

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, C.C.B.
266-4511**

April 22, 2003

OPINION NO. 03-002

To: Alderperson Mike Verveer, Common Council President

From: James L. Martin, City Attorney

Re: **Filling a Permanent Vacancy in Municipal Court Judge Position**

The current municipal court judge was recently elected to the Circuit Court. As a consequence there will shortly be a permanent vacancy in the municipal court judge position. You have requested the opinion of the City Attorney regarding the statutory methodology for filling the position pending selection of a new judge.

Brief Answer

A vacancy in the office of municipal judge is filled by temporary appointment by the Common Council until the office is permanently filled by special election.¹

Opinion

It is an elementary fact that an appointment to an office can be made only by the authority empowered to make it. This is true for an initial appointment as well as for the filling of vacancies. The power of appointment is generally explicitly set forth by the legislature:

Since the power of appointment to office is not essentially an executive function, it may therefore, in the absence of constitutional restriction, be vested in departments other than the executive. The state legislature may confer such power in the absence of constitutional restrictions. Thus, by statute or charter, it is often prescribed that the council or other local governing body shall have power to appoint or select certain municipal officers and employees. This frequently

¹ Given the timing of the anticipated vacancy, the special election will be held concurrently with the 2004 spring election. Section 8.50(4)(fm), Stats. Such special election shall be ordered by the mayor as provided in § 8.50(1), Stats.

includes power to fill vacancies occurring in certain offices, whether such offices are elective or appointive. (§ 12.74 McQuillen, Municipal Corporations. p. 399.)

There are various statutory provisions that govern the filling of vacancies. Section 17.23, Wis. Stats., sets forth the manner of filling vacancies in City offices. The statute reads in relevant part as follows:

17.23 - Vacancies in City offices; how filed²

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(1)(bm) In the office of municipal judge, in the manner provided in § 8.50(4)(fm).

* * * *

(c) In the office of any other elective officer, and except as provided in § 9.10[recall], by appointment by the mayor subject to confirmation by the council

Section 8.50(4)(fm), relating to vacancies in the office of municipal judge, declares:

“A permanent vacancy in the office of municipal judge may be filled by temporary appointment of the municipal governing body”

Thus while vacancies in most offices are filled by appointment by the mayor subject to confirmation by the common council, vacancies in the office of municipal judge are filled by the “governing body.” Neither Chapter 17 nor Chapter 8 of the Wisconsin Statutes defines the term “governing body.” The term, however, is defined in other sections of Wisconsin Statutes relating to municipalities. Just to cite several examples:

5.02(6) “Governing body” means the common council of a city, board of supervisors of a town or board of trustees of a village.

66.0309 Creation, organization, powers and duties of regional planning commissions. (1)(a) “Governing body” means the town, village or county board or the legislative body of a city.

² Vacancies in the office of mayor or the office of alderperson are filled by appointment by the common council. Section 17.23(1)(a), Wis. Stats.

In Chapter 985, 985.01(g) the definition of “governing body” has the meaning given in § 345.05(1)(b), Stats., i.e., . . . “the legislative body of a city or village with reference to cities and villages. . . .”

Therefore, I conclude that “governing body” as used in § 8.50(4)(fm), Stats., means the Common Council. The make up of the Common Council is described in § 62.11, Stats.

62.11 Common Council. (1) How constituted.

The Mayor and alderpersons shall be the common council. The mayor shall not be counted in determining whether a quorum is present at a meeting but may vote in case of a tie. When the mayor does vote in case of a tie the mayor’s vote shall be counted in determining whether a sufficient number of the council has voted favorably or unfavorably on any measure.

Based on the foregoing, it is my opinion that a permanent vacancy in the municipal court judge position would be filled by temporary appointment of the Common Council. As indicated in § 62.11(1), the Mayor’s formal statutory role in this process is limited to voting in the event of a tie.

The statutes do not get into the minutia of the appointment process. However, it is generally understood that:

The power to appoint an officer confers upon the appointing power the right of deciding the question of the competency of applicants for the services to be performed. (§ 12.70 McQuillen, Municipal Corporations, p. 390.)

Consequently, it is appropriate for the Common Council to define and establish the selection process by a resolution duly adopted by the body.³ Nothing precludes the Council from

³ Any selection process should be informed by the responsibilities and qualifications of the office. These are set forth in § 3.59(2) and (3), MGO:

(2) Jurisdiction. The Municipal court shall have jurisdiction over incidents occurring on or after September 1, 1992, as provided in Article VII, Sec. 14 of the Wisconsin Constitution, Sec. 755.045 and 755.05, Wis. Stats., and as otherwise provided by State Law. In addition, it shall have jurisdiction over all actions commenced on or after September 1, 1992, in which a violation of any Madison General Ordinance restricting or prohibiting parking, stopping or standing is alleged regardless of the date of the alleged incident. It shall have exclusive jurisdiction over actions in which the City seeks to impose forfeitures for municipal ordinance violations except as provided in Sec. 755.045, Wis. Stats. The Municipal Judge is authorized to issue warrants under Sec. 755.045(2) and Sec. 66.0119(2) and (3), Wis. Stats.

(3) Municipal Judge.

delegating the administration of this selection process to a committee, provided that the governing body, i.e., the Common Council, ultimately makes the appointment.

James L. Martin
City Attorney

JLM:CSH:skm
cc: Mayor David Cieslewicz
All Alders

Summary: A vacancy in the office of municipal judge is filled by temporary appointment by Common Council until the office is permanently filled by special election in Spring of 2004.

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- (a) Qualifications. There is hereby created the office of Municipal Judge of the Municipal Court of the City of Madison. The Municipal Judge shall be a resident of the City, shall be licensed to practice law in the State of Wisconsin and have been so licensed for five years immediately prior to election or appointment.