



# Post-Election Issues: Oaths, Bonds, Vacancies, and Organizational Meetings

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As surely as April showers bring May flowers, the first Tuesday in April brings local elections.<sup>1</sup> With these elections comes the potential for change in local leadership in Wisconsin cities and villages.

This time of transition brings many questions: What steps must newly elected officials take to qualify for the office? What happens if someone is elected to more than one office or if someone who is elected fails to qualify for the office? When do the reins change hands? What organizational matters are handled at the first meeting of the new governing body, commonly referred to as the organizational meeting? We also receive questions relating to compensation for governing body members. This legal comment addresses a number of these post-election topics of perennial interest.

## Notice of Election and Certificate of Election

When the election is over, it is the municipal clerk's responsibility to notify those persons elected to a municipal office. In villages, Wis. Stat. § 61.21 requires that the clerk notify officers-elect within five days after the election. The statute does not detail how notice must be given.

State statutes require that the clerk "promptly" issue a certificate of election to each person elected.<sup>2</sup> If there is an

"aggrieved party" as defined in Wis. Stat. § 9.01(a)5, the clerk cannot issue the certificate until the deadline for filing a recount petition set forth in § 9.01(1) has passed. When a valid recount petition is filed, the municipal clerk cannot issue the certificate of election for the office in question until the recount has been completed and the time allowed for appealing the recount has passed. If the recount is appealed, the clerk cannot issue a certificate of election until the appeal is decided.<sup>3</sup>

## Oath of Office

Everyone elected or appointed or reelected or reappointed to any village<sup>4</sup> or city office must take and file a written oath or affirmation to qualify for the office.<sup>5</sup> The Wisconsin Statutes prescribe the form of the oath or affirmation in § 19.01 for most offices and § 757.02 for municipal judges. The oath is administered by the clerk or, in the clerk's absence, the deputy clerk.<sup>6</sup> All oaths are filed in the clerk's office, except for the clerk's oath, which is filed in the treasurer's office.<sup>7</sup>

Persons elected or appointed to a city office must take and file the official oath within 10 days after receiving notice of election or appointment from the city clerk. Elected city assessors must take and file the oath within five days before June 1.<sup>8</sup> When an appointive city officer has filed the oath, and bond

if required as discussed below, the city clerk must issue the officer a certificate of appointment. If the appointment is to a board or commission, such as the plan commission or zoning board of appeals, the appointee must file the certificate of appointment with the secretary of the board or commission.<sup>9</sup>

In villages, the clerk must inform anyone elected or appointed to any office within five days of election or appointment and that person must, within five days of such notice, take and file the official oath. The assessor, however, must take and file the oath within five days prior to June 1.<sup>10</sup>

Once the officer has received notice of election or appointment from the clerk, he or she must take and file the oath of office within the requisite time since failure to do so creates a vacancy in the office.<sup>11</sup> For this reason, municipalities should not wait until the third Tuesday in April (that's when the term of newly elected or reelected governing body members begins) or the organizational meeting to administer the oath of office.

Although many municipalities have a ceremonial swearing in of new or reelected members where the oath is orally administered, the oral oath is optional and must be in addition to the written oath.<sup>12</sup> Municipalities that wait until the third Tuesday in April or the organizational meeting to administer the oath of office

1. Wis. Stat. § 5.02(21).

2. Wis. Stat. § 7.53(4).

3. *Id.*

4. Section 61.21 requires every person elected or appointed to an office named in § 61.19 to take and file the oath of office within 5 days after notice of election or appointment. However, § 61.19 only names the president, clerk, treasurer, assessor, constable, and the deputy clerk if one is appointed by the village clerk. It does not name trustees or other

village officials such as the police chief, if the office exists, or the deputy treasurer if one is appointed under § 61.261. Since § 17.03(7) implies that every officer elected or appointed or reelected or reappointed must take and file the oath of office and states that failure to do so creates a vacancy, we suggest that all elected or appointed village officers, not just those named in § 61.19, be required to take the oath of office.

5. Wis. Stat. §§ 19.01, 17.03(7), 62.09(4)(a).

6. Wis. Stat. §§ 61.25(1), 61.19, 61.21, and 62.09(11)(h) and (i).

7. Wis. Stat. §§ 19.01(4)(f) and (g).

8. Wis. Stat. § 62.09(4)(a).

9. Wis. Stat. § 62.09(4)(c).

10. Wis. Stat. § 61.21.

11. Wis. Stat. § 17.03(7).

12. Wis. Stat. § 19.01(1m). Wis. Stat. § 19.01(1m) prescribes the form of the oral oath.



will not administer the oath to elected officers in the time required by law.

However, an officer who fails to file the oath of office and who nevertheless continues to exercise the duties of the office will be considered a de facto officer and his or her acts will be valid so far as they concern the public or third persons having an interest in the actions taken.

A de facto officer is “one who is in possession of an office, and discharging its duties, under color of authority ...

By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.”<sup>13</sup> In Wisconsin, the “acts of a de facto officer are valid as to the public and third parties and cannot be attacked collaterally.”<sup>14</sup>

The de facto officer’s acts are binding and valid until the individual is ousted from the office by the judgment of a court in a direct proceeding to try the officer’s title to the office.<sup>15</sup>

### Official Bonds

In cities, if the council requires them to do so the treasurer, comptroller, chief of police, and such other officers as the council or statutes direct (e.g., the municipal judge under Wis. Stat. § 755.03) must file an official bond. The council may also provide for a schedule or blanket bond. The bonds must be approved by the mayor and filed within 10 days after notice of election or appointment. If the council does not require these officials to execute and file an official bond, the council must obtain a dishonesty insurance policy or other appropriate insurance policy to cover those individuals.<sup>16</sup>

In villages, every bond required of a village officer<sup>17</sup> must be executed with

sufficient sureties as determined by the village board and must be approved by the village president.<sup>18</sup> The village board may provide a schedule or blanket bond. For more information on these requirements applicable to local officials, see “Bonding/Insurance Requirements for Municipal Officials” (Fidelity Bonds 33R2) which was published in the April 2019 issue of *The Municipality*.

### Time of Taking Office

The regular term of the mayor and council members, as well as that of village president and trustees, begins on the third Tuesday in April. The term of other officers begins on May 1 following their election, unless otherwise provided by ordinance or statute.<sup>19</sup>

### Holdovers

Questions sometimes arise regarding whether an officer holds over in office until a successor qualifies. Appointees to elective city and village offices do not hold over after the term of office ends. Elective city and village offices are vacant upon the expiration of the incumbent’s term.<sup>20</sup>

Appointed offices are different. City and village appointed officers serve until their successors are appointed and qualify unless otherwise provided by ordinance.<sup>21</sup>

### Vacancies

Vacancies may occur for a number of reasons, as set forth in Wis. Stat. § 17.03. April vacancies often occur because an elected or appointed officer fails to qualify for office (e.g., declines to take the oath of office, as discussed above) or because a current member of the governing body whose term is not expiring resigns after being elected to another municipal office.

Vacancies in elective offices are filled pursuant to Wis. Stat. § 17.23 for cities and § 17.24 for villages. Vacancies in the office of municipal judge are governed by Wis. Stat. § 8.05(4)(fm).

When an elected office is created in a municipality by state law or ordinance, the office may not be deemed vacant until it has first been filled by the electorate. This provision, therefore, prohibits a municipality from filling a newly created elective office by appointment. An exception allows for the temporary appointment of a municipal judge when a city or village creates a new municipal court before the December 1 preceding the spring election. Section 8.50(4)(g) provides that if through neglect or failure, an elected officer who should have been chosen at the spring election is not so chosen, a special election may be held to fill the vacancy.

### Organizational Meeting

Under Wis. Stat. § 62.11(2), the new common council first meets on the third Tuesday in April. A village board may meet on this date or may wait until the next regularly scheduled meeting.<sup>22</sup> The first meeting is an organizational meeting. Practice varies among municipalities, but this meeting generally has a ceremonial aspect as the newly elected members take their seats with previously elected members and may be a time when procedural matters, such as bylaws, are dealt with.

The organizational meeting is generally the time when the body’s officers (e.g., the council president)<sup>23</sup> are chosen, committee assignments are made, and appointments are made to offices whose terms start on May 1. Section 19.88, part of Wisconsin’s open meeting law,

13. *Schoonover v. City of Viroqua*, 245 Wis. 239, 244, 14 N.W. 2d 9, 12 (1944) (citations omitted).

14. *Walberg v. State*, 73 Wis.2d 448, 463, 243 N.W. 2d 190, 198 (1976); *Joyce v. Town of Tainter*, 232 Wis.2d 349, 606 N.W.2d 284 (Ct. App. 1999).

15. *Id.*

16. Wis. Stat. §§ 62.09(4)(b) and 19.01.

17. Examples include the clerk under § 61.25, the treasurer under § 61.26(1), the marshal and constable, if any, under §§ 61.28 and 61.29, and the municipal judge under § 755.03.

18. Wis. Stat. §§ 61.22 and 19.01.

19. Wis. Stat. §§ 61.23(2), 64.02(1), 64.05(1) and 62.09(5)(a).

20. Wis. Stat. § 17.03(10).

21. Wis. Stat. §§ 61.23(1), 62.09(5)(e), 62.51.

22. See Wis. Stat. §§ 61.19 and 61.32.

23. Wis. Stat. §§ 62.09(8)(e) and 64.07(2).

prohibits voting by secret ballot except for the limited purpose of electing the officers of a governmental body. This does not authorize the filling of vacancies on a governmental body by secret ballot or the selection, by secret ballot, of committee members or officers of the municipality.<sup>24</sup>

Council confirmations of mayoral appointees require a majority vote of the entire council, and the mayor may break a tie.<sup>25</sup> A proposed appointee who is rejected by the council is ineligible for appointment to the same office for a period of one year.<sup>26</sup> There are no similar provisions governing villages in chapter 61.

We are often asked whether business other than these organizational matters may be conducted at the first meeting. Unless local law prohibits this, there is no reason why other business may not be conducted at this meeting.

## Lame Duck Issues

Sometimes the outgoing governing body passes legislation or exercises its authority on matters that the new body would have preferred to act upon. A new or existing governing body may repeal or amend legislation.<sup>27</sup> However, if executive or administrative actions, such as the approval of a contract or the appointment of an officer or employee are involved, there may be problems if the new body attempts to adopt legislation repealing the action of the prior body. Governing bodies should therefore seek legal advice before seeking to nullify such actions.

In addition, there may be powers that can arguably be exercised by either the old or new body. For example, the alderperson and citizen members of the plan commission are to be appointed in April

of each year for terms expiring in April and beginning May 1.<sup>28</sup> In some cases ambiguities such as this may be resolved by the municipality's ordinances, and it is important to be aware of local provisions.

## Compensation Discrepancies and Salary Refusal

We are sometimes asked why persons holding the same office might be compensated at different rates, and whether governing body members can refuse salary. With regard to compensation differences, the law requires that compensation for governing body members be established before the earliest time for filing nomination papers for the office or, in villages that don't use nomination papers, before the caucus date. After that time or date, no changes may be made to the compensation for the office that applies to the term of office for which the deadline or date applies.<sup>29</sup> In newly incorporated cities and villages, compensation for governing body members may be established during the first term of office.<sup>30</sup> Section 66.0505 of the Wisconsin Statutes essentially prohibits governing body members from raising their own salaries during their term. This prohibition does not prevent the members of a municipal governing body from receiving prescheduled salary increases during the middle of their term. Rather, it prohibits mid-term increases determined by current governing body members. A governing body may decide that a salary increase will take effect at the beginning of the next term, or at some other time, such as after the first year of the next term.<sup>31</sup> This means if seats are staggered, newly elected officers might be compensated differently than officers continuing to serve out their terms.

A municipal governing body member who wishes to waive or refuse his or her annual salary can do so provided the refusal complies with the procedures and time constraints set forth in Wis. Stat. § 66.0505(3).

## Conclusion

April is often a time of transition for Wisconsin cities and villages. Elections often result in changes in local leadership and new municipal officials are faced with the task of learning how their local government functions and how to be effective officers. The League has resources available to assist officials in learning about local government, including our website and one-day Local Government 101 Workshops by webinar and in-person at various locations around the state.

## Governing Bodies 369R4

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24. 65 Op. Att'y Gen. i, viii (1976).

25. Wis. Stat. § 62.11(3)(b).

26. Wis. Stat. § 62.09(2)(d).

27. See League opinions Ordinances and Resolutions 334, Powers of Municipality 824, and Governing Bodies 354.

28. Wis. Stat. § 62.23(1)(d).

29. Wis. Stat. §§ 61.193 and 62.09(6)(am)2.

30. Wis. Stat. § 61.193(3) and 62.09(6)(1)(am)3.

31. Wis. Stat. § 66.0505(2).

