure to comply with the strict letter of the law ... violates the public good."[21] Any exceptions should be narrowly construed to preserve the intent of the Open Meetings Act.[22] In applying the rules to the undisputed facts, the Court finds that there was a failure to comply with the Open Meetings Act as set out above.

Under KRS 61.848(5), a circuit court has authority to remedy a situation where a public agency purports to take formal action in contravention of the Open Meetings Act. The remedy is that any such action "shall be voidable by a court of competent jurisdiction."[23] A circuit court is the appropriate court to take such action.[24]

For the reasons set out above, Froedge is entitled to a declaratory judgment establishing that he remains a member of the GEPB. Taylor, Short, and Ray are entitled to a declaratory judgment that the purported meeting of May 5, 2020 was not validly convened due to noncompliance with KRS 96.770 and the Open Meetings Act, specifically KRS 61.823(4)(a). The remedy is a declaration that the actions taken at such meeting are void. It is so declared.

SO ORDERED this the 2nd day of July 2020.

/s/ HON. JOHN T. ALEXANDER
electronically signed
7/2/2020 2:41:47 PM CT

HON. JOHN T. ALEXANDER
JUDGE, BARREN CIRCUIT COURT

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[21] **Webster County Board of Education v. Franklin**, 392 S.W.3d 431, 435 (Ky.App.2013).
[22] See **Floyd County Board of Education**, 955 S.W.2d at 923.
[23] KRS 61.848(5). See **Webster County Board of Education**, 392 S.W.3d at 437.
[24] "Under KRS 61.848(5), a circuit court has authority to remedy a situation where a public agency takes formal action without substantial compliance with the requirements of KRS 61.810, 61.815, 61.820, and 61.823." **Webster County Board of Education**, 392 S.W.3d at 437.