

## Summary

The recommended amendment to Section 1.7 of the Board of Regents Bylaws is unnecessary and expressly conflicts with KRS 63.080(2), KRS 164.321(10), KRS 164.325, and KRS 164.350(2).

In addition, both the recommended amendment to Sections 1.7 and the addition of Section 9.3 are blatant violations of KRS 164.348 (Campus free speech protection), as adopted by this Board in PG-65, and will have a chilling effect on the freedom of expression and assembly specifically guaranteed by that statute.

Finally, the addition of Section 9.3 of the Board of Regents Bylaws improperly delegates authority to the President in violation of statutes and university policies, allowing him to muzzle any dissent expressed by constituent board members.

## Proposed Amendments to Section 1.7 Are Unnecessary and Conflict with the Plain Language of KRS 63.080(2) and Other Statutes

KRS 63.080(2) sets forth a single set of removal and replacement provisions that must be applied to both appointed and constituency members of the Board of Regents when they are removed for cause. The statute provides no basis whatsoever for the creation of separate rules that are solely applicable to constituency board members. Indeed, KRS 63.080(2) and other statutes consistently speak broadly in terms of “members of the board of regents” when discussing removal procedures. For example:

- KRS 63.080(2): “[A] member of the . . . board of regents . . . may be removed for cause as follows . . .” (emphasis supplied)
- KRS 164.321(10): “Board members may be removed by the Governor under the following circumstances . . .” (emphasis supplied)
- KRS 164.325: “KRS 63.080(2) hereby is expressly made applicable to members of the board of regents of each of said universities or colleges.” (emphasis supplied)
- KRS 164.350(2): “Each board shall adopt bylaws, rules, and regulations for the governance of its members . . . which shall reference the member removal and replacement provisions of KRS 63.080 . . .” (emphasis supplied)

The existence of a single set of removal and replacement provisions is evidenced in the bylaws of five other Kentucky universities (see Exhibit A), which consistently apply statutory removal provisions uniformly to appointed and constituency members.

In summary, the current bylaws are in line with KRS 63.080(2) and the practices of other Kentucky universities and, accordingly, Section 1.7 should not be amended.

**Amending Section 1.7 and Adding Section 9.3 Will Have a Chilling Effect on Expression and Assembly Rights Specifically Guaranteed in KRS 164.348 (as adopted in PG-65)**

KRS 164.348, as reflected in PG-65, guarantees:

“The University maintains a marketplace of ideas where the free exchange of ideas shall not be suppressed because an idea put forth is considered offensive, unwise, disagreeable, conservative, liberal, traditional, or radical by some or even most of the members of the University community. To promote and protect a lively and fearless freedom of debate and deliberation, students and faculty are granted the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue, without substantial obstruction or substantial interference.”

The recommended changes to Sections 1.7 and 9.3 violate these statutorily-required standards.

**Amendment to Section 1.7 Violates KRS 164.348**

The amended Section 1.7 creates categories of misconduct targeting constituency members that are broader than those applicable to appointed members. Put differently, constituency members can be removed in circumstances where appointed members cannot be removed (“malfeasance, misfeasance, incompetence or gross neglect of duty” for removal of appointed members versus “malfeasance, misfeasance, incompetence or gross neglect of duty, or actions inconsistent with the Bylaws” for removal of constituency members [emphasis supplied]). Moreover, the new Section 1.7 also creates an action against constituency members, “suspension,” which is not applied to appointed members. Indeed, the notion of “suspension” for any Board member is mentioned in no Kentucky statute.

These are just two examples of how the new Section 1.7 broadens the power of removal for constituency members but not for appointed members. These punitive measures inevitably stifle free expression for faculty and student constituency members and, as such, violate KRS 164.348.

**Addition of Section 9.3 Violates KRS 164.348**

Newly-created Section 9.3 also violates 164.348. First, it imposes constraints on the freedom of expression of the faculty and student constituency members, including through its requirements that constituency members communicate “in a manner in which is professional and using accurate information when addressing constituency.” This limitation explicitly conflicts with providing “the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue,” and, as such, is expressly prohibited by KRS 164.348 and PG-65.

Further, proposed Section 9.3 restricts constituency members’ freedom of assembly rights by limiting their ability to participate in university committees and processes. Constituency members are directed to refrain from: “serving on formal committees internal to the

University”; “taking part in University administrative meetings or processes”; “serving on internal committees which represent a formal vote”; and, “participating in administrative meetings or processes unless it is directly related to performing their direct university employment or student status role.” These restrictions are overt violations of the protections on the freedom of assembly set forth in KRS 164.348 and PG-65.

### **Section 9.3 Improperly Delegates Authority to the President in Violation of Statutes and University Policies**

Finally, proposed Section 9.3 improperly delegates Board oversight duties to the President. The second paragraph of the new section requires "all Board members shall convey any concern in personnel, operation, process, or otherwise to the President who shall evaluate or investigate, and may report back to the Regent or Board as a whole."

This provision subverts the power of the Board, which, under KRS 164.365, holds exclusive “power over and control of appointments, qualifications, salaries, and compensation payable out of the State Treasury or otherwise, promotions, and official relations of all employees” and improperly delegates that power to the President.

More generally, this provision undermines policies of shared governance and, instead, invests additional power in President, including the power to constrain and control constituency action.

## **Exhibit A: Other Kentucky University Bylaws That Address Removal**

### **Eastern Kentucky University**

(1) Any Board member may be removed by the Governor for cause as prescribed in KRS 63.080(2) or may be removed and replaced as prescribed in KRS 63.080(3) to meet the proportional representation requirement.

(2) All appointed members of the Board may be removed for cause as prescribed in KRS 63.080(4) if the board is no longer functioning according to its statutory mandate as specific in the enabling statutes applicable to the board, or if the board membership's conduct as a whole constitutes malfeasance, misfeasance, incompetence, or gross neglect of duty, such that the conduct cannot be attributed to any single member or members.

### **Murray State University**

Members of the Board are subject to removal and replacement in accordance with Kentucky Revised Statute 63.080 and its provisions, processes and procedures.

### **Northern Kentucky University**

1. The Board of Regents is comprised of members who are appointed or elected as provided by KRS 164.321, all other applicable Statutes of Kentucky, and the Constitution of the Commonwealth of Kentucky.

2. Board members may be removed by the Governor for cause, pursuant to KRS 63.080(2); or pursuant to KRS 63.080(3) or (4).

### **University of Kentucky**

"Board members may be removed by the Governor for cause, which shall include neglect of duty or malfeasance in office, after being afforded a hearing with counsel before the council and a finding of fact by the council."

### **University of Louisville**

(a) Except as provided in Sections 3.2 and 3.3, members of the Board of Trustees shall not be removed except for cause.

(b) A Trustee may be removed for cause as follows:

(1) The Governor or the Board of Trustees shall notify, in writing, the Trustee and the Kentucky Council on Postsecondary Education (the "CPE") that the Trustee should be removed for cause and shall specify the conduct warranting removal;

(2) The Trustee shall have seven (7) days to voluntarily resign or to provide evidence to the CPE that the Trustee's conduct does not warrant removal;

(3) Within thirty (30) days after receipt of notice from the Governor or the Board of Trustees, the CPE shall review the written notice, investigate the Trustee and the conduct alleged to support removal and make a nonbinding recommendation, in writing, to the Governor as to whether the Trustee should be removed, a copy of which shall also be provided to the Kentucky Legislative Research Commission (the "LRC");

(4) The Governor shall then make a determination, in writing, whether the Trustee should be removed and shall notify the Trustee, the Board of Trustees, the CPE and the LRC of the determination; and

(5) If the Governor's determination is to remove the Trustee, the Governor shall remove the Trustee by executive order, and shall replace the Trustee with a new appointment according to the applicable statutes for the Board of Trustees.

(c) For the purposes of this Section 3.1, a Trustee may be removed for cause for conduct including but not limited to malfeasance, misfeasance, incompetence or gross neglect of duty.