



# CHAPTER 10

## APPOINTMENT AND REMOVAL OF OFFICIALS IN STATUTORY TOWNS

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### Introduction

Colorado law grants elected officials in statutory towns the power to appoint and remove certain municipal officials, including members of the governing body and officers such as the clerk or treasurer. If you're an elected official in a statutory town, it's important for you to have a working understanding of the rules and potential pitfalls in this area. An improper appointment or removal can not only result in disputes or claims, but also create uncertainty within the organization and a cloud over the governing body. This chapter provides information on appointment and removal of officials in statutory towns, including the filling of vacancies and guidance regarding best practices. In general, statutory cities operate under different statutes, and home rule municipalities operate under charter provisions that are likely different than the statutory requirements outlined in this chapter, and so neither are addressed here.<sup>1</sup>

### Filling Vacancies on the Town Board

A vacancy on the town board can occur under a variety of circumstances, including: resignation; inability to fulfill the duties of office; failure or refusal to take the oath of office; failure to meet residency requirements (including moving out of the ward or municipality); removal from office; a seat left unfilled after an election, or an official passing away during the term of office. Once a vacancy arises, the town board is faced with several considerations.

- **Sixty-day time frame.** First, state law provides that a vacancy on the town board may be filled either by appointment or by election. However, this option only lasts for 60 days. If the town board does not fill the vacancy by appointment or order an election within 60 days, then the board is required to order an election to fill the vacancy.
- **Resolution declaring vacancy.** The board should consider adopting a resolution that declares the vacancy, sets forth the vacancy effective date, and states whether the board chooses to fill the vacancy by appointment or by election. While such a resolution is not required for a statutory town, the board should consider this

approach, as passing a resolution declaring a vacancy provides a written record of when the statutory 60-day clock begins and makes known the intent of the town board regarding its choice on how to fill the position.

- **Special considerations for vacancy in mayor’s office.** Generally, a vacancy in the office of mayor is filled in the same manner as vacancies of other members of the town board. However, if the town board will appoint someone, it may wish to consider qualifications or circumstances unique to the position, including the mayor’s voting rights and role as presiding officer.

## Term of Office for an Appointee Filling a Vacancy

The term of office of a vacated seat filled by appointment or election only runs until the next regular election. This is true even if the original term would not be expiring at such election. There is no authority in state law for a statutory town to extend the term of office of an appointee filling a vacancy. If terms of office are four years, this rule can sometimes create confusion at the next regular election, where some seats are up for a full four-year term while another seat is on the ballot solely for purpose of electing a person to fill a vacant seat for the remainder of the term. Proper parlance can reduce the confusion—candidates running for that vacant seat aren’t running for an office having a new two- or four-year term but for a shortened, two-year term to fill the vacancy.

## Qualifications of an Appointee Filling a Vacancy

Colorado statutes do not separately mandate qualifications for an appointee who is to serve in the event of a vacancy. However, the Colorado Constitution and related statutes require that persons holding any elective office shall be qualified. To be qualified, an appointee must be: at least 18 years old as of the date of the election [or appointment]; a U.S. citizen; a resident of Colorado for at least 22 days prior to the election [or appointment]; a resident of the municipality (and ward, if applicable) for at least 12 consecutive months prior to the date of the election [or appointment]; not serving a sentence in any public prison; and registered to vote.

An appointment is void if the person appointed is not qualified. Therefore, it is important to ensure that a person appointed to fill a vacancy in an elective office has the qualifications set forth in state law, as summarized above.

Although state law does not dictate the process for selecting a qualified person to fill a vacancy, governing bodies should be mindful that appointments to elective positions, to some extent, remove the people’s opportunity to choose their own representative. Therefore, it is prudent to implement a formal process with sufficient advertisement of the vacancy to provide transparency and ample opportunity for participation. Other considerations and pitfalls to avoid include:

- Making an appointment that benefits or appears to benefit any member of the governing body personally (see chapter 6);
- Appointing someone who will create turmoil or dysfunction within the governing body or other areas of municipal government (see chapters 1 - 3); or

- Failing to provide the appointee with proper training once appointed. Like any other person serving in an elective position, an appointee should receive proper training.

## Appointment of Officers in Statutory Towns

State law requires the town board appoint or provide for the election of certain officers, including a clerk, treasurer and town attorney. The applicable statute, C.R.S. Section 31-4-304, states in pertinent part:

The board of trustees shall appoint a clerk, treasurer, and town attorney, or shall provide by ordinance for the election of such officers, and may appoint such other officers, including a town administrator, as it deems necessary for the good government of the corporation.... **[N]o appointment of any officer shall continue beyond thirty days after compliance with section 31-4-401 by the members of the succeeding board of trustees.**

In some cases, the town board fails to act within 30 days to appoint or re-appoint officers of the town. Further, in many cases, these positions are staffed with municipal employees, which can lead to uncertainty in employment when the town board fails to re-appoint an employee to one of these appointed positions. These and other circumstances raise the question: What is the impact of not making appointments within the 30-day period after the new board members are seated? In short, if the 30-day period set forth in this section passes, the term of the officer expires.

*However*, it is important to note that the expiration of the term does not necessarily or automatically oust the individual holding the office from that position and create a vacancy. Rather, absent provisions to the contrary in state law or local ordinance, the public interest requires that public offices should be filled at all times without interruption. The Colorado Constitution adheres to this principle, stating in Article XII, Section 1 that “[e]very person holding any civil office under the state or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified....”

Therefore, an individual holding an appointive office in a statutory town remains in that position after his or her term has expired (i.e. holds over) until a successor properly appointed by the town board takes office. Moreover, if the incumbent is an employee, he or she would remain in their appointive position and on the town’s payroll as a holdover.

To avoid confusion and conflict regarding holdovers, when the term of an appointive office expires, the town board should timely act to either re-appoint the incumbent or appoint a new person to the office. The board should also seek advice of legal counsel before deciding to not re-appoint an incumbent appointive officer who is also an employee of the town.

## Removal from Office in Statutory Towns

The following identifies some of the key requirements pertaining to the removal of an elected official in a statutory town pursuant to a proceeding under C.R.S. Section 31-4-307. Many of these requirements are not present in the statute itself; rather, they are found in some old judicial decisions concerning the statute. Removal of an elected official by

the governing body essentially overrides the will of the people who elected the official. For this reason, it is critical that any removal proceedings take place in accordance with the guidance provided by these decisions. The advice of counsel is also critical given the potential for missteps.

While these decisions are more than a century old, they came into play more recently in the recommendation of a United States Magistrate Judge in a case involving a CIRSA member municipality.<sup>2</sup> While the Magistrate Judge's recommendation is unpublished and does not serve as precedent, it was cited with approval by the Colorado Supreme Court.<sup>3</sup> Thus, the Magistrate Judge's recommendation highlights the importance of these older decisions and may offer some good guidance to a statutory town contemplating a removal proceeding.

Given this recent resurrection of old case law, the way in which a town may have applied Section 31-4-307 in past proceedings may not serve as a sound guide to the conduct of such proceedings today. Thus, past practice should not be used as a basis to avoid compliance with the following requirements gleaned from the old but resurrected case law:

- **The basis for removal (unless the elected official has moved out of town) must be “misconduct or malfeasance in office,” as those terms are used in Article XIII, Section 3 of the Colorado Constitution.** These constitutional provisions contemplate official misconduct of such a magnitude that it affects the performance of the officer's duties, and offenses against the town “of a character directly affecting its rights and interests.”<sup>4</sup> Political or personal disagreements, or a stalemate resulting from failure to obtain a requisite number of votes on matters coming before the town board, may not be sufficient grounds to effect a removal.
- **The removal proceeding is quasi-judicial in nature, subject to the safeguards commonly found in judicial proceedings.** This means:
  - There must be a charge or charges against the official sought to be removed. The charges must be specific and stated with substantial certainty.<sup>5</sup> Vague or general charges likely will not meet this requirement.
  - There must be a hearing in support of the charges, and an opportunity to make a defense.<sup>6</sup> The charges must in the first instance be proven by testimony and evidence, with the opportunity given to the officer sought to be removed to rebut such testimony and evidence, and offer his or her own.
  - The hearing must be held under the same limitations, precautions, and sanctions as in other judicial proceedings.<sup>7</sup>

A basic requirement of judicial proceedings is that decision-makers must be neutral and impartial. This is why in most judicial proceedings, investigative, prosecutorial, and adjudicatory functions are separated. However, in removal proceedings, the adjudicatory body (the town board) may also have carried out an investigative function by establishing the charges that are the basis for the proceeding. Involvement in presenting

testimony and evidence would further diminish the separation of these functions, and the lack of separation may compromise the appearance or reality of a neutral and impartial decision-maker.

These requirements highlight one of the most difficult procedural aspects of a removal proceeding: who will present the evidence and testimony? The town board serves as the decision-maker. It would likely be problematic, from a fairness standpoint, if the decision-makers also served as witnesses. One option to address this issue is use of a hearing officer whose decision is made subject to final review and action by the town board. Another option is to limit involvement in non-adjudicatory functions to one (or at most two) members of the governing body who understand their need to then recuse themselves from the board's decision-making.

- **The decision will be subject to judicial review.**<sup>8</sup> This means that under Rule 106(a)(4) of the Colorado Rules of Civil Procedure, a transcript of the proceedings as well as the evidentiary record, will be produced to the district court for review. The standard of review will be whether the governing body's decision was "arbitrary or capricious." Constitutional due process violations may be raised, and considerations of bias may be raised to set aside a decision as well.

Other questions and issues to consider in holding the proposed removal hearing include:

- Have provisions been made for the issuance of subpoenas to compel the attendance of witnesses, the administration of oaths, the right of discovery, and the cross-examination of witnesses?
- Are rules of procedure in place, has a standard of proof been established, and will rules of evidence be followed?
- Does the officer sought to be removed have the right to be represented by counsel? Is the governing body working with the advice of counsel?
- Have adequate time and opportunity been given to the officer sought to be removed to prepare his or her case in answer to the charges? Have provisions been made for the granting of reasonable continuances?
- Has some means of recording the hearing been arranged, preferably by a stenographer who can prepare a verbatim transcript?
- Who will prepare written findings of facts, conclusions of law, and a final decision and order?

## Conclusion

A town board's powers of appointment are effective tools. They can be used to timely fill a board vacancy and appoint key staff who will help drive the town's vision and success. But, if not handled appropriately, appointments can become the source of intractable disputes and potential liability. Thus, board members should work together to understand their options, duties and obligations when it comes to making appointments, and make wise use of their appointment powers.

Likewise, a town board's power of removal is undoubtedly an important one; but, an imprudent or improper removal proceeding can be the source of significant liability. As noted, recently resurrected case law suggests the bar for exercising the removal power is high, for situations where serious misconduct or malfeasance in office can be proven. Further, the removal power should be exercised only with the procedural safeguards summarized above in place, and only with the assistance of legal counsel. Otherwise, the governing body may be taking on an unacceptable risk of liability.

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Footnotes:

1. Officials in statutory cities and home rule municipalities should obtain from their counsel and staff information on the appointment and removal requirements specific to their organization.
2. *Russell v. Buena Vista*, 2011 WL 288453 (D. Colo. 2011).
3. *Churchill v. University of Colorado*, 2012 WL 3900750 (Colo. 2012).
4. *Board of Trustees v. People ex rel. Keith*, 59 P. 72, 74 (Colo.App. 1899).
5. *Board of Alderman v. Darrow*, 22 P. 784, 787 (Colo. 1889).
6. *Darrow*, 22 P. at 787.
7. *Keith*, 59 P. at 75.
8. *Id.*