

Hot Topics for Town Clerks

2024 Tug Hill Local Government Conference



Association of Towns

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Today's Hot Topics

- Videoconferencing – standard v special circumstances
- Social media
- Compatibility of office
- Credit cards – use and credit card surcharge
- Waiving penalties / washed checks
- Civil Service and Deputies
- Early Mail Ballots in Special Town Elections



Hot Topic




Videoconferencing

Videoconferencing

Original authority- pre-Covid
–Still exists!

- **Public Officers Law § 102 (1)**
- “Meeting” includes the use of videoconferencing for attendance and participation by members of the public body




Videoconferencing

- Member of public body can participate via videoconferencing so long as:
 1. The media is notified of their location at least 72 hours in advance (to the extent practicable);
 2. The public has the ability to attend from that location; and
 3. The members of the public can see the public officer participating

Videoconferencing

“New” authority: “Extraordinary circumstances”

- **Public Officers Law § 103-a**
- Governing body must opt in via local law to use extraordinary circumstances
- Local law dictates what constitutes an “extraordinary circumstance”
 - Disability, illness, caregiving responsibilities, “or any other significant or unexpected factor or event”



Videoconferencing



Public Officers Law § 103-a

- Physical quorum must be present at location with public access
- Public must be able to attend via videoconference
- Policy can address governing body / other boards
- Written policy must be posted on website
- Town **MUST** have website and link to recorded meeting within 5 days
- Extended through 2026 – TED Part KK

Hot Topic Social Media

Can public officials block constituents or delete their comments on social media pages?



Social Media Update

- March 2024 U.S. Supreme Court issued opinion in *Lindke v Freed*, 601 U.S. ____ (2024)
- Deals with a public official's social media page and ability to block another person or delete comments.



Social Media Update



Facts:

- Defendant Freed created FB page in 2008, reached friend limit and converted his page to a "public figure page"
- Appointed city manager in Port Huron, MI in 2014
- Posts were mix of personal and professional

Social Media Update

Facts:

- During COVID-19, plaintiff Kevin Lindke started posting critical comments on Freed's page
- Freed deleted and eventually blocked Lindke
- Lindke brought 1983 claim alleging Freed's FB page was a public forum and deleting comments / blocking him was viewpoint discrimination thus violating his 1st Amendment rights.



Social Media Update

Law and Analysis


- 1983 claims require a "state action" so question before court was when a public official's social media activity constitutes a "state action"
- Court noted that public officials "are also private citizens with their own constitutional rights."



Social Media Update

Created new test to determine when social media activity is attributable to State / Government action

1. Does the official have actual authority to speak on the government's behalf; and
2. Does the official purport to exercise that authority when speaking on social media?



Social Media Update

1. Does the official have actual authority to speak on the government's behalf

- Actual authority comes from statute, regulation, law, custom, or usage
- Custom and usage must "encompass persistent practices.... so permanent and well settled that they carry the force of the law"

Social Media Update

1. Does the official have actual authority to speak on the government's behalf

- Can also look at job descriptions, but can't rely on overly broad ones
- Appearing to have authority is different than actually having it
- Authority to speak must connect to alleged infringement

Social Media Update

2. Does official purport to exercise gov't authority when speaking on social media?
- Speaking in official or personal capacity
 - Context matters (BBQ vs podium)
 - "Mixed use" social media blurs line
 - Certain things help clarify
 - Disclaimer "All viewpoints are my own", is it a town account handed down to officials?



Social Media Update

- Other notes:
- Deleting comments from specific post only makes state action analysis applicable to that post
 - Blocking someone from an entire page, a court would have to look at whether they engaged in state action in ANY post on the social media page



Social Media Update

Practical Advice



- Include disclaimer!
- Be wary of blocking (brings all posts into question)
- Posting pictures of your cat (or anything else personally important to you) does not automatically make your social media page a personal one.

Hot Topic



Compatibility of Office

Dual Office Holding

The Act of Holding more than one office or position simultaneously.



Compatibility of Office

- A person may hold multiple offices and positions simultaneously UNLESS:
 - Statutory Prohibition
 - Local Law or Ethics Code Prohibition
 - Common Law Prohibition
 - o Conflict of Duties
 - o Subordination

People ex rel. Ryan v. Green, 58 N.Y. 295 (1874)

Compatibility of Office

Statutory Prohibition

Examples

Town Law, §20 (4)

Prohibits Holding Two or more Elected Town Offices

Town Law, §267(3)

Prohibits a Tn. Bd. Member from Serving on the ZBA

Town Law, §271 (3)

Prohibits a Tn. Bd. Member from Serving on the Planning Board



Compatibility of Office

- **Local Law**
- Municipal Home Rule Law, §10(1)(ii)(a)(1) allows town boards to adopt local laws consistent with the State Constitution and general state laws in relation to in relation to the qualifications of its officers and employees.
- (Op.Atty.Gen. 83-10; 1977 Op.Atty.Gen. 297).

Compatibility of Office



Ethics Code

General Municipal Law, §806 requires towns to have adopt a local code of ethics and the Attorney General's office has opined that it may include dual office provisions (Op Atty Gen No 96-27)

Common Law Prohibition

- Two offices are incompatible if one office is subordinate to the other or if they are inherently inconsistent (conflict of duties).
- Extended to:
 - One office and a Position of Employment
 - Two positions of employment
 - (Op. Atty. Gen. No. 88-31)

People ex rel. Ryan v. Green, 58 N.Y. 295 (1874)

Common Law Incompatibility

- Subordination
- You Can't be your own boss
- Examples
 - Town Clerk and Deputy Town Clerk
 - Town Board Member and Town Employee



Common Law Incompatibility

- Conflict of Duties
- Erosion of Statutory Checks & Balances
- Frequent, Inevitable or Inherent Conflicts of Duties
- Must be More Than a Mere Possibility of Conflict
- Case-by-Case Determination
- O'Malley v Macejka, 44 NY2d 530, 535 [1978]

Common Law Incompatibility

- **Examples ~ Incompatible**
- The offices/positions of town clerk and
- (1) deputy supervisor; (2) bookkeeper and (3) confidential secretary.
- In a town without a comptroller article 8 of the town law creates a fiscal checks and balance system between the supervisor and the town clerk.

Common Law Compatibility

- **Conflict of Duties**
- **Examples ~ Compatible**
- Town Clerk and
 - Appointed Tax Collector or Receiver
 - Planning Board Secretary
 - ZBA Secretary
 - Court Clerk

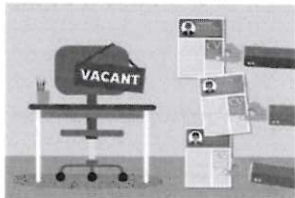




Recap

- **Two Positions are Incompatible If:**
 1. Statute prohibits holding both positions
 2. Local Law or Ethics Code prohibits holding both positions
 3. One Position is Supervisory to the Other
 4. Inevitable & Inherent Conflict in Duties between Two Positions

Impact of Incompatibility



- Vacates Prior Held Office by Operation of Law (Smith v Dillon, 267 AD 39)
- Court Ordered Resignation
- (Dupras v Clinton County 213 A.D.2d 952)



Impact of Incompatibility

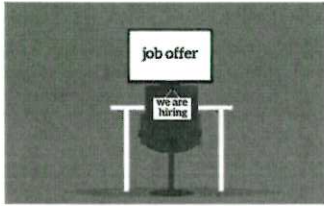
- Accepts and Qualifies for the Incompatible Office
- Takes and Files an oath of office (Spencer v Cristo, 27 Misc 3d 334, 338-39 [Sup Ct 2010], affd, 70 AD3d 1297 [3d Dept 2010])
- Is a Town Elector (Town Law, §23)
 - Resident,
 - US Citizen,
 - 18 or Older



Recusal

- Available for Occasional/Minor Conflicts between two positions incompatible under common law
- Not available for Frequent Conflicts or Conflicts in Significant Functions/Duties
- O'Malley v. Macejka, 44 N.Y.2d 530, 533 (1978); Dupras vs. County of Clinton, 213 A.D.2d at 953 (3d Dep't 1995); Op. Atty. Gen. (Inf.) No. 83-25.

Local Law Exception



- Overall Public Interest Served
- Lack of willing/available residents
- Special Expertise is Necessary

Hot Topic



Credit Cards

Credit Card Surcharges

- New credit card surcharge disclosure requirements effective February 11, 2024
- General Business Law § 518
- Any credit card charges imposed by businesses must be reflected in a certain manner
- How does this apply to local governments?



Credit Card Surcharges

- It doesn't! Not really . . .
- General Business Law § 511 (6): a seller is any person that honors credit or debit cards which may be used to purchase or lease property or services
- Local governments do not meet this definition and do not fall under the General Business Law when acting in a governmental capacity
- Payment of fines, fees, taxes by credit card: all good



Credit Card Surcharges

- What if the town is not acting in governmental capacity?
- If a private entity can do it, likely not a governmental capacity
- Even still, local governments do not fall within description in General Business Law
- Consider posting "compliant" notice if governmental capacity is in question
- State wants assistance with enforcement
- ?



Credit Card Surcharges

- Credit cards in general – governing board can opt into accepting credit cards
- General Municipal Law § 5
- May or may not impose service fee (cannot exceed cost vendor charges) back to taxpayer – most local governments charge the fee back



Hot Topic



Waiving Penalties

Where does it say I can't waive penalties for real property tax payments?

What if the taxpayer's check is stolen and "washed" and there is a police report?

Waiving Penalties

- What about the cities and towns that waived the penalty for taxpayers that had their checks stolen and "washed" from their mailbox?
- Real Property Tax Law § 1182 authorizes taxing districts to cancel or waive interest on "delinquent taxes" if in the best interest of the taxing district
- Towns: taxing districts are counties OR towns if located in Westchester County
- Towns outside of Westchester County cannot rely on RPTL 1182

Waiving Penalties

- Interest charges: penalties are imposed after interest-free period expires (RPTL §§ 924, 924-a)
- Collecting officer has NO authority to waive penalty!
- After interest-free period expires, penalty "Shall" be added
- **Shall = MUST**
- *Comptroller opinion

Waiving Penalties

- Delinquent taxes- taxes that are *included on the return of unpaid taxes*
- For collection purposes, **this does not include taxes that are collecting during the collection cycle that are subject to penalty** – aka the situation that many encountered with the washed checks this cycle
- Once the return is made to the county, the taxes become delinquent taxes that are subject to waiver by the board

Hot Topic

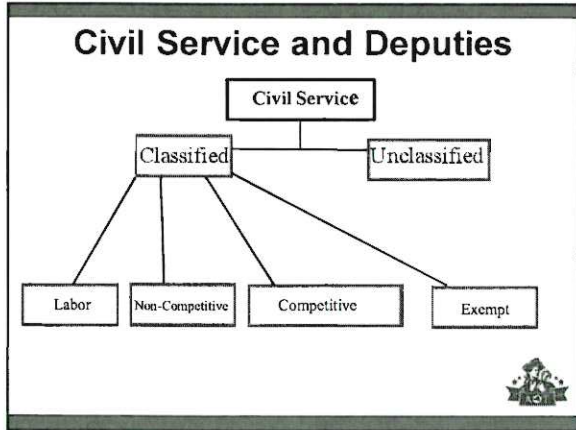


Civil Service & Deputy Town Clerks

Civil Service and Deputies

County Civil Service says I have to hire my second and third deputies off a list, can they do that?





Civil Service and Deputies

Town Law § 30 (10)
1st Deputy: Town Clerk may appoint and remove at his or her please a first deputy. The first deputy town clerk "shall possess the powers and perform the duties of the town clerk during the absence or inability to act of the town clerk, or during a vacancy in the office of town clerk."
2nd and 3rd Deputies: Town Clerk may appoint and remove at his or her pleasure up to two additional deputies whose duties will be established by the town board.

Civil Service and Deputies

Civil Service Law § 41 (1)(b)
 The following offices and positions shall be in the exempt class

- deputies of principal executive officers authorized by law to act generally for and in place of their principals

Civil Service and Deputies

- Interpret Civil Service § 41 and Town Law § 30 (10) to mean that because the 2nd and 3rd deputies, unlike the 1st deputy clerk, do not have specific statutory authority to act for the town clerk in his or her absence the 2nd and 3rd deputy positions are not classified as exempt
- May classify as competitive or non-competitive instead
- But see: *Liss v New York State Civ. Serv. Commn.*, 76 AD2d 831 (2d Dept 1980)



Civil Service and Deputies

Significance of difference between exempt vs non-competitive or competitive

- Competitive positions must be hired off a list of candidates
- Must hold Civil Service Section 75 hearing before terminating or disciplining a competitive or noncompetitive if
 - person has held position for 5+ years or
 - person veteran or volunteer fireperson



Hot Topic



Early Mail Ballots in Special Town Elections

Early Ballot Voting By Mail

- Available After January 1, 2024
- Town Law, §84-b Outlines Rules
- Required for Special Town Elections where Personal Registration is required
- Personal Registration is optional & Authorized by Town Law, §84

Application Requirements

- Town Law, §84-b (2)
- Voter Name and Residential address
- **Signed Voter Statement**
- Voter is a qualified voter and registered to vote in the town, and
- That the information on the application is true to the best of their knowledge, and
- That they understand that it is a misdemeanor to knowingly provide false information.

Application Requirements

Town Law, §84-b (2)

Applications Delivered to the Town Clerk

Mailed Ballots

If Ballot is to be Mailed to the Applicant the Application must be received at least 7 Days before Special Town Election

Personally Delivered Ballots

If the Ballot is to be Personally Delivered to the Voter or Voter's Agent the Application must be received the Day before the Special town Election

List of Early Mail Ballot Recipients

- Town Law, §84-b (3)
 - Applications reviewed by the Special Town Election Board of Inspectors
 - Special Town Election Board of Inspectors provides Town Clerk with a List of Early Mail Ballot Recipients
 - Town clerk marks on List indicating that an early mail ballot has been applied for by, and issued to, the applicant.

List of Early Mail Ballot Recipients

- Town Law, §84-b (6)
- Town Clerk makes list of voters who were issued Early Mail Ballots
- List Open to Public Inspection
- Posted in Conspicuous Places during the Special Town Election

Challenges to Early Mail Ballot Applicants

- Town Law, §84-b (6)
- Filed with the town clerk before Special Town Election
 - Qualified voters may file written challenges to voters appearing on the list
 - Challenge must include reasons for challenging voter on the list other than that the voter should have applied for an absentee ballot
- Filed with Election Inspectors During Election Before Polls Close

Early Mail Ballot

- **Town Law, §84-b (4)**
 - Same content and form as the Special Election Ballot
 - Ballot must include “Official Ballot, Early Mail Voter”
- **Town Law, §84-b (5)(c)**
 - Early Mail Ballots Must reach Town Clerk’s office no later than 5 pm on the date of the Special Town Election

Early Mail Ballot

- **Town Law, §84-b (5)**
- **Envelope Requirements**
- **Statement - “Official Ballot, Early mail Voter for Special Town Election” and the Election Date**
- **Voter Information (Name, residence, town, county, and district)**
- **Early Voter Statement against fraud – signed by voter**
- **Early Mail Ballot Voting Instructions**

Canvassing & Casting Early Mail Ballots

- **Town Law, §84-b (9)**
- **Election Inspectors get Early Mail ballots received before 5 pm on Election Day**
- **Election Inspectors Must:**
 - Compare Voter signature on ballot envelope with registration poll
 - Certify corresponding signatures by initialing on registration poll
- **Uncertified Ballots or Ballots of Voters who Voted in Person are returned Unopened to Town Clerk**
- **Certified Ballots are Opened and Cast**

Canvassing & Casting Early Mail Ballots

- **Objections (Town Law, §84-b (11))**
- Election Inspectors must vote on written objections filed with the town clerk
 - **Sustained Objections** – envelope returned unopened to town clerk
 - **Objections Not Sustained** – envelope opened and ballot deposited in ballot box
 - **Deceased Voters** – if a voter is deceased on the day of the election the envelope is returned to the town clerk unopened.
- **Empty Envelopes (Town Law, §84-b (12))**
 - Election Inspectors File a Memo that the Envelope Received was Empty

Canvassing & Casting Early Mail Ballots

- **Number of Early Mail Ballots Vote Cast (Town Law, §84-b (13))**
- Election Inspectors Count the Early Mail Ballots in ballot Box
- Deduct the Number of Opened and Missing Early Mail Voting Ballots
- Add the Number of Early Mail Ballots to the Other Votes Cast

Early Mail Ballots



Work with your County Board of Elections!



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- **Questions or Comments**

- Email: Info@nytowns.org
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