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Elections—Right of Town Board to Fill Vacancy

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ELECTIONS

Right of Town Board to Fill Vacancy

Section 64(5) of the Town Law gives the power to the town board to appoint a qualified person to fill a vacancy in a town office, whether the office be elective or appointive.¹ While providing for the right of the incumbent to hold-over until his successor is selected, section 5 of the Public Officers Law also states that after the expiration of the term, the office shall be deemed vacant for the purpose of choosing his successor.² This latter provision has been most often used to deny the right of the incumbent to vote at a meeting called to appoint his successor.³ Recently this definition of vacancy was used in conjunction with the aforementioned provision of the Town Law in holding that an appointment by the Town Board of a town supervisor was legal.⁴

In the instant case the incumbent and his opponent vied for the office of supervisor and the election resulted in a tie. The Town Board appointed the opponent and the incumbent sought to have this action declared illegal and have himself declared as continuing in office, by means of an Article 78 proceeding.⁵ The Appellate Division⁶ affirmed an order of denial by the trial court, and the Court concurred in the decision. The right of a town board to appoint in such a situation has long been assumed, but has never been expressly stated, merely being implicit in other holdings.⁷ The only case which denies such power to appoint to an elective office was decided under a statute no longer in force.⁸ Further, various opinions of the Attorney General support the right of a town board to appoint a successor to a vacant office.⁹

1. N. Y. TOWN LAW §64(5). Whenever a vacancy shall occur or exist in any town office, the town board . . . may appoint a qualified person to fill the vacancy If the appointment be made to fill a vacancy in an appointive office if the appointment be made to fill a vacancy in an elective office

2. N. Y. PUBLIC OFFICERS LAW §5. Every officer . . . shall . . . hold over . . . after the expiration of the term for which . . . chosen, until his successor shall be chosen . . . ; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor.

3. *Application of Crosby*, 265 App. Div. 92, 37 N. Y. S. 2d 745 (3d Dep't 1942); *Matter of Smith*, 49 Misc. 567, 100 N. Y. Supp. 179 (Supp. Ct. 1906), *aff'd*, 116 App. Div. 665, 101 N. Y. Supp. 992 (4th Dep't 1906), *aff'd mem.*, 188 N. Y. 549, 81 N. E. 1176 (1907).

4. *Furk v. Board of Supervisors of County of Sullivan*, 1 N. Y. 2d 128, 134 N. E. 2d 104 (1956).

5. N. Y. CIV. PRAC. ACT §§1283 *et seq.*

6. *Furk v. Board of Supervisors of County of Sullivan*, 1 A. D. 2d 794, 148 N. Y. S. 2d 872 (3d Dep't 1956).

7. *Application of Crosby*, *supra*, note 3; *Matter of Smith*, *supra*, note 3; *Williamson v. Corscadden*, 143 Misc. 249, 255 N. Y. Supp. 597 (Sup. Ct. 1932); *People ex rel. Green v. Black*, 229 App. Div. 47, 241 N. Y. Supp. 244 (3d Dep't 1930).

8. *People ex rel. Lovett v. Randall*, 151 N. Y. 497, 45 N. E. 841 (1897); the case was decided under old section 12 of the N. Y. TOWN LAW, later dropped which authorized an incumbent to hold over until a successor should be elected.

9. 1911 OPS. ATTY. GEN. 520; 48 N. Y. STATE DEP'T REP. 513 (1932).

It would seem that in the absence of any contrary decisions or provisions of other statutes, the right of a town board to act in such a case is clearly established by the applicable statute.

Form of Ballots

*Beary v. English*¹⁰ involved a summary proceeding by the petitioner pursuant to section 330 of the Election Law.¹¹ Mrs. Beary, the petitioner, was a candidate for member of a state committee of the Democratic Party. The primary ballot listed her name with those of another woman and two men. After each name appeared the designation "(Male)" or "(Female)". The petitioner brought the present proceeding to require the board to change the arrangement of the names on the primary ballot and separate the candidates by sex. The Court affirmed a dismissal of the proceeding.

The provisions of the Election Law are controlling on political parties, their organization, their committees and their operations.¹² Section 11 of the Election Law provides that the state committee of each party "may provide for the equal representation of the sexes" from each unit and if it does, the primary ballots "shall carry such party positions separately by sexes."¹³ There is a similar provision in the New York Constitution.¹⁴

The state committee of the Democratic Party has provided for equal representation of the sexes. The petitioner interpreted the clause of section 11 providing for designation of "party positions separately by sexes" as requiring on the ballot a separate designation of "Member of State Committee (Male)" and "Member of State Committee (Female)" with the two proper names under each. A minority

10. 1 N. Y. 2d 338, 135 N. E. 2d 313 (1956).

11. N. Y. ELECTION LAW §330. The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any of the subjects set forth in this section, which shall be construed liberally . . . 2. The nomination of any candidate, or his election to any party position, in a proceeding instituted by any candidate aggrieved . . .

12. *People ex rel. Coffey v. Democratic General Committee of Kings County*, 164 N. Y. 335, 58 N. E. 124 (1900).

13. N. Y. ELECTION LAW §11. The state committee of each party shall have power to make its own rules as to the number of its members, the units of representation from which its members shall be elected, and may provide for the equal representation of sexes from each unit. By any rule herein provided for, each unit of representation shall have an equal number of members . . . When any such rule provides for the equal representation of sexes from each unit, the designating petitions and primary ballots shall carry such party positions separately by sexes . . .

14. N. Y. CONST. art. XIII, §1. Members of the legislature, and all officers, executive and judicial, . . . before they enter on the duties of their respective offices, shall take and subscribe the following oath or affirmation . . . and no other oath, declaration, or test shall be required as a qualification for any office of public trust, except the committee of a political party may, by rule, provide for equal representation of the sexes on any such committee . . .