

March 18, 2019

Dave O'Brien, Supervisor
Town of Hampton
Via Email

Re: Q&A relative to highway superintendents (and one regarding Town Clerk)

Dear Dave:

1. What authority does the Town Board have over the Elected Highway Superintendent or the elected Town Clerk. Please reference the law.

Highway Superintendent Discussion: See generally Highway Law §140 provided herewith. The powers of the highway superintendent are set forth by statute. That position being an elected position is largely autonomous from the Town Board. That is, but for the power of the budget, the Town Board has limited oversight over the highway superintendent. See case/opinion note below:

- Town board does not have the authority to require the town highway superintendent to be a "working superintendent". Op.State Compt. 81-168.

Town Clerk Discussion: See generally Town Law §30 provided herewith. That position as well being an elected position is largely autonomous from the Town Board. Some case/opinion notes are below:

- A town supervisor has no authority to set office hours for the town clerk but the town board may, by local law, determine the hours when the town clerk's office must be open for business but this does not include authority to require that the town clerk be personally present in the office during these hours. Op.State Compt. 80-742. See, also, 25 Op.State Compt. 165, 1969.
- A town clerk may maintain unofficial Saturday morning office hours for the purpose of issuing licenses for the convenience of the public, even when he is authorized to maintain official office hours only on week days. 26 Op.State Compt. 210, 1970.
- Saturday closing of offices of supervisor, town clerk, and office of assessor in town of second class, is a matter of determination by each such officer. 10 Op.State Compt. 43, 1954.
- A town clerk **should** be on duty a sufficient number of hours to enable him or her to adequately and efficiently serve the public. 2 Op.State Compt. 412, 1946.
- The town board may designate the location of the town clerk's office, but may not compel the clerk to surrender custody of papers required by law to be filed in his office. 27 Op.State Compt. 159, 1971.

- The decision as to the location of the town clerk's office and the accompanying town public records is for determination by the town board. 24 Op.State Compt. 918, 1968. See, also, 16 Op.State Compt. 34, 1960.

2. Can the Town Board Direct the Elected Highway Superintendent on highway operations or how to maintain or fix the roads. What can the Town Board do in maintenance of roads? Can they override the Highway Superintendent.

Discussion: No. The Town Board cannot direct the Town highway superintendent in this regard, nor can they “override” the Town highway superintendent. You are asking here to prove a negative. That is, it is not the legal question to prove that the Town Board CANNOT override the Town’s highway superintendent, it is for the Town Board to prove that it CAN override the Town highway superintendent. Note that this question you have posed is extremely broad and, in and of itself, would constitute an entire memo. For example, there are instances where Town Board approval by the highway superintendent is required (certain actions related to highways, etc.). But that does not imply that the Town Board can ‘override’ the highway superintendent.

From our discussions, I believe you mean this relative to ‘maintenance’ in which case it is the highway superintendent who decides the level of maintenance required.

3. What authority does the Town Board have over Town Highway employees or Town Highway Equipment.

Discussion: Take a look at some of the case and opinion notes that I have pasted below. These are from Highway Law §140, and seem rather clear but I can clarify on any of these as needed. In short, the Town Board sets the budget, and the highway superintendent sets forth the personnel. However, the Town Board could not, I don’t think, cut the budget to such a point where the highway superintendent could not complete the care and maintenance of the roads. I.e., though this would create interesting legal questions, I believe at a bare minimum the Town Board is required to provide for the budget needed to maintain Town highways.

- The highway superintendent has absolute control over hiring of employees of the highway department within the limitations of the highway fund appropriation for wages for employees, and therefore, apart from amending the budget, there is no legal means for the town board to prevent the filling of an unexpected vacancy in the highway department by the highway superintendent. Op.State Compt. 81-352.
- Town superintendent has power of selection of town highway employees. 3 Op.State Compt. 532, 1947.
- The town superintendent of highways has responsibility for hiring employees of the town highway department involved in repair and maintenance of, and clearance of snow from, town highways and bridges and has the responsibility of filling other positions in the town highway department. Op.Atty.Gen. (Inf.) 82-62.
- Employment of laborers by town superintendent of highways is not subject to approval by town board. Clarke v. Town of Russia (3 Dept. 1939) 257 A.D. 703, 15 N.Y.S.2d 415, reversed on other grounds 283 N.Y. 272, 28 N.E.2d 833.

- A town superintendent does not need the approval of the town board to employ persons who will actually be engaged in maintaining and repairing highways and bridges, and in removing obstructions caused by snow. 24 Op.State Compt. 112, 1968.
- Town board has no direct control over selection or number of town highway employees. 8 Op.State Compt. 186, 1952.
- A town superintendent of highways, without the approval of the town board, may dismiss a person employed by the highway department to maintain and repair town highways. Op.Atty.Gen. (Inf.) 82-38.

4. Can the Town Board Hire people, consultants, road maintenance companies to work on the roads?

Discussion: I am assuming that you mean for maintenance. In that regard, the answer would be no. The Town Board cannot sidestep the highway superintendent and essentially hire out the maintenance of town highways without the authority of the highway superintendent. I find no cases on point in that regard, but this would seem to me to usurp the power of an elected highway superintendent.

5. What agencies in the state oversee an elected Highway Superintendent and the operations of the Highway Department or even direct him in his role?

Discussion: In short. No “agency” in the state oversees an elected highway superintendent or the operations of the highway department. That, however, is not a complete or definite answer.

For example, a “public officer” which would include a highway superintendent, may be removed by the Supreme Court for “misconduct, maladministration, malfeasance or malversation in office” pursuant to Public Officers Law §36, copy provided. Note that these terms carry very heavy burdens in terms of proof, so a case under Public Offices Law §36 in terms of actual removal is to be brought on only the strongest showings of proof.

Note too that as elected officials, public officers including the highway superintendent are subject to a key form of oversight: the vote. That is, the power of the people to vote on election day. Lastly, note too that the Town may convert itself from an elected highway superintendent to an appointed highway superintendent, a conversion that Hampton tried unsuccessfully years ago. That would change this entire analysis.

Let me know if you have any further questions.

Sincerely,



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