New York State Bar Journal

March/April1997

See below for footnotes

Public Officers, Beware! No Excuses Accepted

By Carolyn H. Mann

Vetere v. Ponce, (I) emanating from the jurisdiction of the T own/Village of Harrison, has recently cast significant public opinion on § 30, Public Officers Law. (2) Although surrounded by political mischief, the case ultimately concerns the perceived right of a duly elected public official to retain his elected post, even though not in strict compliance with a qualifying section of Public Officers Law. The New York Law Journal (3) has headlined its piece on this case (and its most curious sequence of political events) with the words, "Technical Omission Costs Official His Post." We question here whether non-compliance with this statute is properly characterized as a "technical" omission. We submit that the failure to timely file an oath of office is an important and justifiable disqualification for holding public office. Those who are hurt by the consequences of failure to strictly comply, must resignedly accept their fate because, as we intend to show, the purpose of the statute is to secure a trust rather than to punish the careless.

No Exceptions!

Briefly, § 30(1)(h) obligates a public official, whether elected or appointed, to file an oath of office, within 30 days of the commencement or notification of his term. The New York Courts have heard several cases pleading relief from a direct reading of this section, yet all pleas have been to no avail. In each and every case, the courts have read the clear and undisputed language of the statute finding no latitude to permit any exceptions. This piece brings to light the cases of the various office holders whose positions were properly declared vacant by operation of law for non-compliance with the mandate to timely file an oath of office. We will probe why this law, with its seemingly harsh results, is set so firmly into New York Law and whether such law and its consequences should continue undisturbed.

Let us first examine the pleas of the various petitioners asking that their particular set of circumstances be judged worthy of exception when the state clearly leaves room for none.

In 1913, in People v. Keator, (4) the relator filed his oath 17 days after commencement of his duties and in spite of the fact that the relator received the highest number of votes, the Board passed a resolution reciting the existence of a vacancy and properly proceeded to fill the vacancy by appointing another

individual. The relator pleaded relief from the Board's action appointing someone other than himself, the duly elected officia1. The Court concluded:

Taking the constitutional oath of office being a condition precedent to relator being entitled to enter upon the duties of the office, and hence to his right to maintain an action to oust defendant and to recover possession of the office, we conclude that the relator is not entitled to succeed in this action. .It would be unfortunate, if the refusal or neglect of a person elected to such office to qualify, as required by the Constitution of the state, could deprive a town of such an officer, as the position is one of importance, and particularly so in certain contingencies.

No exceptions! .

In the Matter of Comins v. County of Delaware, (5) a public officer entered upon his duties and performed them for some time only to find his position declared vacant. He pleaded before the court that his removal must be annulled for surely his service for such an extended period surely conferred rights of legitimacy to his claim to office. The court disagreed, repeated the clear words of § 30 and continued:

> The fact that the Board did not earlier move to dismiss petitioner, does not, in our view, constitute an appointment of petitioner to his position. When a person appointed to office fails to timely file his oath of office, neither notice nor judicial procedure is necessary, the office is automatically vacant and may be filled by the proper appointive power. Consequently, .no hearing on charges was required in order to dismiss him from office.

No exceptions!

Perhaps the circumstances set forth in McDonough v. Murphy (6) would lead one to expect the court to annul the declaration of a vacancy. Here, two appointed members of the College Board entered upon their official duties and subsequently were officially notified of the appointments. Both filed the oath within 30 days of that official notification, but the Court allowed the vacancy to stand, stating:

> ...when by one's own actions it is clear that a person knows of his appointment, he should not be allowed to wait indefinitely before filing an oath of office. This interpretation is
> -mandated by the necessity to file an oath of office, which is intended to be part of the requirements making an officer fully qualified to carry out the duties of his office. Thus, once plaintiffs have taken actions as official members of the board, as has been done here, they cannot be heard to claim that they had no notice of their appointments, for without a doubt the contrary is true. [Emphasis added.]

No exceptions!

Neither is ignorance of the law an excuse for non-compliance with the requirement for a timely filing, as the Court declared in Boisvert v. County of Ontario, (7) where petitioner pleaded he was unaware of § 30 Public Officers Law. The court ruled:

> The obligation imposed by the Public Officers Law statute is personal to plaintiff, it is an act he is required to do and the office became vacant by the mere failure to file the oath, whether or not the defendants knew or were chargeable with notice that plaintiff had failed to file his oath, and they are not required to make any declaration or give any notice. On his default in' filing his official oath "the appointment was vitiated and the office * * * became vacant" [citing Ginsberg v. City of Long Beach, 286 N.Y. 400, 36 N.E.2d 637; and also People ex reI. Walton v. Hicks, infra].

No exceptions!

That the statute leads to an unambiguous reading is probably nowhere better stated than in Walton v. Hicks, (8) where the Court ruled:

> This statute is emphatic and unequivocal. It does not seem possible that it can be misunderstood. In case a person appointed to office neglects to file his official oath within 15 [now 30] days after notice of appointment or within 15 [now 30] days after the commencement of the term of office, the office becomes vacant ipso facto. That is all there is to it. No judicial procedure is necessary; no notice is necessary; nothing is necessary. The office is vacant, as much so as though the appointee were dead; there is no incumbent, and the vacancy may be filled by the proper appointive power .

Certainly, no further explanations of § 30 were necessary. Yet, in 1990 in response to a request, the State Board of Equalization and Assessment (9) clarified the "emphatic and unequivocal" words of the statute:

Both the Attorney General (1976, Op. Atty. Gen. (Inf.) 336) and the State Comptroller (10 Op. State Compt. 332) have issued opinions that the failure of a public officer to file an oath is not correctable, because the statute specifically creates the vacancy without providing a remedy. The provisions of Public Officers Law § 30 creates a vacancy which the appointing authority (e.g., town board, county executive, county legislature) may fill at any time (Public Officers Law, § 38).

The appointive assessor or county director who fails to file the oath of office within 30 days is in the same position as any de facto officer; his or her actions are valid, but employment is subject to immediate termination (Williamson v. Fermaille, 31 A.D. 438, 298 N.Y.S. 2d 557 (4th Dept. 1969), affd 26 N.Y. 2d 731,257 N.E. 2d 285, 309 N.Y.S. 2d 35 (1970); Vescio v. City Manager, City, of Yonkers, 69 Misc. 2d 68, 389 N.Y.S. 2d 357 (Sup. Ct. Westchester Co. 1972), affd 41 A.D. 2d 833, 342 N.Y.S. 2d 376 (2d Dept. 1973); 1979, Op. Atty. Gen. 198). Although the failure to file the oath cannot be remedied, the Attorney General has concluded that there is no bar to the appointment of the same individual to the same office (1978, Op. Atty. Gen. (Inf.) 833). Presumably, such reappointed official would be sure to timely file the oath the second time.

It is important to note that nowhere in the opinion is any mention or reference made to any exceptions to strict compliance with § 30; clearly the legislature intended none.

The administrative explanation of § 30 has been exhaustive and the reiteration of the statute's words frequent. Nevertheless, additional cases managed to find their way into New York courtrooms. In Lombino v. Town Board of the Town of Rye (10) petitioner claimed compliance with § 30 pleading his filing was only one day late. The Court was unimpressed and the Appellate Division stated:

The Supreme Court denied the defendants' motion for summary judgment on the ground that there is a factual issue of whether the plaintiff filed his oath of office on January 3, 1991. However, contrary to plaintiffs contention, even if he filed his oath of office on January 3, 1991, the filing was still untimely. Public Officers Law § 30 provides that an appointive office shall become vacant for failure to file an official oath "within thirty days after [the] [sic] appointment, or within thirty days after the commencement of such term." Here, the plaintiff was notified of his appointment as Assessor in November 1990, and began working on December 3, 1990. Thus, even if he filed his oath of office on January 3, 1991, the filing was more than 30 days after the notification and commencement of his term. Thus, the Town Board properly declared the Office of Assessor vacant.

No exceptions!

Proper Judicial Role: Declaring What the Law is, Not What it Should Be

In the most recent case, Vetere v. Ponce, supra, the case which catapulted § 30 onto a red-hot front

burner, petitioner sought to be excused from strict compliance with the statute by arguing first, that petitioner was not notified by the Town Village Clerk to timely file, as required by Law, (11) claiming, in effect, ignorance of a legal duty and second, that petitioner was justifiably distracted from his duty because of the concurrent illness and death of his spouse.

Politics takes center stage here. As set forth in the decision, the Town Village Clerk of Harrison arranged to have all the Republican elected officials report to Town Hall to sign and file the official oaths. Curiously, however, no one reminded or told petitioner, the sole Democrat on the Board, to be in attendance. On February 16, seventeen days after the expiration of the 30-day period, the Town Clerk issued a Certificate of Vacancy and declared Mr. Vetere's position vacant because of the failure to timely file his oath. The Board then proceeded, as is its right under law, to appoint another (Republican) to fill the vacancy. This action caused great public outcry, however, urging the appointee to resign. Mr. Vetere was promptly thereafter appointed to fill his own vacancy until the next annual election, at which time he would have to run to fulfill the balance of his term.

Mr. Vetere sought to be reinstated and reclaim his original position and term and pleaded with the Court to be excused from strict compliance with § 30 due to these particular circumstances. The Court, however, found itself compelled by a clear reading of the statute and appropriate case law to find petitioner's elected position vacant indeed, stating:

> Notwithstanding equitable considerations and respondent's consent to reinstatement, the court can only direct reinstatement in the event it finds petitioner was improperly removed as a matter of law. Whether respondents acted unfairly or took advantage of petitioner during a period of personal crisis, therefore, is irrelevant. If this result is harsh, as it is in this case, the remedy lies with the Legislature In this case, since petitioner, did not file within 30 days of commencement of his term, the office became vacant on Feb. 1, 1996 The Town Board and Village Trustees were entitled, in turn, to declare a vacancy and to fill it. (12)

The situation presented in Vetere is illustrative of the problems faced when considering how to avoid equity considerations, and is instructive. Both the Election Law and the Village Law seek to minimize potentially harsh results imposed by § 30 by requiring the Village Clerk to notify officials of the § 30 mandate. The difficulty here lies with enforcement, however. If meeting one's official duty is paramount, enforcement of a law requiring a clerk to notify others of their duty might result in the removal of said clerk for non-performance or non-feasance. This produces a harsh result in itself, and neither does it eliminate, ameliorate or excuse the duty of the official to timely file. There are simply too many possible equity considerations to statutorily exempt some and not others. No excuses, therefore, can be deemed worthy as exceptions.

Finally, Supreme Court Justice Nicholas Colabella, who delivered the opinion in Vetere, made a truly correct observation. If § 30 can produce a popularly

perceived harsh result by not permitting any exceptions to its mandate, the remedy lies not with the Court but with the Legislature. Members of the New York Bar must agree, for it is surely the proper role of the judiciary to declare what the law is, and not what it ought to be.

Since no exceptions can be accepted by the courts to relieve the demands of the "emphatic and unequivocal" language of the statute, (13) Public Officer, Beware! No excuses under New York Law can remedy your unenviable situation.

Non-Compliance is Not a "Technical Omission"

Is the law acceptable? If not, what ought it to be? Is the law too harsh in its result by not permitting exceptions to the 30-day limit for filing the qualifying oath? We know that the limit was already extended from 15 to 30 days. Should the limit be two months? Is a limit necessary at all? Why should the office become vacant by operation of law "so much so as though the appointee were dead"? (14) What is all this fuss about an oath of office not being timely filed? Is it merely a "technical" bugaboo that should be significantly eased? Or, is the demand for strict compliance rational and wise? This author believes the latter .

The New York Legislature apparently believes the taking of the oath of office to be a critical qualification for those in public office accepting the public trust. An oath, we are all aware, is a solemn promise the taking of which is described as "burdening the conscience" where something is present to distinguish between an oath and a bare assertion. (15)

An oath, and its required accompanying and distinguishing act, is what can hopefully establish trust between people. Through this device in a public setting, the people are offered some assurance that the words and actions of public officers are possibly being carefully guided by something other than the official's own set of self serving principles. The swearing-in ceremony is visual and psychologically binding; the filing is written and legally binding. Is there another act which could as simply convey a solemn promise to behave with a full measure of integrity? How else might the public accept the offer of honest public service if not with a solemn, believable offer being made, by way of oath, to create a contract with all the rights and responsibilities we assume are contained in it?

The public must be offered something which fosters confidence in the official's moral responsibility. The official's conscience must be seen to be sufficiently burdened by something to help assure that the desired devotion to the public's trust might reach broadly into the official's public relations and daily decision-makjng. It is this promise, this oath of office, which helps to hold a civil society together. .

Certainly, it is an easy task to file an oath of office within 30 days of the commencement or notification of one's term, and no one in public administration should be statutorily charged with informing another official of his or her duties. This is more properly the job of the official and his legal counsel. The purpose of the requirement reflects wise reasoning and speaks to the act being most critical for the health of the compact among the governed and the governors and, therefore, can permit no exception.

The "emphatic and unequivocal" language of § 30, Public Officers Law represents one of the important links in the web of our representative democracy and is on the far other side of a mere "technical" nuisance. To reiterate, Public Officer, Beware! The law as it is presently set forth is there to protect, not to punish. No excuses will save a public term of office without taking and timely filing a solemn promise to the people served.

I New York Law Journal, April 23, 1996, p. 29, col 6.

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2 Section 30, entitled Creation of vacancies, provides, in part:

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:...

> h. His refusal or neglect to file his official oath or undertaking, if one is required, before or within thirty days after the commencement *of* the term of office for which he is
> chosen, if an elective office, or if an appointive office, within thirty days after notice of his appointment or within thirty days after the commencement of such term...

Personnel on Active Duty with the Armed Forces have a 90 day limit imposed for filing, after which time a vacancy may be declared by operation of law.

3 Cerisse Anderson, "Technical Omission Costs Official His Post," New York Law JourT1~1, April 22, 1996, p. 1.

4 People v. Keator, 166 App. Div. 368, 154 N.Y.S. 1007. 566 A.D. 2d 966,412 N.Y.S. 2d 428.

692 A.D. 2d 1022, 461 N.Y.S. 2d 439.

789 Misc. 2d 183, 391 N.Y.S. 2d 49, affd 57 A.D. 2d 1051, 395 N.Y.S. 2d 617. 8173 App. Div. 338,158 N.Y.S. 757, affd 221 N.Y. 503, 116 N.E. 1069.
9 Opinion, November 19, 1990.

101994; 206 A.D. 2d 462, 614 N.Y.S. 2d 564, leave to appeal denied 84 N.Y. 2d 807, 621
N.Y.S. 2d 516, 645N.E. 2d 1216.

11 Section 15-128 Election Law: "The clerk of the village shall, within three days after the election of a village officer, notify each person elected of his election, and of the date thereof, and that, in order to qualify: he is required to file his oath of office... and that upon his failure so to do he will be deemed to have declined the office."

12 The Court, citing the Lombino case and others, observed that the failure to file constitutes an automatic vacancy and is not subject to a cure nunc pro tunc by a belated filing. .

13 Walton v. Hicks, supra. 14 Walton v. Hicks, supra. 15 O'Reilly v. People of the State of New York, 86 N.Y. 154, 1881. Judge Finch of the Court of Appeals further stated:

> Some form of an oath has always been required, for the double reason that only by unequivocal form could the sworn be distinguished from the un-sworn averment, a sanctions of religion add their solemn and binding force to the act. (Pandects, xii, 2; 3 Inst. 165; 1 Phil. on Ev. 15; 1 Starkie on Ev. 23; Lord HARDWICKE, in Omychund Barker, 1 Atkyns, 21; Tyler on Oaths, 15; 1 Greenleaf on Ev., §§ 328, 371; 1 Alison's Crim. Law, 474;.3 Wharton's Am. Crim. Law, § 2205; 2 Arch. Crim. PI., 1723.)...

> [T]hese sanctions have grown elastic, and gradually accommodated themselves to differences of creed, and varieties of belief, so that, as the Christian is sworn upon the Gospels, and invokes the Divine help to the truth of his testimony, the Jew also may be sworn upon the Pentateuch, the Quaker solemnly affirm without invoking the anger or aid of Deity, and the Gentoo kneel before his Brahmin priest with

> peculiar ceremonies... The changes of form incident to the growth of nations and of commerce have been serious, but have not dispensed with a form entirely; . ...A wide scope, a large liberty, is thus given to the form of the oath, but some form remains "essential. Something must be present to distinguish between the oath and the bare assertion. An act must be done, and clothed in such form as to characterize and evidence it. ..

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