

within five days after the establishment of the office of deputy, or within five days after a vacancy occurs in the office of deputy, the town board has the power to appoint.

B. Powers and duties. The deputy town superintendent of highways functions during the absence or inability of the town superintendent to act, and at that time is vested with all the powers and duties of the town superintendent.

C. Oath of office; undertaking. Before a deputy can perform any power or duty of the office of town superintendent, he or she must take and file the constitutional oath of office and execute and file an official undertaking approved by the town board.

D. Compensation. The town board fixes the compensation to be received by the deputy [Town Law § 32(2)].

#### § 7-16. Tax collection deputies.

A tax collector may appoint, and at his or her pleasure remove, a deputy tax collector, whose compensation, if any, must be approved by the town board. The appointment of a deputy tax collector must be made by an instrument in writing, which shall become effective when filed in the office of the town clerk. Whenever the collector is absent or unable to act, or during a vacancy in the office of collector, the deputy collector assumes the powers and duties of the collector. The collector, however, is liable for the faithful performance of all duties by a deputy, except where such deputy is acting during a vacancy in the office of collector (Town Law § 35).

### ARTICLE IV, Vacancies in Office

#### § 7-17. In general.

A. One of the areas in which town boards seem to experience difficulty from time to time is in exercising their power and responsibility to fill vacancies in town offices. Town Law § 64, Subdivision 5, confers specific authority on town boards to fill vacancies in town offices. It provides that whenever a vacancy shall occur or exist, the town board or a majority of all the members thereof may appoint a qualified person to fill the vacancy. If the appointment is made to fill a vacancy in an appointive office, the town board appointment is for the remainder of the unexpired term. If the appointment is made to fill a vacancy in an elective office, the town board appointment is until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. The words "annual election at which the vacancy may be filled" do not relate here to the biennial town election for town officers. They relate to the November election held in the year in which the vacancy occurred, except when the vacancy occurs in an elective office after September 20, in which case it may not be filled by election that year (Public Officers Law § 42) because it is difficult for candidates seeking nomination and election to make themselves and their positions known to the electorate.

B. The person appointed by the town board to fill the vacancy must possess the same qualifications for the office as the original electee or appointee. No particular procedure must be followed by a board in determining who that person will be. The Town Law specifically provides that a person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be eligible for appointment to fill the vacancy, provided that he or she resigns from the board prior to being so appointed. In that situation, he or she clearly cannot participate as a member of the town board in making

the appointment. Care should also be taken lest the town board be reduced to less than a majority of its total membership by such action.

C. The Public Officers Law authorizes the Governor to call a special election to fill a vacancy in an elective office whenever a board vested with the authority to fill such vacancy is unable to do so by reason of a tie vote or if such board neglects to fill such vacancy for any other reason. The Governor has done so on a few occasions involving town elections, but not often.

§ 7-18. Determining whether a town office is vacant.

A. Problems have arisen regarding what circumstances really cause a vacancy in a town office to exist. Every town office becomes vacant upon the happening of one of a number of events before the expiration of the officer's term. These include:

- (1) The death of the incumbent.
  - (2) The resignation of the town officer. (See § 7-17, Resignations.)
  - (3) Removal from office. This is accomplished by a court upon application for removal made by any citizen-resident or by the district attorney upon notice to the town officer and with a copy of the charges. (The standard is misfeasance, malversion or maladministration of the office. Courts are reluctant to reverse the will of the electorate, so the degree of misconduct shown must be substantial.)
  - (4) Ceasing to be a resident of the town. If, while holding office, the town officer moves out of the town and takes up residence elsewhere, the office becomes immediately vacant by virtue of such move. Note that "residency" essentially means domicile. No one factor controls, although intent is key. Thus, temporary absences may not terminate one's residency.
  - (5) Conviction of a felony or of a crime involving one's oath of office.
  - (6) Entry of a judgment or court order declaring the officer to be insane or incompetent.
  - (7) Judgment of a court declaring an election or appointment void or finding that an office is forfeited or vacant.
  - (8) Refusal or neglect to file an official oath or undertaking within 30 days after the commencement of the term, in the case of an elective office, or within 30 days after notice of appointment, in the case of an appointive office. The Legislature has given additional time in cases of persons elected or appointed to office on active duty in the armed forces and absent for such reason from the county of residence at the time of such election or appointment.
- B. In addition to the above-enumerated events which will create vacancies in town offices, certain other acts will also create vacancies. Our courts have held that where two candidates for the same office receive the same number of votes for an elective town

office, the tie vote creates a vacancy upon the commencement of the term of office for which the election was held. The vacancy is filled by the town board sitting at the time the vacancy occurs (i.e., January 1). Another event which might create a vacancy is the acceptance by a town officer of an office which is, under the law, incompatible with the office held. The acceptance of such a second office creates a vacancy in the office already held.

§ 7-19. Resignations.

Public Officers Law § 31 prescribes the method by which a resignation must be accomplished. A town officer must resign by delivering his or her resignation in writing to the town clerk. If no effective date is specified, the office becomes vacant immediately upon delivery of the resignation to the town clerk. If an officer wishes to resign at some future date, he or she may do so, and the resignation becomes effective on the date specified, except that if the date named is more than 30 days after delivery of the resignation to the town clerk (90 days for justices), the resignation still becomes effective 30 days after such delivery. In the event that a town clerk wishes to resign, he or she may do so by sending a written resignation to the Secretary of State.

ARTICLE V, Compensation and Benefits

§ 7-20. Compensation; hiring of additional employees; employees hired for elections.

Fixing of salaries of town officers has been discussed under Chapter 5, Fiscal Matters. It should be sufficient to repeat here that Town Law § 27, Subdivision 1, provides the authority for the town board to fix the salary of all officers, officials and employees of the town and to determine when the same shall be paid. Under these same provisions of law, the town board may hire laborers, clerical assistants and stenographers and compensate them upon an hourly or daily basis if it so desires. The town board is also authorized to compensate officers required for the conduct of elections -- inspectors, ballot clerks and poll clerks -- in such an amount per day for their services on registration, election and primary days as it may determine by resolution.

§ 7-21. "Fringe" benefits.

A. Vacations, sick leaves, leaves of absence, overtime. A town board may provide by resolution for paid or unpaid vacation, sick leave and leave of absence plans for town officers and employees, including all highway employees, and it may adopt rules and regulations in relation thereto (General Municipal Law § 92). A fringe benefit policy could include provisions for payment for unused benefits, but such policy may only apply prospectively. The town board is also authorized to establish the town policy for the payment of overtime compensation. That overtime policy must not be inconsistent with the Federal Fair Labor Standards Act.

B. Work hours of elected officials. In most instances, elected officials are not bound by work regulations and are not required to conform to regular work hours. For similar reasons, they are equally unable to accumulate vacation or sick leave. Elected officials are not restricted to time they must spend on their duties or to regular hours (Ops. State Compt. 80-736 and 78-411).

C. Establishment of benefit policy. A sample form of resolution covering these matters in relation to town highway employees follows:

BE IT RESOLVED, by the Town Board of the Town of ....., .....County, New York,