

FIRE COUNSEL NOTES



A Sometimes Thorny Topic – Handling Board Vacancies

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Most fire protection districts will, at some point in time, experience a vacancy on the Board of Trustees before a trustee's regular term is ending. This can occur for any number of reasons due a trustee moving from the district, medical reasons, death, or other causes which compel a trustee not to fulfill her or his complete term. It is important for districts to know how these midterm vacancies are handled and to be prepared to address them when they occur since they are relatively infrequent. Because of this, district boards and appointing authorities often make assumptions about the replacement process that are not correct leading to potentially defective appointments. This article will address the procedures and issues that can arise.

The first distinction in connection with this question is the difference in the manner in which persons originally came to serve on the board of trustees. As most readers should understand, under the Fire Protection District Act, fire protection district trustees may either be appointed or elected. Upon creation of a district by referendum, the board members will be appointed by a statutorily designated "appointing authority." If the district is located in more than one township (with the exception of a county with a population in excess of three million), the appointing authority will be the presiding officer of the county board with the "advice and consent" of the county board. (In districts located in multiple townships in a county with over three million in population, the appointing authority will be the township or townships based on the population

in the townships). If a district is located completely within a single township, the appointing authority will be the township board of trustees. If the district is located completely within a single municipality (city or village), the city council or village board of trustees will be the appointing authority. (70 ILCS 705/4) Most trustees serving on an appointed board should be familiar with their appointing authority (although surprisingly, this is not always the case). On the other hand, an elected board may be established by referendum or, if the district is wholly within a single township, by the township board of trustees. How vacancies are filled differs significantly depending on whether the board is appointed or elected.

When a midterm vacancy occurs on an appointed board, the process for filling the vacancy is relatively straightforward: the appointing authority appoints a replacement. Section 5 of the Fire Protection District Act states that when a vacancy occurs "...either by death, resignation, refusal to qualify, ceasing to be an inhabitant of the district, or for any other reason..." the appropriate appointing authority shall fill the vacancy within 60 days "...after the vacancy occurs..." for the "...unexpired term to which the person was appointed." (70 ILCS 705/5)

For an elected board of trustees, filling a midterm vacancy on the board is somewhat more complicated. The remaining members of the district board of trustees initially appoint a replacement for the departed trustee, but that person

will only serve until the next scheduled election for fire protection district trustees. Under the Election Code, those elections occur every other year at the Consolidated Election held in April of odd numbered years. (10 ILCS 5/2A-1.1(b)) This interim appointment can be as long as two years depending on when the vacancy occurs. At the next Consolidated Election following the creation of the vacancy, the voters fill the vacancy, but only for the balance of the unexpired six year term of the trustee whose departure from the board created the vacancy.

While the procedure to replace a trustee on either an appointed or elected board is relatively straightforward, multiple issues can and do arise more often than would be expected.

Perhaps the most frequent issue, and one which should not arise, but often does, is the length of the term of the person who is appointed as the replacements.

For appointed boards, it is not at all unusual for appointing authorities to improperly make replacement appointments for a term of three years rather than for the balance of the term of the departing trustee. This occurs because the appointing authority, thinking that the terms of appointed fire protection districts trustees are for three years, assumes that the replacement trustee will have a term of that length when appointed to fill a vacancy. This is, as explained above, incorrect, and it can lead to difficulties. The Fire Protection District establishes three year terms on the principle that,

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on a three member board, one trustee's term will expire each year. This avoids a situation where regular appointments of more than one trustee are made in any given year which can then lead to a majority of the board consisting of new and inexperienced members. It also avoids the instability on a board which can occur when there are multiple turnovers in seats on the governing board in a single year. The effect can be similar for boards with more members. To avoid this problem, the best practice is for districts to inform their appointing authority when a vacancy is being filled of the ending date of the replacement's term. This can be done by a letter to the appointing authority (and with a copy to the county or township clerk and/or, depending on the practice in the county, township, or municipality making the appointment) when submitting the name

of a proposed replacement or requesting the appointment of a replacement.

For elected boards, similar issues can arise. In some cases, districts believe that it is the county or township which will appoint the replacement. This, of course, is a misunderstanding of the rules applicable to elected boards. In other instances, district boards, in making the appointment to fill the vacancy, will incorrectly undertake to make it for the full balance of the departing trustee's six year term (and, in some extreme cases, for a full six year term), rather than until the next Consolidated Election. This can have serious consequences if a transaction occurs in the period after the next election and the vote of the replacement trustee is critical to the transaction or if the incumbency of the board must be correct for a matter to be legally sufficient. For example, a disciplinary matter involving the termination of a firefighter could be challenged based on a claim that the

board is improperly constituted or a bond issue by the district could be questioned.

Another not infrequent question that can arise is when does the "vacancy occur?" While this may seem to be a simple question (and it is in the case of a trustee who dies in office or an elected trustee who clearly "ceases to be an inhabitant of the district"), the circumstances leading to a vacancy can complicate the answer to this question. For example, determining when a person actually ceases to be an inhabitant of the district may not be as clear cut as it sounds. Does retaining ownership of a residence in the district while taking a job in another state for a long period of time for employment reasons constitute "ceasing to be an inhabitant?" What if the person continues to attend and participate in board meetings during the absence from the district or before it becomes clear that he or she is no longer an inhabitant

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of the district (for example, by selling the person's residence). Does "any other reason" include a trustee with a long term illness or condition rendering the trustee unable to attend meetings and participate in district administration, but who declines to resign? Is maintaining voter registration in the district wholly sufficient to preclude a vacancy? A multitude of questions like these can arise. While a trustee will typically resign in these situations, that may not occur in which case there is a threshold question of whether there is, legally, a vacancy. Depending on the circumstances, a district may even be put to seeking a judicial determination as to whether there is, or is not, a vacancy. A trustee who is unwilling to resign, but who is not, for some reason, participating, can create serious issues for the district's governance. Multiple hypothetical circumstances can be imagined in which the board of trustees will be crippled legally and precluded from acting by reason of a question of whether there is or is not a vacancy.

In addition to *whether* there is a vacancy, the question of *when* the vacancy occurs can become an issue. For example, suppose a departing trustee issues a resignation letter setting a resignation date in the future? Illinois law as interpreted by the United States Supreme Court as far back as 1877 is that when a vacancy occurs in a public office, the officer continues to serve until the successor has been appointed and qualified to serve. Beyond that, for a tendered resignation to be effective, it must be accepted by the authority who will name the replacement for the departing officer. If a resignation letter is directed, for example, to an appointed district board of trustees, rather than to the proper appointing authority (a not uncommon occurrence based on the incorrect belief that the district board or fire department makes the appointment), it may not be legally effective on the date indicated in the letter. This can mean that a trustee who is considered to have resigned, has not, in legal effect, done so. Accordingly, it is important that any letter of resignation be addressed to the

proper appointing authority and that a clear determination of the effective date of the resignation be ascertained based on the acceptance of the appointing authority. A wrinkle in this is that in the case of an elected board an elected trustee who ceases to be an inhabitant of the district, "his or her office shall become immediately vacant" and Section 5 requires that the remaining district board members will make an appointment to fill the vacancy "...within 60 days *after the vacancy occurs.*"

Beyond the question of whether or when there is a vacancy, if there is a delay until the vacancy occurs, the Fire Protection District Act generally provides that the departing trustee will continue to serve until the departing trustee is qualified to serve. This can mean that a departing trustee's service may continue even after a resignation by a trustee with a specified date if the proper appointing authority fails to act. Multiple references in the Fire Protection District Act provide that a trustee continues to serve until his or her successor has been appointed and qualifies to serve. (70 ILCS 705/4 [appointed three member board]; 70 ILCS 705/4.01 [appointed five member board]; 70 ILCS 705/4a [elected board]; 70 ILCS 705/4.03 [elected five member board]). Of course, if the departing trustee is physically not available or able to participate or if the person simply ceases to attend meetings of the district board or otherwise participate in the governance of the district, this question will not arise, but in circumstances where there may be other existing or subsequent vacancies on the board or where the remaining board members may question the legality or advisability of the departing trustee's participation, whether or when the vacancy has occurred can be an important issue and can introduce thorny questions about board participation and actions.

The significance of these issues surrounding board vacancies can be illustrated by reviewing the requirements of the Open Meetings Act. On a three member board, at least two trustees are required to conduct the business of the board and make decisions for the district. If one trustee's position is vacant and one of the two remaining trustees is unable

to meet with the other trustee, the board cannot take action. On a five member board, under the Open Meetings Act, at least three trustees must vote in the same way on any matter for the action to be legally effective. This can have great practical significance where there are two board vacancies or where there is a board vacancy and where a trustee is absent from a meeting. The three remaining trustees must, in that situation, all agree on any action taken by the board in order for it to be valid. (5 ILCS 120/1.02) If the appointing authority or, in the case of an elected trustee, the district board, fails to timely fill a vacancy or vacancies on a board, this can potentially put the district board in a position of being unable to do business if the three remaining trustees do not agree unanimously on an item of business requiring board action.

As all of this illustrates, it is important for districts to think through how a resignation, in particular, will be handled procedurally. Formal resignations that specify a date well into the future, can be problematic and create issues regarding the continued participation by a departing trustee. It is important for both departing trustees and remaining trustees to consider how a departure from the district board of trustees is handled whether the departure is planned or unexpected. Prompt consultation with the district's legal counsel is advised and is prudent to assure that the process is managed correctly and, in a manner which will not to create issues of the type discussed above.



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