KEY PROVISIONS OF NEW YORK STATE CONSTITUTION

ARTICLE IV

Art IV, § 1. The executive power shall be vested in the governor, who shall hold office for four years; the lieutenant-governor shall be chosen at the same time, and for the same term. The governor and lieutenant-governor shall be chosen at the general election held in the year nineteen hundred thirty-eight, and each fourth year thereafter. They shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices, and the legislature by law shall provide for making such choice in such manner. The respective persons having the highest number of votes cast jointly for them for governor and lieutenant-governor respectively shall be elected.

Art IV, § 5. In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his or her term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.

Art IV, § 6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein. The lieutenant- governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly.

In case of vacancy in the offices of both governor and lieutenant- governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant- governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

ARTICLE XIII

Art. XIII, §3. The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his or her office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy; provided, however, that nothing contained in this article shall prohibit the filling of vacancies on boards of education, including boards of education of community districts in the city school district of the city of New York, by appointment until the next regular school district election, whether or not such appointment shall extend beyond the thirty-first day of December in any year.

Art. XIII, §4. The political year and legislative term shall begin on the first day of January; and the legislature shall, every year, assemble on the first Wednesday after the first Monday in January.

Art. XIII, §5. Provision shall be made by law for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative and who shall be elected at general elections, and also for supplying vacancies created by such removal.

KEY PROVISIONS OF PUBLIC OFFICERS LAW

POL § 41. Vacancies filled by legislature

When a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such actual or prospective vacancy.

POL § 42. Filling vacancies in elective offices

1. A vacancy occurring before September twentieth of any year in any office authorized to be filled at a general election, except in the offices of governor or lieutenant-governor, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election.

2. A vacancy occurring by the expiration of term at the end of an even numbered year in an office which may not under the provisions of the constitution be filled for a full term at the general election held prior to the expiration of such term, shall be filled at said general election for a term ending with the commencement of the political year next succeeding the first general election at which said office can be filled by election for a full term.

3. Upon the failure to elect to any office, except that of governor or lieutenant-governor, at a general or special election, at which such office is authorized to be filled, or upon the death or disqualification of a person elected to office before the commencement of his official term, or upon the occurrence of a vacancy in any elective office which cannot be filled by appointment for a period extending to or beyond the next general election at which a person may be elected thereto, the governor may in his discretion make proclamation of a special election to fill such office, specifying the district or county in which the election is to be held, and the day thereof, which shall be not less than thirty nor more than forty days from the date of the proclamation.

4. A special election shall not be held to fill a vacancy in the office of a representative in congress unless such vacancy occurs on or before the first day of July of the last year of the term of office, or unless it occurs thereafter and a special session of congress is called to meet before the next general election, or be called after September nineteenth of such year; nor to fill a vacancy in the office of state senator or in the office of member of assembly, unless the vacancy occurs before the first day of April of the last year of the term of office, or unless the vacancy occurs in either such office of senator or member of assembly after such first day of April and a special session of the legislature be called to meet between such first day of April and the next general election or be called after September nineteenth in such year. If a special election to fill an office shall not be held as required by law, the office shall be filled at the next general election.

4-a. If a vacancy occurs in the office of United States senator from this state in any even numbered calendar year on or after the fifty-ninth day prior to the annual primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the year following the next even numbered calendar year. If such vacancy occurs in any even

numbered calendar year on or before the sixtieth day prior to an annual primary election, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the next calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the next odd numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the state board of elections. At the time for filing such certificate, the governor shall issue and file in the office of the state board of elections a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration for the term of such appointment.

5. Whenever the authority to fill any vacancy is vested in a board and such board is unable to fill such vacancy in an elective office by reason of a tie vote, or such board neglects to fill such vacancy for any other reason, the governor may, in his discretion, make proclamation of a special election to fill the vacancy.

POL § 43. Filling other vacancies

If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.

1941 N.Y. Op. Atty. Gen. No. 123, 1941 WL 52333 (N.Y.A.G.)

Office of the Attorney General
State of New York

Formal Opinion

November 12, 1941

PUBLIC OFFICERS LAW, SECTION 43; STATE CONSTITUTION, ARTICLE IX, SECTION 8. AUTHORITY OF THE GOVERNOR TO FILL VACANCIES IN THE OFFICES OF MAYOR AND COUNCILMEN OF THE CITY OF LACKAWANNA.

There being no other provision of law for filling the existing vacancies in the offices of mayor and four councilmen of the City of Lackawanna, the Governor is authorized to appoint a mayor and four councilmen to execute the duties of those offices until January 1, 1942.

These offices having been created after the Constitution of 1884, Article IX, section 8 of the State Constitution does not prohibit such appointment by other than city officers.

Executive Department

Your Counsel's letter of November 10 informs me of your desire for my opinion on the question whether you have authority to appoint a Mayor and four Councilmen of the City of Lackawanna to fill the vacancies now existing in those offices.

It appears that the Mayor and all four Councilmen of the city have been convicted of the crime of conspiracy in violation of Sections 1863 and 1864 of the Penal Law and that, following their conviction, they resigned, leaving the City of Lackawanna without any administrative officials. It further appears that at the last general election a Mayor and four Councilmen were elected. These new officers, however, will not take office until January 1, 1942.

Section 43 of the Public Officers Law provides:

> "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election."

Neither the City Charter (L. 1939, Ch. 785) nor any statute other than Section 43 of the Public Officers Law provides for the filling of these vacancies in the present circumstances. You are accordingly, by virtue of that section, vested with authority to appoint persons to execute the duties of the offices until the officers elected at the last general election take office on January 1, 1942 (1934 A. G. 81).

In reaching this conclusion I have not been unmindful of the provisions of the State Constitution (Art. IX, Sec. 8): "All city, town and village officers, whose election or appointment is not provided for by this constitution shall be elected

by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." These provisions first appeared in the Constitution of 1846 (Art. X, Sec. 2) and were continued without change in the Constitution of 1894 (Art. X, Sec. 2). It has been held authoritatively that they do not prohibit appointment by other than local officers to local offices created after the adoption of the Constitution of 1894 (*Matter of Allison v. Welde*, 172 N. Y. 421; *cf. Matter of Wendell v. Lavin*, 246 N. Y. 115). The present offices were created after the adoption of the Constitution of 1894, by the enactment of the first Lackawanna City Charter in 1909 and, unless the rule has been changed by the revision of the Constitution in 1938, no constitutional impediment exists to the appointment of these officers by you.

***2** The labors of the Constitutional Convention of 1938 did not result in the submission to the people of a new Constitution, but rather of a series of amendments to the Constitution of 1894 (*Matter of Stoughton v. Cohen*, 281 N. Y. 343). The provisions now under consideration were not changed in any particular by those amendments except to transfer them to a different article. The 1938 amendments accordingly have not altered the date as of which the provisions speak and the word "hereafter" appearing therein must be construed as relating to offices created after January 1, 1895, the effective date of the Constitution of 1894. The word "hereafter", occurring in a statute amended "so as to read as follows", is to be construed distributively. As to the original provisions, it means subsequent to the time of their amendment; as to the new portions, it means subsequent to the time the amendment introducing them took effect (*Ely v. Holton*, 15 N. Y. 595). The same rules apply to the construction of a constitution as to that of statute law (*Matter of Wendell v. Lavin*, supra p. 123).

I am further impelled to the conclusion that I have reached by the necessities of the occasion and the temporary nature of the appointments. There is at present no local officer possessing the power to fill these vacancies. It is not feasible to hold a special election in the short period intervening before January 1. If the vacancies are not filled by appointment by the Governor, the city will be entirely without a mayor or council until the newly elected officers assume their offices on January 1. The Constitution and statutes should be construed in such a manner as to avoid that result.

In answer to the specific question asked, you are advised that you have authority to appoint a Mayor and four Councilmen of the City of Lackawanna to execute the duties of those offices until January 1, 1942.

John J Bennett, Jr.

1941 N.Y. Op. Atty. Gen. No. 123, 1941 WL 52333 (N.Y.A.G.)
END OF DOCUMENT

1943 N.Y. Op. Atty. Gen. No. 378, 1943 WL 54210 (N.Y.A.G.)

Office of the Attorney General
State of New York

Formal Opinion

August 2, 1943

CONSTITUTION, ARTICLE III, SECTION 9; ARTICLE IV, SECTIONS 5 AND 3; PUBLIC OFFICERS LAW, SECTIONS 41, 42 AND 53.

In the event of the death of the Lieutenant-Governor, no election may be held in order to fill that office. The New York Constitution makes express provision for the devolution of the duties but omits provision for any election to fill the office. Only if there be no Governor and no Lieutenant-Governor, is an election required by the Constitution to fill the Governor's office. Even then there is no provision for filling the office of Lieutenant-Governor.

Department of State

You have requested my opinion—whether you should certify that the office of Lieutenant-Governor of this State is to be filled at the next general election, in view of the recent death of the late Lieutenant-Governor, the Honorable Thomas W. Wallace.

The question is answered in the negative.

From the explicit language of the Constitution it is clear that, in the event of the death of the Lieutenant-Governor, no election may be held for the purpose of filling that office. Instead, a precise devolution of the functions of that office is provided. This is completely unlike the situation that obtains with the other statewide elective offices, such as the Attorney-General and the Comptroller. Only in the event that there be no Governor and no Lieutenant-Governor does the Constitution require an election to fill the office of Governor otherwise than in the regular gubernatorial election years. Even then there is no provision for filling the office of Lieutenant-Governor.

The succession to the Governorship has always received special treatment in the various Constitutions of the State. This special treatment not only maintains uninterrupted functioning of government but seeks to make certain that the State's Chief Executive be chosen only after opportunity for the full and free expression of the people's will. Thus great and fundamental State issues may receive the undivided attention of the people and the widest attendance at the polls.

This constitutional plan of succession is patterned after the Constitution of the United States.

The first Constitution of the State was adopted in 1777, before the adoption of the Constitution of the United States. It made provision for the election of a Lieutenant-Governor in the event of his death, resignation or removal. It provided (Art. XX):

"That a lieutenant-governor shall, at every election of a governor, and as often as the lieutenant-governor shall die,

resign, or be removed from office, be elected in the same manner with the governor, to continue in office until the next election of a governor; * * *."

That very explicit provision was omitted from the Constitution of 1821.

The subsequent Constitutions of 1846, 1894 and 1938 have similarly omitted any provision for the election of a Lieutenant-Governor in the event of death, resignation or removal. It should be noted that these provisions of the Constitution which omitted this provision followed the adoption of the United States Constitution, which contained no provision for electing a Vice-President in the event of a vacancy in that office.

*2 The plan under all the Constitutions of this State since the one of 1777 has been for a succession to the governorship or lieutenant-governorship when either of those officers should die, resign or be removed, rather than elections to fill such offices, except when both the offices of Governor and Lieutenant-Governor are vacant. In 1847 the Legislature enacted a special law (ch. 303) requiring the election of a Lieutenant-Governor to fill a vacancy in that office. That law was never tested in the courts. In any event, it applied only to the election to be held in that year. In the same year, the general law on the subject of vacancies was amended by chapter 240 and expressly excepted the offices of Governor and Lieutenant-Governor.

The Constitution of 1894 (Art. IV, §§ 6 and 7) contained the following provisions on the subject:

"When lieutenant-governor to act as governor. § 6. In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue Commander-in-Chief of all the military force of the State."

"Qualifications and duties of lieutenant-governor; succession to the governorship-§ 7. The Lieutenant-Governor shall possess the same qualifications of eligibility for office as the Governor. He shall be president of the Senate, but shall have only a casting vote therein. If during a vacancy of the office of Governor, the Lieutenant-Governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any of the above causes shall become incapable of performing the duties pertaining to the office of governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease."

The references in section 7 to a vacancy were apparently to a vacancy in the office of Governor and the references to disability to a disability of the Lieutenant-Governor. (Lincoln's Constitutional History of New York, Vol. IV, p. 490).

It is thus seen that, under the Constitution of 1894, upon a vacancy occurring in the office of Governor, the duties of that office devolved upon the Lieutenant-Governor *for the remainder of the term.* It was only when a vacancy existed in *both* the office of Governor and Lieutenant-Governor that an election was to take place and then the election was to be of a Governor only. The use of the singular noun "vacancy" when vacancies would exist in both offices makes that entirely clear. There is thus no need for an election except when the office of both Governor and Lieutenant-Governor are vacant. Since there is no need for an election when the Governor dies, certainly there is no need for an election when the Lieutenant-Governor dies while the Governor still holds office.

*3 In the revision by the Constitutional Convention of 1938, section 6 of Article IV was renumbered 5 and section 7 became section 6. The only other change in former section 6 was to delete the word "said". The last sentence of former section 7 was divided into two sentences and amended to read:

"If the office of governor become vacant and there be no lieutenant-governor, such vacancy shall be filled for the remainder of the term at the next general election happening not less than three months after such vacancy occurs; and in such case, until the vacancy be filled by election, or in case the lieutenant-governor be under impeachment or unable to discharge the powers and duties of the office of governor or shall be absent from the state, the temporary president of the senate shall act as governor during such inability, absence or the pendency of such impeachment. If the temporary president of the senate shall be unable to discharge the power and duties of the office of governor or be absent from the state, the speaker of the assembly shall act as governor during such inability or absence."

This amendment was obviously designed to clarify the formed language and was made without any purpose to effect a change the plan of succession or the circumstances under which an election should take place. On that subject, the Chairman of the Committee on Governor and Other State Officers of the Constitutional Convention of 1938 said (Revised Record, Vol. III, p. 2523):

"We now come to Section 6. The change in this section deals with the succession in office of the Governor, and it has been made so that it will be a correct statement of succession. It is now provided that in the event a vacancy occurs in the office of Lieutenant-Governor, it should be filled by the President of the Senate. The Lieutenant-Governor is the President of the Senate, so that the language means nothing. We have redrafted the section so that it states the correct succession of officers."

The 1938 revision removed any doubt that it is the office of Governor rather than that of Lieutenant-Governor that is to be filled in the case of vacancies in *both* the offices of Governor and Lieutenant-Governor and made it plain in even clearer language that it is only when there are vacancies in *both* offices that there is to be an election.

Any argument contrary to the conclusion which I have expressed must of necessity be based upon the general provisions of law relating to the filling of vacancies in office. The Constitution (Art. XIII § 8) provides as follows:

"The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy."

Pursuant to that direction, the Legislature has provided (Public Officers Law, § 42) that a "vacancy occurring before October fifteenth of any year in any office authorized to be filled at a general election, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election." That that provision was not intended to apply to the office of Governor or Lieutenant-Governor is made clear by other provisions of the Public Officers Law. Section 41 of that law provides:

*4 "Vacancies filled by legislature. When a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such actual or prospective vacancy."

That section from 1849 to 1926 also embraced all of the other effective State officers except Governor and Lieutenant-Governor, viz: Secretary of State, Treasurer and State Engineer and Surveyor, until such offices were abolished as elective offices. Section 42 of the Public Officers Law, as well as section 41, applies to the offices of State Comptroller and Attorney-General (1941 A. G. 250; *Matter of Moore* v. *Walsh*, 286 N. Y. 552). If the Legislature had intended that section 42 should apply to the office of Lieutenant-Governor, it naturally would have included that office in section 41 also. The omission shows recognition of the fact that death or disability of the Lieutenant-Governor was taken care of by the rule of succession contained in the Constitution itself.

Again, section 43 of the Public Officers Law provides:

"If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term."

No one has ever claimed that this section conferred upon the Governor the power to appoint his own successor. Such a contention would lead to the anomalous result that a Governor by appointing a Lieutenant-Governor and then resigning could impose upon the people his own choice as their Governor. Yet there is no distinction in language between this section and section 42 of the Public Officers Law which provides for filling vacancies in other elective offices.

Section 9 of Article III of the Constitution contains the provision:

"and the senate shall choose a temporary president to preside in case of the absence or impeachment of the lieutenant-governor, or when he shall refuse to act as president, or shall act as governor."

Under the constitutional plan, there is in no real sense a vacancy in the office of Lieutenant-Governor when the incumbent dies, for immediately and automatically, the Temporary President of the Senate succeeds to his duties as President of the Senate (Art. III, § 9, *supra*) and becomes authorized to act as Governor during a vacancy in that office or when the Governor is without the State (Art. IV, § 6, *supra*). In my opinion, the rule of succession which the Constitution prescribes was intended to be all-inclusive and to deny to the Legislature the authority to provide for the election of a Governor or Lieutenant-Governor otherwise than provided by the Constitution itself.

*5 The functions of the Lieutenant-Governor under the Constitution are (1) to exercise the powers and perform the duties of Governor when that office is vacant or the Governor is without the State, and (2) to preside over the Senate. The Constitution makes provision for the carrying out of both of those functions by others when there is no Lieutenant-Governor. There is thus no necessity or occasion for the election of a Lieutenant-Governor when that officer dies. The Constitution recognizes this not alone in the general succession plan which it sets up, but also by an explicit provision of section 6 of Article IV. When there is no Governor and no Lieutenant-Governor, express provision is made for an election to fill the vacancy in the office of Governor (*supra*, page 2). Yet even upon such election for Governor, no provision is made for the election of a Lieutenant-Governor.

The rule of succession under the New York Constitution is substantially the same as the rule of succession to the presidency and vice-presidency under the Federal Constitution and statutes. Section 5 of Article II of the Constitution of the United States provides:

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice-President and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

Pursuant to that authority, the Congress has provided (U. S. Code, Title 3, § 21) for the succession to the presidency, in turn, of various members of the President's cabinet.

The Federal Constitution further provides (Art. 1, § 3):

"The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the Office of President of the United States."

Significantly, no provision is made in either Constitution or statute for the election or appointment of a Vice-President and in the several instances in which Vice-Presidents have died in office (1853, 1875, 1885, 1899) no election has taken place or appointment been made.

In conclusion, it is apparent that the Constitution of this State makes express provision for the devolution of the Lieutenant-Governor's duties but definitely omits provision for any election to fill the office. In fact, such a provision was contained in the first Constitution of 1777, and eliminated thereafter. Analysis of the statutes and analogies from the Federal Constitution also demonstrate that no election is proper. Moreover, the nature of the Lieutenant-Governor's functions makes it inappropriate to attempt to fill the office otherwise than in the regular gubernatorial election years.

***6** Without discussing any technical ground which might lead to the same result (see Election Law, §§ 69, 82, 319-f), it is my opinion that you should not certify that the office of Lieutenant-Governor is to be filled at the election to be held in November.

Nathaniel L. Goldstein

1943 N.Y. Op. Atty. Gen. No. 378, 1943 WL 54210 (N.Y.A.G.)
END OF DOCUMENT

1947 N.Y. Op. Atty. Gen. No. 78, 1947 WL 43440 (N.Y.A.G.)

Office of the Attorney General
State of New York

Formal Opinion

March 28, 1947

STATE CONSTITUTION ARTICLE IX, SECTION 8; PUBLIC OFFICERS LAW, SECTION 43; BEACON CITY CHARTER (L. 1913, c. 539).—SUPERVISOR OF THE CITY OF BEACON, FILLING VACANCY IN OFFICE.

The Governor has authority under Section 43 of the Public Officers Law to appoint a person to execute the duties of the office of Supervisor of the City of Beacon until the vacancy in that office shall be filled by an election.

Executive Department
Governor

You have asked whether you have authority to fill by appointment a vacancy existing in the office of Supervisor for the Second Ward of the City of Beacon occasioned by the resignation of the incumbent as of March 17, 1947.

Section 43 of the Public Officers Law provides:

> "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, of if the office be appointive, the appointee shall hold for the residue of the term."

Careful examination has been made of the Beacon City Charter, of the General City Law and other statutes which might contain provision for filling this vacancy by the local authorities and none has been found. An identical situation arose in the City of Beacon in the year 1934 and this Department at that time was unable to find authority to fill the vacancy otherwise than by appointment by the Governor (1934 Atty. Gen. 81).

A similar situation arose in 1941 in regard to vacancies existing in the offices of Mayor and four councilmen of the City of Lackawanna by reason of the resignation of the incumbents of those offces. The then Governor was advised that he had authority to appoint a mayor and councilmen to execute the duties of those offices until the end of that calendar year (1941 Atty. Gen. 123.) Consideration was given in that opinion to the provisions of Art. IX, § 8 of the State Constitution that city officers whose election or appointment is not provided for by the Constitution shall be elected by the electors of the city or appointed by such officers thereof as the legislature shall designate for that purpose, and that all officers whose offices may "hereafter" be created by law shall be elected by the people or appointed as the legislature shall direct. It was concluded that the provision requiring that appointment be made by local officers was inapplicable because, under the authorities there cited, the word "hereafter" meant after January 1, 1895, the effective date of the Constitution of 1894. With that conclusion I am in agreement. The office of Supervisor in the City of Beacon was created subsequent to January 1, 1895, upon the enactment of the City's Charter in 1913 (L. 1913,

c. 539). The requirement that city officers be elected or appointed by local officers accordingly is without application here, even if city supervisors are to be considered as city, rather than county, officers.

*2 In response to your specific inquiry, you are advised that you have authority under section 43 of the Public Officers Law to appoint a person to execute the duties of this office until the vacancy shall be filled by an election.

Nathaniel L. Goldstein

1947 N.Y. Op. Atty. Gen. No. 78, 1947 WL 43440 (N.Y.A.G.)
END OF DOCUMENT

Legislative Document (1953) No. 1

STATE OF NEW YORK

MESSAGE

OF

GOVERNOR

THOMAS E. DEWEY

TO THE

LEGISLATURE

January 7, 1953

ALBANY
WILLIAMS PRESS, INC.
1953

JOINT ELECTION OF GOVERNOR AND LIEUTENANT GOVERNOR

Under our present Constitution the Governor and Lieutenant Governor are elected separately. Up to now we have been fortunate in that most people have had the good judgment to vote for Governor and Lieutenant Governor of the same party. The reason is obvious with respect to such closely-knit offices. Good government requires responsible, cohesive administration.

Last year your Honorable Bodies approved a concurrent resolution proposing an amendment to the State Constitution providing for the joint election of Governor and Lieutenant Governor on a single ballot. This will conform to the method of selection of electors for President and Vice President. It is an important forward step and I urge your support of the amendment again.

REAPPORTIONMENT

The Joint Legislative Committee on Reapportionment has been engaged in preparation of the figures necessary to accomplish readjustment of Senatorial districts and membership of the Assembly to reflect the results of the 1950 census. As soon as its studies are completed, I urge that action be taken at this session to provide for the revision of our legislative districts in accordance with constitutional requirements.

MEMBERS OF THE ARMED SERVICES

I am happy to report that the statutory provisions enacted in prior years for the benefit of members of the armed forces and their families have effectively preserved the rights and provided the benefits which we anticipated in their adoption.

More than 70,000 New York State servicemen and their spouses voted a full ballot through a simple and expeditious procedure at the general election last November. The statutes which provide special income tax treatment, war service scholarships and absentee voting should be continued. In addition, the measure adopted last year preserving unemployment insurance benefits for Korean veterans should be extended. These are but minor ways in which we can demonstrate our gratitude to the men and women in uniform defending this Nation and the free world.

CIVIL DEFENSE

The Defense Emergency Act is serving its purpose well in providing a realistic basis for our civil defense preparations. I urge its extension for another year. Under this act, the State Defense Council and the State Civil Defense Commission have nearly completed the bomb shelter survey which is of vital importance to congested urban areas. Training, spotting, radio, rescue tests, medical stockpiling and other Civil Defense activities have been expanded. Part of our Civil Defense force is now operating on a 24-hour emergency schedule. The Interstate Civil Defense Compact is now in effect between New York and 17 other states, and a cordial working relationship is maintained with the Civil Defense authorities in Canada.

New York State leads the entire Nation in civil defense preparation. But this is not enough. We need even greater participation by alert and patriotic citizens.

BUSINESS, LABOR AND AGRICULTURE

The year 1952 as a whole was one of full employment for labor and capacity production for nearly every segment of the economy of New York State.

Agriculture in New York continues to develop with the help of those agencies of our State government concerned with the complex problems of food production and distribution. The marked strides in efficiency made by farmers in New York in the past decade are a tribute to their diligence, their progressive skill and to the spirit of cooperation between them and your State government.

Farm Vehicle Fees

In 1951 the computation of registration fees for trucks was changed and laden weight of the vehicle made the basis of the fee. Last year it became apparent that farm vehicles, which normally combine low annual mileage with partial use of load capacity, were inequitably affected by the new schedule.

The Bureau of Motor Vehicles and the Joint Legislative Committee on Highway and Canal Revenues in cooperation with representative farm organizations have proposed legislation to reduce the registration fees for such vehicles from fifty to thirty-five cents per hundred pounds. I urge immediate and favorable consideration of the proposal so that the new fee schedule may become effective before January 31 when current registrations will expire.

Legislative Document (1953) No. 36

STATE OF NEW YORK

MESSAGE OF THE GOVERNOR

IN RELATION TO

PROPOSED CONSTITUTIONAL AMENDMENT FOR JOINT ELECTION OF GOVERNOR AND LIEUTENANT GOVERNOR

ALBANY
WILLIAMS PRESS, INC.
1953

STATE OF NEW YORK

EXECUTIVE CHAMBER

ALBANY, *February* 9, 1953

To the Assembly:

There is presently awaiting your consideration for the second time a proposed amendment to the State Constitution providing for the joint election of Governor and Lieutenant Governor on a single ballot.

Under our Constitution separate votes are cast for the Governor and Lieutenant Governor and it is possible to elect a Governor and Lieutenant Governor of opposing political parties. When this has occurred in the past, it has resulted in wholly unnecessary strife and divisiveness.

Executive responsibilities in our government are so interwoven that the election of a Governor and Lieutenant Governor politically opposed to each other involves serious problems. As a practical matter the Governor must encounter difficulty in leaving the State even for a short period and on pressing public business. This has created the greatest embarrassment in other states, to the damage of public confidence in government and the injury of the public interest.

Even more important, there is a great advantage in being able to entrust many of the complex administrative tasks of the Governor to an able Lieutenant Governor. I have done this repeatedly and with notable benefit to the people of the State. This would not have been possible if the Lieutenant Governor was required, as a matter of party loyalty, to lead the minority party.

In my Annual Message I stated that good government requires responsible cohesive administration in closely knit offices. In my judgment it would be foolhardy to fail to close the present constitutional gap and reaffirm our faith in executive and party responsibility.

Some states have avoided the problem by abolishing the office of Lieutenant Governor, leaving the state without a state-wide elected officer to take over the duties of Governor if necessary. In our State the executive duties are so exceedingly heavy that an able

Lieutenant Governor, holding the full confidence of his associates, is essential to the proper conduct of the people's business. We should no longer risk the confusion and maladministration which might result from having the Governor of one party while the Lieutenant Governor leads the opposition. We have seen enough of this in other countries where the multi-party system keeps such constant turmoil and struggle for advantage that government is in chaos and people turn away from free institutions.

It is notable that the joint election of Governor and Lieutenant Governor has been the pattern of the national government in the joint election of President and Vice President for 150 years. No one even makes the proposal that they be separated. The two offices should be joined here as in the Nation.

I urge your prompt approval of the concurrent resolution proposing the amendment and your earnest support of it at the polls.

THOMAS E. DEWEY

Legislative Document (1953) No. 37

STATE OF NEW YORK

ANNUAL REPORT

OF THE

DEPARTMENT OF STATE

FOR CALENDAR YEAR 1952

SUBMITTED BY THE

SECRETARY OF STATE

TO THE

GOVERNOR AND LEGISLATURE

ALBANY
WILLIAMS PRESS, INC.
1953

Legislative Document (1944) No. 1

STATE OF NEW YORK

MESSAGE

OF

GOVERNOR THOMAS E. DEWEY

TO THE

LEGISLATURE

January 5, 1944

ALBANY
WILLIAMS PRESS, INC.
1944

been renewed from year to year. In its present form it prevents the foreclosure of mortgages so long as the home owner pays his interest and 1% of the principal each year. The conditions of unemployment and reduced income which called this legislation into being have long since passed. The present period of high employment and high income is one in which debts ought to be paid off. Accordingly, I believe that while the mortgage moratorium should be continued so as to avoid undue, sudden hardship, the bill should provide for reasonable payments upon the principal of these debts and require the owners to maintain the premises in good condition.

MUNICIPAL FINANCES

Certain of the municipalities of the State have for some time been experiencing increasing financial difficulties. To a degree these difficulties arise out of past mistakes and present administrative difficulties. But, broadly speaking, they reflect an inherent conflict between the demands for increased services by municipalities on the one hand and, on the other hand, inelastic taxing powers based largely on taxation of real estate.

At a later time I propose to submit to your Honorable Bodies recommendations for alleviating these conditions to the extent presently possible.

THE JUDICIAL SYSTEM

For many years now there has been frequent and very well-founded complaint in the City of New York against the present method for the selection of justices of the Supreme Court. The criticism against the system reached a culmination at the last election when a person, who owed his nomination to disreputable characters, was elected to the Bench. There is little question now in the mind of anyone that the system of selection of judges requires an overhauling.

It is my suggestion to your Honorable Bodies that a plan which has been successfully used in another state be considered in this State. It envisages a constitutional amendment giving each of the judicial districts in the State by their electorate the option to change the selection of judges from the present system and to provide an alternative method. Thus the voters of the two judicial districts which include the City of New York would have the right by referendum to provide a method for the selection of justices of the Supreme Court, different from the present party nomination by convention which exists. This method is known as the Missouri plan and has been widely approved.

As to the alternatives to be provided, they more properly should be determined by your Honorable Bodies after appropriate discussion and the receipt of the views of all the many interested and respected groups which are seeking a change in the present system.

WAR EMERGENCY LEGISLATION

Many thousands of citizens of our State have given liberally of their time and effort during the past year in the gigantic labor of making New York a most effective part of the national war effort. I wish to acknowledge with deep gratitude the debt of the State and its people to those who have contributed so much through the many activities of civilian protection, and all of the services under the New York State War Council. I recommend that the existing war emergency legislation and the State War Council be continued for another year.

LIEUTENANT GOVERNOR WALLACE

On July 17th of the past year, the tragic death of Lieutenant Governor Thomas W. Wallace occurred. It was a great loss to the State administration and to the State itself. His charming personality and untiring energy quickly made him an integral and valued part of the administration. Although he had served in his office for less than seven months, his sudden passing was a shock and a loss to all of us.

SUCCESSION TO GOVERNORSHIP

Upon the death of Lieutenant Governor Wallace, issue was made in the courts whether an election of his successor was required at the next general election. The Court of Appeals, without opinion, decided that question in the affirmative. With the Administration less than one year old, with the Nation at war, and there being no other major contested candidacies or State issues, it became necessary for the people of the State to choose a successor to the Lieutenant Governor.

This is an unwholesome and unworkable system, whether the State administration be Republican or Democratic. Moreover, it violates the basic concept adopted by the people in 1937 when they approved the amendment making the term of office of the four state-wide elected officers four years and their election at a time when the attention of the people could be directed primarily to State affairs.

I therefore urge upon your Honorable Bodies the enactment of a

constitutional amendment and appropriate legislation which will forever obviate such a situation. The person who succeeds to the office or the duties of the Lieutenant Governor should serve for the unexpired term. Thus, needless and burdensome elections in years in which a State administration is not to be elected will not be necessary.

I urge that such amendment permit and require that the successful candidates for Governor and for Lieutenant Governor be of the same party, elected together, exactly as in the case of the President and Vice-President of the United States. I also recommend that the Public Officers Law be immediately amended so as to dispense with an election prior to the expiration of the term in the event of a vacancy in the office of Lieutenant Governor between the quadrennial state-wide elections.

CONCLUSION

Finally, may I again say how deeply I appreciate the cooperation and good will which the executive branch of the State Government has received this past year from both houses of the Legislature. There has been a spirit of cordial understanding and of teamwork which has helped all of us to play our part in putting this State into the war effort. For myself I pledge you the same cooperation and good will in this coming session. There is much work to be done. Let us do it together.

Our meeting here today is a part of the process of free government. It is a sobering and humbling thought that men are laying down their lives all over the world that we may exercise those functions of government in freedom here at home.

Let us together ask God to give us the understanding and purpose to carry out this high trust. Let us resolve that we will labor together to fulfill our responsibilities as those who are now fighting to preserve free government would have us do. Then, just as we are proud of them they shall not be ashamed of us.

THOMAS E. DEWEY

1966 N.Y. Op. Atty. Gen. No. 171, 1966 WL 146373 (N.Y.A.G.)

Office of the Attorney General
State of New York

Informal Opinion

December 7, 1966

YONKERS CITY CHARTER, ART. III, § 8; PUBLIC OFFICERS LAW § 43.

A vacancy in the office of Mayor of the City of Yonkers may be filled only by appointment of the Governor until the vacancy shall be filled by an election.

Hon. Francis B. Cline
Yonkers

This is in reply to your letter received November 29, 1966 regarding the question of succession to the office of mayor of the City of Yonkers in the event of a vacancy caused by the resignation of the present incumbent thereof.

Yonkers City Charter, Article III, § 8 provides:

> "* * * In the event of death, removal or resignation of the mayor the vice-mayor shall perform the duties of mayor *until the vacancy is filled according to law*." (Emphasis supplied.)

Thus, while the Charter provides for the performance of the duties of the mayor, upon his resignation, by the vice-mayor, it is apparent that it is contemplated that this situation would be temporary and would continue only until the vacancy, which would still exist, would be filled.

I find no other provision of the Yonkers City Charter relating to filling a vacancy in the office of mayor.

General City Law § 2-a(1) provides that:

> "In every city in which the mayor and president or presiding officer of the local legislative body are elected at the same time and for the same term by the electors of the entire city, in case of the removal from office of the mayor, his death, inability to discharge the powers and duties of the office, resignation or absence from the city, the powers and duties of the office shall devolve upon such president or presiding officer for the residue of the term or until the disability shall cease. * * *."

Yonkers City Charter, Article III, § 7(b) provides that the mayor shall preside at all meetings of the common council. There is no provision in said Charter for the office of president of the common council. Therefore, the above provisions of General City Law § 2-a, *supra*, do not apply to a vacancy in the office of mayor of the City of Yonkers.

There being no other applicable provision, Public Officers Law § 43 would govern, as follows:

> "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling of same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term."

In view of the above I conclude that a vacancy in the office of mayor of the City of Yonkers may be filled only by appointment of the Governor of the State of New York until the vacancy shall be filled by an election.

Louis J Lefkowitz

1966 N.Y. Op. Atty. Gen. No. 171, 1966 WL 146373 (N.Y.A.G.)
END OF DOCUMENT

OPINION 64-787

Conflict of Interest—Village Trustee also Employee of Contracting Corporation.—A corporation employing a village trustee may contract with the village if the trustee's interest in the contract is solely by reason of employment and his duties and remuneration as employee do not directly involve the contract with the village (Gen Mun L §§800(3), 801, 802(2)(b), 803).

Inquiry: May a corporation employing a village trustee contract with the village?

Statement of Law: The employee has an interest in the contract of his employer (Gen Mun L §800(3). As a village trustee who participates in making the contract and auditing claims thereunder, his interest is a prohibited one (Gen Mun L §801) unless an exception applies.

If the trustee's interest in the contract is *solely* by reason of employment, and if his remuneration is not directly affected by the contract, and his duties do not directly involve the procurement, preparation or performance of any part of the contract, then the contract is excepted from the prohibition (Gen Mun L §802(2)(b). Disclosure of such interest is required (Gen Mun L §803).

Conclusion: A corporation employing a village trustee may contract with the village if the trustee's interest in the contract is solely by reason of employment and his duties and remuneration as employee do not directly involve the contract with the village.

October 5, 1964.

OPINION 64-788

Office of Fire District Commissioner—Vacancy—Filling Procedure.—Vacancy in the office of fire district commissioner may be filled by the Governor (Pub Off L §§5, 30(1)(a), (d), 43; Gen Const L §41; Town L §§175(1), 176(3), (23).

Fire District—Reconveyance of Real Property.—A fire district, through its board of fire district commissioners and pursuant to the authority set forth in the Town Law, may convey to the school district the real property no longer necessary for its uses or purposes, by resolution of the board of fire commissioners, subject to a referendum conducted pursuant to the terms of Town Law §179. Such fire district may convey fire district owned real property by resolution of the board of fire commissioners, without a referendum, if such conveyance is made pursuant to the authority set forth in General Municipal Law §72-h (also Gen Mun L §72-h (a).

Dissolution of Fire District—Procedure.—Town Law §185 provides the procedure to be followed in the dissolution of a fire district. Upon dissolution, assets may be sold.

Statement of Fact: From our investigation the following facts appear:

In 1939 a school district, by quitclaim deed, conveyed a former school house and site thereof to a fire district.

It appears that there are now living three members of the board of fire commissioners of such fire district as that board was last constituted in the year 1955. However, one of such members has, since such time, ceased to be a resident of the fire district for more than 30 days past, and there but two of such members now residents of such fire district.

Inquiries: (1) How may a vacancy in the office of fire district commissioner be filled?

(2) What procedure must be followed by the fire district in order to reconvey such former school house and site to the school district?

(3) How may the fire district be dissolved, and how may such action be compelled?

Statements of Law: (1)(2) It appears that there are only two persons in being who are holdover members of the board of fire commissioners in such district, since the other members of such five man board, as last constituted in the year 1955, have either died or moved away from such district and since no successors to such two holdover members of the board have been elected and qualified in respect to the offices of fire district commissioner which they occupy (see Pub Off L §§5, 30(1)(a), (d); 12 Op St Compt 27 (1956); 12 Op St Compt 117 (1956); 3 Op St Compt 520 (1947).

It follows that such two fire commissioners may *not* meet as the board of fire commissioners of the district and exercise the powers granted to them, since there would be no necessary quorum present to transact business as the board (see Gen Const L §41; 9 Op St Compt 12 (1953). Accordingly, no vacancy in the office of fire district commissioner may be filled by such two fire district commissioners (see Town L §176(3) since a quorum cannot be present when they meet as a board to transact such business of appointing a fire district commissioner to office.

We note that, prior to July 1, 1964, the town board or town boards concerned were compelled by the former provisions of Town Law §176 (3) to fill a vacancy in the office of fire district commissioner, if such vacancy was not filled by the board of fire commissioners within 30 days from the date when the office became vacant. However, Laws of 1964 chapter 221, which became a law on March 29, 1964, effective July 1, 1964, deleted that portion of Town Law §176(3) which compelled the town board (or town boards) in which a fire district was located to fill a vacancy in the office of fire district commissioner where the board of fire commissioners of such district had failed to fill such office after the same was vacant for 30 days.

It appears, therefore, that there is no provision in the Town Law in reference to filling the vacancies that now exist in the offices of fire district commissioner. Therefore, the Governor must appoint persons to execute the duties of such offices until the same can be filled by an election (see Pub Off L §43). The election should be held on the first

Tuesday in December after due notice thereof by the board of fire commissioners (see Town L §175(1).

After the vacant offices of fire district commissioner have been filled by the Governor, it follows that such fire commissioners may meet as the board of fire commissioners of the district and exercise the powers granted to them (see Gen Const L §41). Town Law §176(23), in relation to the powers of such board provides, in pertinent part, as follows:

> May sell or otherwise dispose of real * * * property of the district no longer necessary for any of its uses or purposes if, when and in the manner and to the extent authorized so to do in a proposition which is duly submitted and adopted or approved at a special or annual fire district election in the manner provided by section one hundred seventy-nine for voting upon appropriations * * *.

Town Law §179 sets forth the necessary procedure to be followed in voting on appropriations at fire district special elections. Such procedure must be followed in reference to the sale of fire district real property (see also 18 Op St Compt 471 (1962).

However, General Municipal Law §72-h independently authorizes the sale of such real property by a fire district to a school district for a valuable consideration only (cf. 18 Op St Compt 451 (1962). General Municipal Law §72-h(a) provides as follows:

> Sale, lease and transfer to municipal corporations of certain public lands.
>
> (a) Notwithstanding any provisions of any general, special or local law or of any charter, the supervisors of a county, the town board of a town, the board of trustees of a village, the board of fire commissioners of a fire district and the board of estimate of a city, or if there be none the local legislative body of such city, may sell, transfer or lease to or exchange with any municipal corporation or municipal corporations, school district, fire district, the state of New York, or the government of the United States and any agency or department thereof, for a valuable consideration and upon such terms and conditions as shall be approved by such body, any real property owned by such county, town, village, fire district or city; and any municipal corporation or fire district may acquire or lease such real property as provided in this section. The term of any lease entered into pursuant to the provisions of this section shall not exceed ten years but nothing herein contained shall prevent the renewal of any such lease.

It follows that the foregoing statute, *independently of all other laws*, authorizes such a sale of real property by a fire district to a school district. Therefore, no referendum is required as a prerequisite to the sale

of such real property to a school district, where the same is to be accomplished pursuant to General Municipal Law §72-h (cf. 20 Op St Compt 295 (1964).

(3) The provisions of Town Law §185 provide the procedure to be followed in the dissolution of a fire district. Dissolution is effected by action of the town board, after a hearing upon a petition of resident taxpayers favoring such dissolution. The town board cannot be compelled to dissolve the district, since it must determine whether or not the dissolution would be in the public interest. If the district is dissolved, the building could be sold pursuant to §185, and the necessity of filling the vacancies be avoided.

Conclusions: (1) Vacancy in the offices of fire district commissioner may be filled by the Governor.

(2) A fire district, through its board of fire district commissioners and pursuant to the authority set forth in the Town Law, may convey to the school district the real property no longer necessary for its uses or purposes, by resolution of the board of fire commissioners, subject to a referendum conducted pursuant to the terms of Town Law §179.

Such fire district may convey fire district owned real property by resolution of the board of fire commissioners, without a referendum, if such conveyance is made pursuant to the authority set forth in General Municipal Law §72-h.

(3) Town Law §185 provides the procedure to be followed in the dissolution of a fire district. Upon dissolution, assets may be sold.

October 7, 1964.

OPINION 64-789

County Highway Signs and Signals—Erection and Maintenance—Expense.—The expense of erecting and maintaining county highway signs and signals as specified in Vehicle and Traffic Law §1651 is a general fund charge (High L §114).

Inquiry: What fund, *i.e.*, general fund or county road fund, is to be charged for the cost of erecting traffic control signs and signals specified in Vehicle and Traffic Law §1651?

Statement of Law: Vehicle and Traffic Law §1651 authorizes county superintendents to erect stop signs, flashing signals, or yield signs on county roads outside of cities and villages. The section does not designate the fund to which the expense for such signs or signals is to be charged.

Section 1651 was derived from former §102(12) of the Highway Law. The Highway Law provision specifically provided that the cost of erecting and maintaining the road signs was to be paid for from any funds available for the maintenance of county roads. However, when

OPINION 64-861

Vacancy in Office of Mayor—City of Fulton.—A vacancy in the office of mayor in the city of Fulton shall be filled by a person appointed by the Governor, since no other provision has been made for filling such vacancy. A person accepting an appointment to fill a vacancy in the office of mayor may not continue to hold any other office in the city which he may have held prior to the appointment (Pub Off L §43).

Inquiry: Upon resignation of the mayor of the city of Fulton, who performs the duties of the mayor? If the president of the common council becomes mayor, may he receive a separate salary for each position?

Statement of Law: The Fulton City Charter §40 (L 1902 ch 63) provides in part as follows:

> The common council shall choose one of the aldermen to be its president, who shall, during such official year, be the presiding officer of the common council in the absence of the mayor; and while the mayor is absent from the city or unable to perform his duties, said presiding officer shall be acting mayor, and shall have all the powers and duties, and be subject to all the obligations of the mayor.

This section authorizes the president of the common council to act as mayor during the absence or disability to act of the mayor. It assumes that there is a person who actually holds the office of mayor who is absent or unable to perform his duties, rather than a vacancy in the office of mayor. If a mayor resigns or dies there is no person who is mayor, and an acting mayor is insufficient to fill this vacancy. We are of the opinion that §40 does not contemplate a vacancy in the office of mayor and that the president of the common council is not thereby authorized to become mayor under those circumstances.

The charter makes no specific provision for an appointment to fill a vacancy in the office of mayor.

General City Law §2-a provides:

> In every city in which the mayor and president or presiding officer of the local legislative body are elected at the same time and for the same term by the electors of the entire city, in case of the removal from office of the mayor, his death, inability to discharge the powers and duties of the office, resignation or absence from the city, the powers and duties of the office shall devolve upon such president or presiding officer for the residue of the term or until the disability shall cease. * * *

The Fulton City Charter, §10 provides for a common council composed of the mayor of the city and all of the aldermen. The mayor and the aldermen are elected at the same time and for the same term.

The mayor is elected by the city at large, but one alderman is elected by each ward within the city. The president of the common council is chosen by the members of the council, from among the aldermen, at the beginning of each official year to serve during that year (Fulton City Charter §40). The president of the council, then, is neither elected by all of the electors of the city nor serves for the same term as the mayor. The provisions of General City Law §2-a, therefore, do not apply to a vacancy in the office of mayor of the city of Fulton.

Since there is no other applicable provision, the situation comes within Public Officers Law §43, which states:

> If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling of same, if the office be elective the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.

Any person appointed under this section shall not hold office by virtue of this appointment longer than the commencement of the political year next succeeding the first annual election after the occurrence of the vacancy, in compliance with State Constitution Article XIII §3 (see also Pub Off L §§38, 42(1); 1962 Op St Compt #62-894, unreported).

The Fulton City Charter §9 provides, in part, as follows:

> No person shall at the same time hold more than one city office in said city except that a commissioner of deeds may hold any other city office, except the office of mayor or city judge * * *.

If the Governor, then, were to appoint, to fill a vacancy in the office of mayor, the president of the common council or any other city officer, such appointee, in order to accept the appointment, must first resign the other office which he holds. Upon resignation he would cease to receive the salary for his former office, and upon assumption of the duties of mayor he would receive the proper compensation for that office. At no time may he hold both offices or be compensated for both offices.

Conclusion: In the event of a vacancy in the office of mayor in the city of Fulton, the Governor shall appoint a person to execute the duties of that office. The person so appointed shall not hold office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the occurrence of the vacancy. The person accepting such appointment may not continue to hold any other office in the city which he may have held prior to the appointment.

January 4, 1965.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

DEAN G. SKELOS and PEDRO ESPADA, JR., as duly elected members of the New York State Senate,

Index No. 13426/2009

Plaintiffs,

-against-

DAVID PATERSON, as Governor of the State of New York and RICHARD RAVITCH , as putative nominee for Lieutenant Governor of the State of New York and LORRAINE CORTES-VASQUEZ, as Secretary of State of the State of New York,

Defendants.

----------x

MEMORADUM OF LAW IN OPPOSITION TO CROSS MOTION TO DISMISS AND MOTION SEEKING CHANGE OF VENUE

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of disputes between and by the executive and legislative branches of government.

While Senator Espada now occupies the position of Majority Leader, he, like Senator Skelos shares the right to protect the effectiveness of his vote and avoid the negation of any vote by a tie breaker action of an interloper.

POINT III

THE MOTON TO CHANGE VENUE SHOULD BE REJECTED BECAUSE VENUE IS PROPER IN NASSAU COUNTY

Defendants in their moving papers urge dismissal on the basis that this declaratory judgment action has been commenced in Nassau County, see p. 7 Defendants' Memorandum of Law. In order to reach this conclusion Defendants ignore the applicable case law and attempt to miscast this declaratory judgment action as a CPLR Article 78 Proceeding. The defendants rely upon a reading of CPLR 6311 (1) and an attempt to claim that an action for a declaratory judgment is the same as an Article 78 proceeding. In both respects, defendants' arguments fail. This Court should determine that venue is proper in Nassau County.

The central issues in the matter before this Court are set forth in the Complaint, which asserts that "[t]he Governor may not fill the office of Lieutenant Governor", Complaint, par. 8, and, "The Governor is precluded by the Constitution, Article

Should the Court conclude, on the merits, that there is in duty imposed upon the Governor to engage in the particular unconstitutional acts complained of herein, then there is no possibility of the Plaintiffs transgressing upon the terms of CPLR 6311.

C. CPLR 506 (b) Provides No Basis For Change Of Venue.

Defendants similarly assert that the venue provisions mandate that the matter must be transferred to Albany County on the basis of CPLR 506 (b) CPLR 506 (b) provides in pertinent part as follows:

> (b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located

Defendants are incorrect in two respects. First the action is not an action against a body or an officer as the statute is entitled. The venue provision cited relates solely to a CPLR Article 78 proceeding. Plaintiffs brought an action for a declaratory judgment and not an Article 78 proceeding. Thus the venue statute relied upon by defendants is not applicable to the

instant action. Had the plaintiffs sought Article 78 relief exclusively then they would have set venue in Albany County.

So clear is the limitation of CPLR 506 (b) to Article 78 proceedings that CPLR 7804(b), the venue statute for Article 78 proceedings refers directly back to CPLR 506 (b) :

> 7804. Procedure. (a) Special proceeding. A proceeding under this article is a special proceeding.
> (b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides

Plaintiffs did not bring a special proceeding. They brought an action for a declaratory judgment. CPLR 103 (b). CPLR 103 (b) provides that all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. In the instant action, the plaintiffs seek a declaratory judgment of unconstitutional action by the governor and other defendants.

Special proceedings have a special venue provision. They should not be confused with plenary actions such as an action for a declaratory judgment. Only then must a petitioner as opposed to a plaintiff must observe the venue rule cited by the defendants. An action against a body or an officer is a term of art, specific to acts seeking relief under Article 78 Only

TO BE ARGUED BY:
DAVID L. LEWIS, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Second Department

DEAN G. SKELOS and PEDRO ESPADA, JR.,
as duly elected members of the New York State Senate,
Plaintiffs-Respondents,

-against-

DAVID PATERSON, As Governor of the State of New York, and
RICHARD RAVITCH, as Lieutenant Governor of the State of New York,
and LORRAINE CORTES-VAZQUEZ,
as Secretary of the State of New York,
Defendants-Appellants.

Appellate Division Case No. 2009-00678

BRIEF FOR PLAINTIFF-RESPONDENT DEAN G. SKELOS

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On the Brief:
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ELIZABETH COLOMBO, ESQ.

Supreme Court, Nassau County, Index No. 13426/09

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performance of duties enjoined upon him by statute only in the most extraordinary circumstances such as when he acts illegally and without authority, See, Matter of Village of Purchase, 80 Misc.2d 541 (Sup. Ct. Westchester County 1974). Both those circumstances are present in the case at bar. The lower court found that the appointment of Ravitch was illegal and without authority and, under concededly extraordinary circumstances, issued the preliminary injunction.

C. CPLR 506 (b) Provides No Basis For Change of Venue.

Respondents brought an action for a declaratory judgment, CPLR 3001. CPLR 103 (b) provides that all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. In the instant action, Respondents seek a declaratory judgment of unconstitutional action by the Governor and other Appellants.

Appellants assert that the venue provisions mandate that the matter must be transferred to Albany County citing CPLR 506 (b). It provides in pertinent part as follows:

> (b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the

material events otherwise took place, or where the principal office of the respondent is located

Appellants are incorrect. The complaint is not an action against a body or an officer as the Article 78 statute is entitled. An action against a body or an officer is a term of art, specific to acts demanding relief under Article 78. The venue provision cited relates solely to a CPLR Article 78 proceeding. The Complaint is an action for a declaratory judgment, with an application for ancillary provisional relief, not an Article 78 proceeding.

Had Respondent sought Article 78 relief exclusively then he would have set venue in Albany County. So clear is the limitation of CPLR 506 (b) to Article 78 proceedings that CPLR 7804(b), the venue statute for Article 78 proceedings refers directly back to CPLR 506 (b). When a party commences a special proceeding under Article 78, CPLR 506 (b) does apply because the act relates to a statutory duty. As was the case regarding CPLR 6311, the actions of Appellants are not the performance of a "statutory duty." CPLR 506 (b).

D. Venue Is Not Jurisdictional and Thus the Remedy Is Transfer, Not Dismissal.

The lower court was correct in denying Appellants theory that a venue claim requires dismissal of this proceeding. Appellants cite case law, such as People ex rel. Derby v. Rice, 129 N.Y. 461 (1891) which reflects older case law that the issue

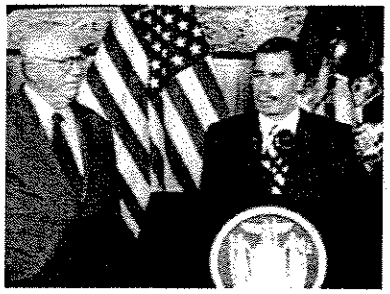
Elizabeth Benjamin
THE DAILY POLITICS

Gov: Ravitch Is Legal, But Won't Preside

July 9, 2009

Gov. David Paterson formally introduced Albany to the man he says is his new lieutenant governor, Richard Ravitch, while simultaneously acknowledging a legal challenge to his appointment will prevent him from presiding over the Senate today.

> "With respect to the other parties who brought an injunction, we're not going to try to engage in flaunting an appointment," said Paterson, who also held off from the ceremonial swearing-in of Ravitch that was supposed to take place in the Capitol's Red Room this morning.



Paterson said his administration will go to court this afternoon to fight the temporary restraining order received by the Senate GOP/Sen. Pedro Espada Jr. coalition shortly after midnight that sought to block Ravitch from being sworn in and filing his oath of office.

The governor confirmed Ravitch had been secretly sworn in shortly after his 5:01 p.m. announcement yesterday, signed his oath of office at 8:40 p.m. and filed it with the state Secretary of State at 11 p.m. (six hours after the close of business).

> "We think the issue is now moot because at the moment the judge signed the order, the oath was already sworn," Paterson said of the TRO. "...(But) we will not in any way bemoan the court their right to make a determination...We will not swear Dick in right here."

The governor said his appointment of Ravitch is legal because "there's nothing in the Constitution that says it can't be done," although he did admit this is "not the clearest delineation of duty that the Constitution can find."

Paterson defended Ravitch's secret swearing-in, calling it "traditional" for elected officials to have both private and public swearing-in ceremonies. He noted he himself had been sworn in privately at midnight on Jan. 1, 2007, and then again several hours later during a public inauguration on the Capitol lawn.

Paterson said former Gov. Eliot Spitzer was also sworn in during a private ceremony. That's true, except he didn't mention the event, which took place at the Executive Mansion, was open to a pool reporter - unlike the Ravitch swearing-in, which was done entirely in secret.

I should know. I was the pooler that night.

Paterson slammed the Senate for calling off power-sharing negotiations last night in the wake of the Ravitch announcement, insisting that nothing is precluding them from striking a deal. He said the appointment was made

largely to clear up the succession question, adding: "You can't have rotating co-acting governors...An executive office is not the kind of office that can be shared by two people."

The governor said the Senate is "too fragile" to be left without a "neutral" presiding officer, adding: "No tennis balls at Wimbledon moved as quickly as some of these senators changed their seats on either side of the aisle."

Ravitch acknowledged the task put before him by Paterson is "not an easy one," but added: "I suppose I wouldn't be standing here today" if it were.

Asked by Capitol Bureau Chief Ken Lovett if he had had second thoughts before agreeing to take on this challenge - perhaps the last thing the 76-year-old veteran public servant will do professionally - Ravitch replied simply: "Yes".

Ravitch noted his long history of witnessing - and helping avoid - economic crises in New York, and said he wanted to do so again in this instance.

> "I have spent many, many days and nights worrying about how does government meet its fundamental obligation to serve the needs, particularly the needs of poor people, in every community of this state if it doesn't have the resources because of the inability to have a fiscally sound government," Ravitch said.
>
> "(I have an) awareness of how severely that effects so many people in a state like this that; that's why I could not say 'no' to the governor of the State of New York."

Tags:

Albany , David Paterson , Democrats , Republicans , Richard Ravitch , Senate

By Elizabeth Benjamin on July 9, 2009 12:30 PM | Comments (7)

EMAIL

7 Comments

KevNY
July 9, 2009
12:58 PM

Secret ceremony???

YOU MUST BE KIDDING!

SEND THEM ALL TO JAIL FOR FRAUD!!!

BJ99999
July 9, 2009
1:06 PM

Hey Gov, why not hold off on special session until Monday allowing the courts time to rule on this and saving the taxpayers some money vs. keeping the Senators and staffs here for the weekend? You can even tell them in secret.

gecannon
July 9, 2009
1:09 PM

Sen. Pedro Espada Jr reminds me of the Beatles Nowhere Man.

"He's a real nowhere man,
Sitting in his Nowhere Land,
Making all his nowhere plans
for nobody.

Doesn't have a point of view,
Knows not where he's going to,
Isn't he a bit like you and me?

Nowhere Man please listen,
You don't know what you're missing,
Nowhere Man,the world is at your command!
He's as blind as he can be,
Just sees what he wants to see,
Nowhere Man can you see me at all?

Nowhere Man, don't worry,

Year 1911 Chapter 3

The New York State Library
Legislative Reference Section
Albany, N. Y.

Bill Jacket Collection

MICROFILMED

DATE 6-14-59
NO. OF PRINTED BILLS 2
NO. OF EXPOSURES 42
EXCLUSIVE OF BILLS

SECOND READING No. 3
Reported by said committee without amendment and ordered to a second reading

THIS ORIGINAL BILL TO BE RETURNED WITH REPORT

STATE OF NEW YORK

No. 8 Int. 8

IN ASSEMBLY

THIRD READING No. 3
Read a second time, ordered placed on the order of third reading and referred to the Committee on Revision.

January 5, 1944

Introduced by Mr. REOUX—read once and referred to the Committee on Judiciary

AN ACT

To amend the public officers law, in relation to filling vacancies in the offices of governor and lieutenant-governor

3

Reported from Committee on Revision Without Recommendations, ordered engrossed.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section forty-two of chapter fifty-one of the laws of nineteen hundred nine, entitled "An act in relation to public officers, constituting chapter forty-seven of the consolidated laws," as last amended by chapter one hundred five of the laws of nineteen hundred forty-three, is hereby amended to read as follows:

1. A vacancy occurring before October fifteenth of any year in any office authorized to be filled at a general election, *except in the offices of governor or lieutenant-governor*, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election.

§ 2. This act shall take effect immediately.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

STATE OF NEW YORK

No. 15 Int. 15

IN SENATE

January 5, 1944

Introduced by Mr. WARNER—read twice and ordered printed, and when printed to be committed to the Committee on the Judiciary

AN ACT

To amend the public officers law, in relation to filling vacancies in the offices of governor and lieutenant-governor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section forty-two of chapter fifty-one of the laws of nineteen hundred nine, entitled "An act in relation to public officers, constituting chapter forty-seven of the consolidated laws," as last amended by chapter one hundred five of the laws of nineteen hundred forty-three, is hereby amended to read as follows:

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§ 2. This act shall take effect immediately.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Form No. 88

State of New York

In Assembly

JAN 17 1944

Ordered, That the Clerk deliver the bill entitled

AN ACT

To amend the public officers law, in relation to filling vacancies in the offices of governor and lieutenant-governor

to the Senate, and request their concurrence in the same.

By order

ANSLEY B. BORKOWSKI

Clerk

1

Lie
1/18/44
Cal.

January 17, 1944.

MEMORANDUM RE: Senate Int. #15, Print #15
Assembly Int. #8, Print #8

The purpose of this bill is to dispense with the need for an election to fill the vacancy in the Lieutenant Governorship between the general elections in which the Governor is a candidate.

Under the decision of the Court of Appeals last summer in connection with the vacancy caused by the death of Lieutenant Governor Wallace, since no opinion was written, it is not clear whether the requirement of an election was dictated by provisions of the Constitution or of Section 42 of the Public Officers Law. There were many arguments and views that it is the provisions of Section 42, subdivision 1 of the Public Officers Law that required such an election. This amendment by specifically excluding the office of Lieutenant Governor removes the grounds for that view. It also mentions the office of Governor not because it is necessary, but simply to indicate clearly the two offices for which an election is not required by reason of vacancies occurring between the constitutionally-fixed times for such elections. By the last phrase of the section which exists in the present law and is retained, the whole law is, of course, made subject expressly to the requirements of the Constitution.

It should be noted that there have been introduced proposed constitutional amendments which will clarify the problem of elections for the Lieutenant Governor, assuming that the statutory amendment is not sufficient.

CDB-k

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April 3, 1944.

Louis J. Lefkowitz, Esq.,
270 Broadway,
New York, New York

Dear Mr. Lefkowitz:

I enclose herewith the bill which I discussed with you this morning.

Thank you very much.

Sincerely yours,

JNB:A
Enclosure
Assembly, Int. 9

4

John Ciampoli, Esq.

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Suite 202
Albany, New York 12207

518 - 527 - 1217

August 11, 2009

Hon. James Pelzer
Chief Clerk
Appellate Division Second Department
45 Monroe Place
Brooklyn, New York Fax: 718-858-2446

RE: Skelos & Espada, Plaintiffs - Respondents v. Paterson, et. al. Defendants – Appellants, Docket No. 6673 – 2009

Dear Mr. Pelzer:

As I reported to the Court by telephone yesterday I had experienced some difficulty in contacting my client, Senator Pedro Espada, Jr. during the time in which briefs were completed and to be filed.

Early last evening I spoke directly with Senator Espada and received particular instructions from him as to how to proceed in this Appeal. Senator Espada's precise instructions to me were to inform the Court that he would not be filing a brief on appeal and that he did not wish to participate in the appeal at this juncture. Accordingly, I will not appear before the Appellate Division on behalf of Senator Espada on August 18, 2009, and we will not file a brief on his behalf.

I advised my adversaries as to these instructions, and also advised the clerk's office. I am informed that the Court will require no further paperwork to effectuate Senator Espada's posture in the appeal.

Senator Espada advises that he has no objections to my continued participation in this case on an of counsel basis to David L. Lewis, Esq., counsel for Senator Skelos.

I apologize for the delay, and appreciate the Court's assistance in this matter.

Very truly yours,

John Ciampoli, Esq.

cc: counsel for all parties