

El. Bd. Op. 05-1 (Reaffirmed 12/17/08)

Summary:

A vacancy in the office of municipal judge, caused by the creation of that office by a municipality, is filled on a temporary basis by appointment and on a permanent basis by election at the next spring election following the effective date of the office, if the office takes effect before December 1 and at the spring election following the next spring election if the office takes effect after December 1. (Issued to John Voelker, April 22, 2005)

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on December 17, 2008.

Opinion:

You have requested a formal opinion of the State Elections Board to respond to the following question:

If a municipality creates the office of municipal judge in January 2004 and a new judge takes office then, is the office subject to election in the 2005 spring election? Can this be changed by an ordinance of the municipal board specifying a later election date?

The circumstances regarding which you have asked this opinion are as follows:

In December 2003, the Ferryville Village Board, by ordinance, created the office of municipal judge effective January 1, 2004. Because no election could be held in January 2004 to fill the office of municipal judge, the village board filled the office by appointment. The appointment provided that the office was to expire in April 2006.

The opinion of the Elections Board is that if a municipality creates the office of municipal judge effective in January 2004, and a new judge takes office at that time, pursuant to a temporary appointment by the municipal governing body under §§17.245 and 8.50, Stats., the office of municipal judge for that municipality is filled on a permanent basis at the spring election in April 2005. Because both the filling of that office on a temporary basis by appointment, and on a permanent basis by election, is specifically governed by statute, the municipality may not, by ordinance, change the term of the temporary appointment or the date of the election, to fill the office on a permanent basis.

The two statutes referred to above - the statute governing the filling of the office of municipal judge newly created by municipal ordinance (§17.245, Stats.), and the statute governing the filling of vacancies in the office of municipal judge (§8.50(4)(fm), Stats.) would both appear to apply to the creation of the office of municipal judge and the filling of the vacancy caused by the creation of that office.

Section 17.245, Stats., reads as follows:

17.245 New city, village or town office, filling. Whenever an elective office is created in a city, village or town pursuant to law or ordinance, the office shall not be deemed vacant until it has first been filled by the electorate, **except** that if a city, village or town enacts an ordinance or bylaw creating a municipal court under s. 755.01 before the December 1 preceding the spring election the office of municipal judge for that court shall be considered vacant and a temporary appointment may be made by the city, village or town governing body pending the election of the initial elected occupant of the office. **(Emphasis supplied)**

How §17.245, Stats., applies to these circumstances is not clear because the office of municipal judge was not created until after December 1, 2003. What the statute appears to mean is that if the office of municipal judge is created before December 1, then the governing body may appoint an interim judge until the office is filled on a permanent basis at the following spring election. Thus, if Ferryville had created the office of municipal judge effective November 30, 2003, and its appointee had been appointed to hold that seat effective November 30, 2003, the statute is clear that the office would be permanently filled at the 2004 spring election. But another way to look at the statute is that because the Village of Ferryville created the office of municipal judge before December 1, 2004, the village may appoint an interim officeholder until the office is permanently filled at the spring 2005 election.

The foregoing conclusion would be clearer still if, instead of providing that “if a city, village or town enacts an ordinance or bylaw creating a municipal court under §755.01 before the December 1 preceding the spring election the office of municipal judge for that court shall be considered vacant and a temporary appointment may be made by the city, village or town governing body pending the election of the initial elected occupant of the office,” the legislature had said that:

if a city, village or town enacts an ordinance or bylaw creating a municipal court under s. 755.01 **before the December 1** preceding the spring election the office of municipal judge for that court shall be considered vacant and a temporary appointment may be made by the city, village or town governing body pending the election of the initial elected occupant of the office **at the next spring election.**

The legislature did not provide the foregoing, but the Board believes that that is what the legislature meant, or otherwise the statute does not make sense. If the basic principle of the statute is that a newly created office has to be filled by election, not by appointment; and then creates a narrow, **temporary** exception for municipal judge if the office of municipal judge is created before December 1, why would the legislature have intended that that “temporary appointment” last for over two years. That is not a temporary appointment.¹

If the exception, in §17.245, Stats. - for offices of municipal judge created before December 1 - does not apply, then the basic premise of s.17.245, Stats., does because, in either case, the village was undeniably creating an elective office when, in December 2003, the Village of Ferryville created the office of municipal judge. The basic premise of s.17.245, Stats., is:

¹ Under §7.55(4), Stats., the term of office for municipal judge is two years unless a longer term is provided by the municipality’s creating ordinance: **755.02 Term.** The judges shall be elected at large for a term of 2 years unless a longer term, not exceeding 4 years, is provided by ordinance or bylaw. The term shall commence on May 1 of the year of the judge's election.

Whenever an elective office is created in a city, village or town pursuant to law or ordinance, the office shall not be deemed vacant until it has first been filled by the electorate,. . .

If the basic premise of §17.245, Stats., applies, then Ferryville did not have the authority to fill the office by temporary appointment and should have filled it, on a permanent basis, by election at the spring, 2004 election. Because Ferryville filled the office by temporary appointment, the village had to have used the statute's exception for its temporary appointment, but that temporary appointment only lasts until the next spring election: April 2005²

Instead of the language in §17.245, Stats., however, the discussion in this matter has centered around the language of the statute for filling vacancies in the office of municipal judge. That statute is §8.50(4)(fm), Stats., (re-printed above). That statute reaches the same result as is reached under §17.245, Stats: Ferryville should have filled the office of municipal judge for a full term at the spring 2005 election. The critical language of the statute - that appears to apply to this situation - is the following:

. . . a vacancy occurring during the period after December 1 and on or before the date of the spring election shall be filled at the 2nd succeeding spring election, and no such election may be held after the expiration of the term of office nor at the time of holding the regular election for the office.

Under the terms of the statute, if the office of Ferryville Municipal Judge had been created before December 1, 2003, it would have been filled by special election at the spring 2004 election. But because the office was created and filled after December 1, 2003, but before the spring 2004 election, the office is filled at the second succeeding spring election. The second spring election succeeding the creation of the office is the spring 2005 election.

Apparently, in setting the term of office, the Village Board interpreted the language "second succeeding election" to mean April 2006. This appears to be premised on counting April, 2005 as the "first succeeding election." But the term "succeeding" refers to the effective date of the appointment to the office of municipal judge. The first election to succeed the appointee's January 1, 2004 appointment was the spring 2004 election, not spring 2005. Therefore, the second spring election to succeed the January 1, 2004 appointment was spring 2005, not spring 2006.

Consequently, the Board believes that, with respect to the creation of the office of municipal judge in Ferryville, Wisconsin after December 1, 2003, and the temporary appointment to fill the vacancy in that office in January, 2004, the first election to permanently fill that office, under both §§17.245 and 8.50(4)(fm), Stats., was in April 2005.

² The office of Ferryville Municipal Judge, or any municipal office created in January 2004, could not have been filled at the spring, 2004 election because there would not have been enough time. The reason that the legislature used December 1 as the cut-off for the municipal judge exception is because December 1 is the beginning date for the nomination cycle for all offices elected at the spring election. An office created in January would miss virtually the entire nomination period. Offices are not created that way.