

The State of New Hampshire

JUDICIAL BRANCH

MERRIMACK COUNTY

SUPERIOR COURT

No. 217-2023-cv-370

IN RE: TOWN OF WARNER

ORDER

The Town of Warner has a three-person selectboard. Two of its members — Christine Frost and Jody Sloane — resigned voluntarily. “Vacancies in the board of selectmen shall be filled by appointment made by the remaining selectmen.” RSA 669:63. But a selectboard may act only with “[a] majority of the selectmen.” RSA 41:8. Lacking a quorum, no appointment was possible.

RSA 669:63 provides that where selectmen “fail to make such appointment, the superior court or any justice thereof, on petition of any citizen of the town, and after such notice as the court shall deem reasonable, may appoint a suitable person to fill the vacancy.” Harry Seidel, a citizen of the Town of Warner and the remaining selectman, petitioned the court to appoint a person to fill one of the vacancies in order that the board could act going forward. The court scheduled a hearing on the petition, but in the interim Ms. Frost and Ms. Sloan moved to intervene on the ground that they had rescinded their resignations and remained board members. They base their position on the common law, which holds that “acceptance of appointment to public office is compulsory and such office

once assumed cannot be laid down without the consent of the appointing power.” *Warner v. Selectmen of Amherst*, 95 N.E.2d 180, 182 (Mass. 1950). Without evidence that their resignations were accepted, they say the resignations did not go into effect. Mr. Seidel, represented by the Town’s attorney, contends RSA 652:12 directs that a vacancy occurs on resignation without reference to acceptance, and no provision in the law permits rescission of a resignation once made.

I granted the motion of Ms. Frost and Ms. Sloane to intervene (doc. no. 7). There was a hearing on July 20, 2023, devoted largely to whether they could properly rescind the resignations and whether they remained members of the board. The facts are not in dispute and are taken from the parties’ pleadings and oral arguments.

Background

On July 12, 2023, Ms. Frost and Ms. Sloan sent email notices of their resignations from the board. At 7:49 a.m., Ms. Frost notified Sloane and Seidel that “Effective immediately, I am resigning from the Select Board. I wish you well and am always available if you need anything.” In an email sent to the Town Administrator and town department heads at 7:55 a.m., she said “I’m letting you know you [sic] that I have resigned from the Selectboard. I wish you the best of luck, and if need anything please let me know. I am still here if you need anything.” At 9:31 a.m., Ms. Sloane wrote in an email to Seidel, the Town Administrator, and the Select Board Assistant that “Effective immediately, I am resigning from the Board of Selectmen for the town of Warner. Regards, Jody Sloane.”

Later that day, the Town Administrator forwarded to Sloane an email from the town's attorney, suggesting that either Ms. Sloane or Ms. Frost "come back to a selectboard meeting to" provide a quorum and "vote on filling the vacancy" to avoid delay and litigation costs. Seidel sent the email to Ms. Frost and in a phone call to her suggested she return to the Town Hall and temporarily rescind her resignation so there could be an appointment to fill a vacancy. Frost declined. A subsequent invitation from the Town attorney was also rebuffed because Ms. Frost said she needed time to think about a suitable replacement. Throughout the day, Seidel, Frost, Sloane, and the town administrator communicated on the suitability of possible candidates.

On July 13, Frost agreed to Seidel's request to attend a board meeting on July 14 to appoint Faith Minton to the Board. On the morning of July 14, however, Seidel notified Frost that the meeting was unnecessary, and he filed the present petition for court appointment. The court scheduled a hearing for July 20, 2023. Mr. Seidel convened a duly noticed public meeting on July 18, 2023, to give notice of the petition and the hearing date. Ms. Frost and Ms. Sloane attended and gave written notice that their resignations were rescinded. Frost and Sloane contend the request for court appointment of a selectboard member is moot as they have resumed their positions as board members.

Discussion

Frost and Sloane agree they resigned voluntarily. In their communications to town officials, they deemed their resignations "effective immediately." But citing common law,

they say their resignations were not binding and were subject to rescission until accepted by some authority. Putting aside the practical difficulty of determining what officer in the town was required or able to accept the resignations under the circumstances of this case, the common law dictates that

a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws.

Edwards v. United States, 103 U.S. 471, 473–74 (1880).

Seidel’s argument relies on a law governing vacancies in public office, which deems an office vacant on the occurrence of a specified event. The statute, RSA 652:12, applies to elected town offices such as that held by Ms. Frost and Ms. Sloane. See RSA 652:1; 652:7. It provides that “[a] vacancy shall occur in a public office if, subsequent to his or her election and prior to the completion of his or her term, the person elected to that office:

- I. Either dies, resigns, or ceases to have domicile in the state or the district from which he or she was elected; or
- II. Is determined by a court having jurisdiction to be insane or mentally incompetent; or
- III. Is convicted of a crime which disqualifies him or her from holding office; or
- IV. Fails or refuses to take the oath of office within the period prescribed in RSA 42:6 or to give or renew an official bond if required by law; or
- V. Has his or her election voided by court decision or ballot law commission decision; or
- VI. Is a member of the general court of New Hampshire and a member of a military reserve or national guard unit; and
 - (a) The member was called to serve in an emergency; and

(b) Service in such unit causes the member to be unable to perform his or her legislative duties, as determined by the house of representatives in the case of a member of the house of representatives and by the senate in the case of a member of the senate, for longer than 180 consecutive days; and

(c) The selectmen of any town or ward in the district from which the member is elected request of the governor and council that the office be declared vacant.

The statute does not condition the vacancy on acceptance.

To interpret a statute, the State Supreme Court requires

[w]e first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent.

Petition of State, 175 N.H. 587, 589 (2023) (citation omitted). “According to common usage, ‘resign’ means ‘to give up deliberately and ‘resignation’ means ‘formal notification of relinquishment.’” *Appeal of Young*, 146 N.H. 216, 217-18 (2011). Frost and Sloane do not dispute that they resigned their positions voluntarily within the meaning of the definition. And resignation, just as other categorical events listed in the statute such as death, a court determination of mental incompetence, conviction of certain crimes, or refusal to take the oath of office, creates a vacancy in the office that is not dependent on acceptance by a governing authority.

Both sides agree no provision in state law or in the town’s ordinances or regulations either describes how to effect a resignation of from the selectboard or specifies the resignation must first be accepted for the office to be vacant. In some instances, the

legislature prescribes how resignations from public office take effect without requiring acceptance. For instance, under RSA 14-A:2 a resignation by a member of the general court is effective on delivery of a letter of resignation to a specified person. Contrary to the common law, the resignation is effective upon delivery and does not require acceptance to take effect. And under a statute that is no longer in place, a town “officer who has given an official bond,” remained liable on the bond “until he shall resign, and his resignation shall have been accepted by the town, selectmen, or other competent to accept the same.” Gen. Laws c. 42, § 1. *Attorney General v. Marston*, 66 N.H. 485, 486-87 (1891). These statutes show that where the legislature wants to make a resignation effective upon acceptance, it has done so, and “recognize[] the law to be that but for such provision the resignation would take effect at once.” *Reiter v. State ex. rel. Durrell*, 36 N.E. 943, 945 (Ohio 1894). See *Bisceglia v. Secretary of State*, 175 N.H. 69, 71–72 (2022) (“We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.”)

New Hampshire law is inconsistent with the common law on resignation of public office. Under the common law, an office holder has no right to vacate the office at will and must await acceptance of the resignation by the appropriate authority. But the statute deems the office vacant in various circumstances, such as when the person “ceases to have domicile in the state or the district from which he or she was elected,” RSA 652:12, I, or fails to “give or renew an official bond if required by law.” RSA 652:12, IV. In these instances, “[n]o acceptance of such resignation seems to be contemplated, and certainly none is

provided for." *Reiter* 36 N.E. at 944. (applying similar provisions of Ohio law showing legislative abrogation of common law rule on acceptance of resignations). As the person is not compelled to remain in office and it is deemed vacant, the statutes "show that office holding is not regarded as compulsory in this state. It is therefore clear that the common-law rule as to acceptance of resignations has been abrogated . . . to the extent, at least, of authorizing the filling of a vacancy." *Id.* Accordingly, efforts by Frost and Sloane to rescind their resignations from offices that became vacant with their actions were of no effect, and their ability to hold the office depends on future election or appointment.

The vacancies deprived the selectboard of a quorum and the ability to fill the vacancies. See RSA 41:8. So, even if the board was required to accept the resignations, there was no lawful way it could act as a board to do so. In that instance, where there was a vacancy on the selectboard and no way for the selectboard to fill it, "any citizen of the town" is authorized to petition the court to appoint "a suitable person to fill the vacancy." RSA 669:63. The matter is before the court on that basis.

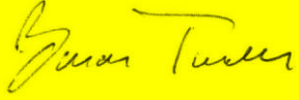
Conclusion

The intervenors' motion to dismiss the petition (doc. no. 9) is DENIED. Mr. Seidel proposes the appointment of Faith Minton, a resident of the Town of Warner, to fill the vacancy created by the resignation of selectboard member Frost. Notice of the proposal was given and no objection to Ms. Minton's appointment was filed with the court or expressed

at the hearing. Accordingly, the petition (doc. no. 1) is GRANTED and Ms. Minton is appointed to complete the term of Ms. Frost.

SO ORDERED.

DATE: JULY 24, 2023



BRIAN T. TUCKER
SUPERIOR COURT JUDGE

Clerk's Notice of Decision
Document Sent to Parties
on 07/24/2023