



**WASB**

# Legal Services Membership

## LEGAL NOTES

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March, 1986

### SCHOOL BOARD VACANCIES

The topic of the March Legal Notes is school board vacancies how they arise and how they are filled. The focus will be on vacancies that arise during the term of an elected or appointed member.

#### A. HOW VACANCIES ARISE

Section 17.03, Wis. Stats., specifies how public offices, including school board offices, become vacant. Any of the following events will cause a school board vacancy:

- (1) death of the incumbent;
- (2) resignation of the incumbent;
- (3) removal from office;
- (4) the incumbent's ceasing to be an inhabitant of the school district for which elected, or continuous absence from the district for a period exceeding sixty days;
- (5) conviction by a state or federal court of certain crimes, or conviction of an offense involving a violation of the official oath;
- (6) the decision of a competent court a) declaring the board member's election void, b) adjudging the individual incapable of understanding the objective of the elective process, or c) placing the individual under guardianship (unless the individual is found competent to vote);
- (7) the failure of the board member to take and file the required official oath, or to execute and file a required official bond in the manner and in the time required or prescribed by law;
- (8) the death or declination in writing of a person elected or appointed as a board member before he/she qualifies or enters upon the duties of the office;
- (9) the expiration of the term of an elected incumbent; or

- (10) any other event which is declared by other statutes to create a vacancy, such as recall, pursuant to § 9.10.

### Resignations

Section 17.01(13) mandates that resignations be in writing, and be addressed and delivered to the school board. Leaving a copy of the resignation with the clerk at his or her public office or usual place of business constitutes delivery to the board.

A resignation becomes effective at the time indicated in the written resignation. If no time is indicated, the resignation is effective upon delivery.

### Removal From Office

Sections 17.13(3) and 17.16 set forth the procedure by which all common, union high school and unified school district officers may be removed from office for cause. The term "cause" in this setting includes inefficiency, neglect of duty, official misconduct or malfeasance in office. The existence of cause is to be determined by the judge of the circuit court wherein the school district is situated on written, verified charges preferred by a taxpayer and resident of the school district. The accused school board officer is assured due process under the procedures provided by the statute. Section 17.13(3) requires that the accused officer be provided a copy of the charges and written notice of the time and place for the hearing. Additionally, the officer has 10 days to file a verified answer to the charges. Further, the accused officer is entitled to a speedy public hearing at which a full opportunity for the officer to be heard must be afforded.

Elected school board members may also be removed from office, for cause, by recall of the electorate. The recall election is initiated by a petition of the electorate. The recall procedures applicable to school board members are set forth in § 9.10.

### Continuous Absence From School District or Change of Residence

If a school board member is continuously absent from the school district for a period in excess of sixty days, his office is deemed vacated. This provision was declared applicable to all board members in Van Kaufen v. School District of Beloit, Case No. 2175, Circuit Court, Rock County (January 11, 1978).

When the board president, vice president, treasurer or clerk is unable to discharge the duties of office due to disability or because of absence from the school district (for a period of less than sixty days), § 120.05(3) authorizes the remaining

board members to appoint a person to discharge the duties of such office temporarily. In case of a three member board any elector of the school district may be appointed, but in case of a board having more than three members, the appointee for the president shall be the vice president and the appointee for the other officers shall be one of the remaining board members.

When a school district operates under the area apportionment plan for election of board members (§ 120.02), and a board member elected from a given area of the school district during the course of his term moves to another area of the district, it is the author's opinion that this does not cause a vacancy. Under an area apportionment plan, all or a portion of the school board members must reside in specified areas of the school district as a condition to being an eligible candidate for election. Such a requirement for candidates may not be made a condition to continued service, for the area candidate is required by law to be elected at large from the area but not for the area. Further, the statute setting forth events which cause a vacancy to occur refer, in the case of residency, only to -

"his ceasing to be an inhabitant of the . . . school district for which he was elected"

or in case of absence -

"his being and remaining absent from the district for a period exceeding 60 days".

#### Failure To Comply With Oath And Bond Requirements

An office also becomes, or is deemed, vacant if the officer fails to take and file the required official oath or to execute and file a required official bond in the manner and within the time prescribed by law.

Sections 120.06(10) provides that oaths of office must be taken and filed by school board members on or prior to the day provided for taking office. For members selected for regular or unexpired terms, this means that oaths must be taken and filed on or before the fourth Monday in April. The school district clerk notify the person of his or her election or appointment within eight days after the election or appointment and in the manner prescribed in § 7.53(3).

#### B. HOW MIDTERM VACANCIES ARE FILLED

##### Notice Of Vacancy

When a vacancy occurs, other than by resignation of a board member, notice as set forth in § 17.17, must be given as follows:

- (1) In case the vacancy occurs by virtue of a court judgment, by the clerk of court to the body or officer authorized to fill the vacancy;
- (2) In case of other vacancies by the clerk, or in his absence, the treasurer, to the body or officer authorized to fill the vacancy.

### Appointment

Except for vacancies created by the recall of a school board member pursuant to sec. 9.10, vacancies in common, unified, and union high school districts are to be filled by appointment by the remaining members of the board. Such appointees hold office only until a successor is elected and takes office under §§ 120.06(4) or 120.73(1). As of March 31, 1986, a bill was pending before the Governor which would renumber 120.73(1) as 120.42 (Assembly Substitute Amendment 1 to 1985 Assembly Bill 710).

Vacancies in the Milwaukee School District are filled by special election pursuant to § 119.08(4). The rules and procedure governing such a special election are set forth in § 8.50.

### Open Meetings Law Requirements

Under the Open Meetings Law, interviews and discussion by a school board of the qualifications of potential appointees to fill a vacancy must be conducted in open session, unless the information solicited or the discussion involves financial, medical, social or personal histories, or disciplinary data, which if discussed in public would be likely to have a substantial adverse effect upon the reputation of any person. In a recent opinion the Attorney General has interpreted this exception to the general open meetings rule as requiring that at least one board member have actual knowledge of information which he or she reasonably believes will have a substantial adverse effect upon reputations if divulged in open session. (OAG 15-85) Further, there must be a probability that such information will be divulged in order to close the discussion.

In addition, the actual appointment process to fill a vacancy must take place in open session and school boards may not vote by secret ballot. According to §19.88(1), only the election of the school board's officers, i.e., president, vice-president, clerk, and treasurer, may be conducted by secret ballot.

Whenever any appointee is notified of his or her selection to fill a vacancy on any school board, §17.26(3) provides that the appointment will be deemed accepted unless a written refusal to serve is filed with the school district clerk or director within 5 days of notification.

## Election

In common, union high, and unified school districts, successors to appointees filling vacant school board offices are elected at the spring election and serve the unexpired term. Section 17.26(1) specifically addresses when elections to replace appointees, i.e. those board members holding office during the pre-election period, are to be held:

- (1) If a vacancy occurs in the office of a board member in the last year of his or her term (i.e., in an office at stake in the next election), the successor shall be elected at the next spring election.
- (2) If a vacancy occurs after a spring election (the first Tuesday in April) but on or before the last Tuesday in November in the office of the board member who is not in the last year of his or her term, the successor shall be elected at the next spring election.
- (3) If a vacancy occurs after the last Tuesday in November and prior to the spring election in the office of a board member who is not in the last year of his or her term, the successor shall be elected at the second following spring election, and the appointee shall serve in the interim period.

The appropriate number of candidates receiving the highest number of votes fill the regular terms up for election, while the unexpired terms are filled by the appropriate number of candidates receiving the next highest number of votes.

In the Milwaukee School District, successors to appointees filling vacant school board offices are elected by special election pursuant to §§119.08(4) and 8.50.