IN THE SUPREME COURT OF IOWA

No. 19-1397

NICOLE BRIBRIESCO-LEDGER,
Plaintiff-Appellee,

v.

FRANK J. KLIPSCH, MAYOR, AND THE CITY OF DAVENPORT
Defendants-Appellants.

APPELLANTS' FINAL REPLY BRIEF

APPEAL FROM IOWA DISTRICT COURT FOR SCOTT COUNTY
THE HONORABLE TOM REIDEL
SCOTT COUNTY CASE NO. EQCE131600

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ARGUMENT

A. THE DISTRICT COURT AND PLAINTIFF FAIL TO ENGAGE IN STATUTORY INTERPRETATION.

This entire case turns on statutory interpretation. Yet, like the District Court, Plaintiff fails to apply the well-recognized principles of statutory interpretation. Instead of applying the plain language of Iowa Code § 372.15 and § 216.19(2), Plaintiff abandons the elementary rules of statutory interpretation and adopts a hodgepodge of conjecture. The Court must reject Plaintiff's approach and faithfully interpret the statutes.

1. Iowa Code Section 372.15 Is Clear and Unambiguous and Allows the Mayor to Remove Appointees Without Cause.

Plaintiff fails to address the threshold determination of whether § 372.15 is even ambiguous. *See Colwell v. Iowa Department of Human Services*, 923 N.W.2d 225, 232 (Iowa 2019) ("Before engaging in statutory interpretation, we must determine whether the statute is ambiguous."). In fact, nowhere in Plaintiff's brief does she even allege that § 372.15 is ambiguous. Thus, the Court must apply § 372.15 as it is written. *See Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011) ("If the statute is unambiguous, we look no further than the statute's express language."). Iowa courts have for many years found § 372.15 unambiguous. *See McIntosh v. City of Riverdale*, 2018 WL 3302112, at *2 (Iowa Ct. App. 2018) ("[T]here is

no ambiguity here' – the plain language contained in Iowa Code section 372.15 … is straightforward and clear."). Section 372.15 provides that "… all persons appointed to city office may be removed by the officer or body making the appointment …." Iowa Code § 372.15. There are no exceptions in § 372.15 for local civil rights commissioners. Thus, under the plain language of § 372.15, the Mayor has the authority to remove a local civil rights commissioner, and this Court has consistently held such a removal may be without cause. *See, e.g., Scott v. City of Waterloo*, 180 N.W. 156 (Iowa 1920) ("The statute does not require that removal from office shall be for cause …."); *Bennett v. City of Redfield*, 446 N.W.2d 467 (Iowa 1989) (same); *Waddell v. Brooke*, 684 N.W.2d 185 (Iowa 2004) (same).

Notwithstanding the plain language of § 372.15 and this Court's prior precedent, Plaintiff continues to argue that the qualifying language "[e]xcept as otherwise provided by state or city law …" in § 372.15 saves her case. Plaintiff argues that Iowa Code § 216.19(2) and Chapter 2.58 of the Davenport Municipal Code somehow prohibit the Mayor from removing a local civil rights commissioner under § 372.15 without cause. Of course § 372.15 says nothing about cause. Plaintiff identifies no specific provision of § 216.19(2) or Chapter 2.58 that prohibits the Mayor from removing a local civil rights commissioner without cause. Plaintiff somehow thinks cause is required

despite the fact that even the District Court acknowledged that neither the Iowa Civil Rights Act nor the Davenport Municipal Code "expressly prescribes how a commissioner of a municipal civil rights commission may be removed." (Ruling, p. 3; App. 078). Despite the absence of any removal standards, Plaintiff, like the District Court, seizes on the sole word "independent" in § 216.19(2) and engages in pages of tortured analysis to imply a for cause removal requirement in § 372.15 without engaging in any meaningful statutory interpretation.

2. Iowa Code Section 216.19(2) Is Clear and Unambiguous and Does Not Require Cause for Removals under Section 372.15.

Like § 372.15, an analysis of § 216.19(2) must begin with whether the statute is even ambiguous. Section 216.19(2) provides as follows:

> A city with a population of twenty-nine thousand, or greater, shall maintain an independent local civil rights agency or commission consistent with commission rules adopted pursuant to chapter 17A. An agency or commission for which a staff is provided shall have control over such staff. A city required to maintain a local civil rights agency or commission shall structure and adequately fund the agency or commission in order to effect cooperative undertakings with the Iowa civil rights commission and to aid in effectuating the purposes of this chapter.

Iowa Code § 216.19(2). Nothing in the plain language of § 216.19(2) creates a "cause" standard (or any other standard) for removal, or even mentions removal, either with or without cause. Section 216.19(2) merely mandates the creation of an independent local civil rights agency or commission in certain

cities. *See* Iowa Code § 216.19(2). Thus, without a showing that the statutes involved are ambiguous or conflict, there is nothing to interpret, and the Court must apply § 216.19(2) as it is written.

Knowing that § 216.19(2) lacks any reference whatsoever to removal of local civil rights commissioners, Plaintiff ignores the plain language of the statute and submits pages of pure conjecture about what the Legislature may have intended when it wrote § 216.19(2). However, if statutory language is plain and the meaning is clear, courts do not inquire any further into legislative intent. *See Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016) ("It is of course true that where the language chosen by the legislature is unambiguous, we enforce a statute as written."); *State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996) ("We do not speculate as to the probable legislative intent apart from the words used in the statute."). Where language is unambiguous, courts presume the legislature's intent is contained in the words used. *See Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 113 (Iowa 2011).

A court cannot add language to a statute based on what the legislature could, should or might have said. *Id.* As one court has stated, "A matter not covered in a statute is not covered." *See In re Myers*, 874 N.W.2d 679, 681 (Iowa Ct. App. 2015) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)). Removal of local civil

rights commissioners is simply not covered by § 216.19(2), therefore it is not covered. Plaintiff cannot imply that what is not covered in § 216.19(2) limits § 372.15 to create a for cause removal standard of local civil rights commissioners. If Plaintiff's theory were correct, any statute could be rewritten by the court under the guise of "statutory interpretation."

Nevertheless, even if the word "independent" in § 216.19(2) is somehow ambiguous and causes a conflict with § 372.15, the Court must harmonize the statutes. *See State v. Lutgen*, 606 N.W.2d 312, 314 (Iowa 2000) (quoting 82 C.J.S. Statutes § 355, at 474-75 (1999) ("If a court can reasonably harmonize two statutes dealing with the same subject, it must give concurrent effect to both, even though one is specific, or special, and the other general.") (emphasis added). As this Court has said, "We do not interpret statutes to generate conflicts; we assiduously interpret statutes to avoid conflict." *Albaugh v. The Reserve*, 930 N.W.2d 676, 690 (Iowa 2019). Yet, the District Court and Plaintiff make no attempt to avoid the conflict but instead actually created a conflict between § 372.15 and § 216.19(2) where none exists.

Plaintiff has a very high burden in proving the statutes cannot be harmonized:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." A party seeking to suggest that two statutes

> cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. The intention must be "clear and manifest." And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.

Id. at 691 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)) (emphasis added). Here, Plaintiff has failed to meet any burden of showing the Legislature's clear and manifest intent that § 216.19(2) limit a mayor's broad removal powers under § 372.15.

Further, Plaintiff argues that *Scott* is inapplicable because § 216.19(2) was adopted 45 years after *Scott*. But this argument supports Defendants' position, not the Plaintiff's. As this Court stated recently:

> It is only when the very high bar of irreconcilability is met that a specific statutory provision will prevail over a general provision. To demonstrate irreconcilability, "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation. The legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'"
>
> This "demanding" standard exists because "[t]he legislature is presumed to know the existing state of the law when the new statute is enacted," and "[i]n the absence of any express repeal, the new provision is presumed to accord with the legislative policy embodied in prior statutes."

Albaugh, 930 N.W.2d at 690 (internal citations omitted) (emphasis added). When Chapter 216 was enacted, the Legislature was presumed to know about

a mayor's without cause removal power under § 372.15 and this Court's interpretation that a removal under that provision does not require cause. Further, in the absence of express intent by the legislature to alter § 372.15, § 216.19(2) is subject to the Court's prior interpretation of of § 372.15, which grants mayors broad authority to remove their own appointees without cause.

Additionally, Plaintiff completely ignores the fact that when the Legislature adopted Chapter 216, it included a for cause removal standard for State civil rights commissioners appointed by the governor. *See* Iowa Code § 216.3. If the Legislature wanted to provide that local civil rights commissioners could not be removed except for cause, it would have said so. It did not. It is not this Court's prerogative to rewrite what the Legislature could have said, but to enforce the Legislature's words as written. *See Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962) ("Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it.").

Further, §372.15 and § 216.19(2) are easily harmonized. A local civil rights commission is "independent" even though the individual members of the commission are subject to a mayor's removal powers under §372.15. Plaintiff's brief details numerous ways in which the DCRC is "independent" from the City including the following:

- DCRC is independent of the State Commission;
- DCRC appoints the DCRC's executive director (Davenport Mun. Code § 2.58.060; App. 122);
- DCRC controls its own director and staff (Davenport Mun. Code § 2.58.050; App. 121);
- DCRC has the power to issue subpoenas, conduct discovery, investigate allegations of unfair or discriminatory practices and hold hearings and issue decisions (Davenport Mun. Code § 2.58.050; App. 121);
- DCRC has the power to develop its own procedures and remedies to ensure protection of rights under the Iowa Civil Rights Act (Davenport Mun. Code § 2.58.050; App. 121); and
- DCRC is independent of the City Council and Mayor and appeals are taken directly to District Court (Davenport Mun. Code § 2.58.180; App. 125).

The DCRC is "independent," regardless of whether a mayor has the power to remove a commissioner. To the extent § 216.19(2) and § 372.15 irreconcilably conflict, § 372.15 should prevail because that is the statute dealing specifically with removal. *See City of Des Moines v. City Development Bd.*, 633 N.W.2d 305, 311 (Iowa 2001).

Finally, the language of § 216.19(2) is perhaps the most instructive in determining what the legislature meant by the word "independent":

> A city with a population of twenty-nine thousand, or greater, shall maintain an independent local civil rights agency or commission consistent with commission rules adopted pursuant to chapter 17A.

Iowa Code § 216.19(2). In § 216.19(2), the word "independent" is used in conjunction with a city's population. A city with a population over the 29,000 threshold must have an "independent" local agency. Cities with populations of less than 29,000 do not have to have an "independent" agency. Thus, it is clear from the statute that the word "independent" is meant to distinguish between cities that are required to have their own local commission and those that are not. The Court need not strain interpretation of the statute any further.

3. The DCRC and Independent Agencies Are Not Comparable.

Relying on Federal cases of *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935), *Collins v. Munchin*, 896 F.3d 640 (5th Cir. 2018) and *Ford v. Blagojevich*, 260 F.Supp.2d 700 (C.D. Ill. 2003), the District Court and Plaintiff argue that use of the word "independent" in § 216.19(2) effectively makes the DCRC an independent agency comparable to the Federal Trade Commission or the National Labor Relations Board. (Ruling, p. 4; App. 079). However, the District Court and Plaintiff misapply these cases. It is not the use of the word "independent" in an agency's enabling statute that renders the agency independent. In the cases cited by the District Court and Plaintiff, the agency's own enabling statute authorizes removal only for cause. *See Humphrey's Ex'r*, 295 U.S. at 620 (discussing the enabling statute of the Federal Trade Commission, which stated "[a]ny commissioner may be

removed by the President for inefficiency, neglect of duty, or malfeasance in office"); *Collins*, 896 F.3d at 649 (discussing the enabling statute of the Federal Housing Finance Agency, which stated the director may only be removed "for cause by the President"). Neither *Humphrey's Ex'r* nor *Collins* created a judicially implied for cause removal standard. Congress enacted the for cause removal standard. Unlike *Humphrey's Ex'r* and *Collins*, § 216.19(2) does not contain any express language for removing commissioners only for cause. In fact, it does not contain any removal language whatsoever.

Further, *Ford v. Blagojevich* and *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8 (Iowa 2012) are inapplicable to this case. In *Ford*, the issue was not whether the governor had authority to remove a commissioner from the Illinois Industrial Commission under his general constitutional removal powers, but whether his removal violated the commissioner's due process rights. *See Ford*, 260 F. Supp.2d at 701. Thus, to the extent *Ford* is even relevant, the court relied on several factors in the enabling statute and prior precedent to imply a for cause removal standard, not simply the use of the word "independent." Neither the District Court nor Plaintiff can cite to any other provision of Chapter 216, or this Court's prior precedent, that supports implying a judicially created for cause removal standard for local civil rights commissioners.

Edwards is also inapplicable to this case. *Edwards* addressed whether the mental process privilege was applicable to an administrative law judge within the Iowa Department of Corrections. *See Edwards*, 825 N.W.2d at 10. The court's discussion of the word "independent" was a blip in the court's opinion and focused on the importance of having independent ALJs to preside over prisoner disciplinary hearings. *Id.* at 17. Nothing in *Edwards* stands for the proposition that the Legislature's use of the word "independent" implies a for cause removal standard.

Plaintiff's attempt to compare the DCRC with Federal independent agencies is unpersuasive. The Legislature's use of the word "independent" is clearly meant to mean independent from the State commission. If, as Plaintiff argues, the Legislature wanted the DCRC to be independent like its State counterpart, it would have stated that removal by the Mayor could only be for cause.

B. FOR CAUSE REMOVAL IS STILL SUBJECT TO A MAYOR'S REMOVAL POWERS UNDER SECTION 372.15.

Even if the Court determines that § 216.19(2) somehow requires cause to remove a local civil rights commissioner, a mayor may still elect to remove an appointee under § 372.15. *See Waddell*, 684 N.W.2d at 190 (indicating a mayor can elect to remove a member of a board of adjustment either for cause under § 414.8 or without cause under § 372.15 at the mayor's option); *see also*

Scott, 274 N.W. at 157 (holding the right of a police matron to continue to serve "during good behavior" is subject to the authority of a mayor to remove her from office).

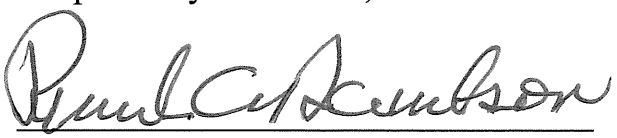
C. THE MAYOR'S REMOVAL LETTER WAS REQUIRED BY IOWA CODE SECTION 372.15 AND IS NOT INCONSISTENT WITH A REMOVAL WITHOUT CAUSE.

Plaintiff claims that the Removal Letter shows that cause is required to remove a local civil rights commissioner. Plaintiff overlooks that § 372.15 requires the mayor to "give the reasons" for removal. This requirement to "give the reasons" for removal is so that a removed appointee can address "all issues connected with the removal" at the post-termination name-clearing public hearing before the city council. As this Court has held on numerous occasions, this language does not create a "for cause" standard of removal. *See Scott*, 180 N.W. 156; *Bennett*, 446 N.W.2d 467; *Waddell*, 684 N.W.2d 185.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's Ruling denying Defendants' motion for summary judgment and remand this case with instructions to grant Defendants' motion for summary judgment.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,815 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman.

CERTIFICATE OF FILING AND SERVICE

I certify that on May 28 2020, I filed Appellants' Final Reply Brief with the Clerk of the Appellate Court by electronically filing the document through the EDMS Electronic Filing System.

I further certify that on May 28, 2020, I served Appellants' Final Reply Brief on the Appellee by electronically serving Appellee's counsel through the EDMS Electronic Filing System as follows:

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