

# LEGAL Q&A: The Oath of Office for Municipal Officials

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This column will summarize the requirements for local officials to take an oath of office, providing guidance on the who, what, when, why and how of the oath of office in New Hampshire.

**Q: What is New Hampshire's oath of office?**

**A:** As provided in RSA 42:1, every town officer must take the following oath of office prescribed in Pt. II, Article 84 of the NH Constitution:

I, A. B. do solemnly swear, that I will bear faith and true allegiance to the United States of America and the state of New Hampshire, and will support the constitutions thereof. So help me God.

I, A. B. do solemnly and sincerely swear and affirm that I will faithfully and impartially discharge and perform all the duties incumbent on me as \_\_\_\_\_, according to the best of my abilities, agreeably to the rules and regulations of this constitution and laws of the state of New Hampshire. So help me God.

**Q: Who are the "town officers" who must take the oath of office?**

**A:** The term "town officer" is not defined, although N.H. Const. Pt. II, Article. 84 states that civil officers who are chosen must take the oath. This strongly suggests both appointed and elected statutory officers shall take the oath of office (e.g., select board, planning board, town clerk, tax collector, etc.). For members of a board or committee created by the select board, taking the oath of office would be optional, but nevertheless recommended. This requirement that elected town officials take the oath of office is stated unambiguously in RSA 669:9. Elsewhere an oath of office is required by statute for the following positions: Assistant Moderator, RSA 40:3-a, RSA 658:7; Police Officers, RSA 105:2; and a deputy clerk or assistant who is assisting with receiving absentee ballots, RSA 669:1-a, VIII and RSA 669:26, II (c).

**Q: How does taking the oath of office have a bearing on serving as a town officer, elected or appointed?**

**A:** Taking the oath of office is a precondition to serving as a public official for appointed or elected members of a public body. RSA 92: 2 provides: "No person chosen or appointed to any public office or to any position where an oath is required, under any law, shall exercise such office or position or perform any act therein until he shall make and subscribe the oath or declaration as prescribed by part 2, article 84 of the constitution of New Hampshire and any such person who violates said oath after taking the same shall be forthwith dismissed from the office or position involved."

**Q: What oath of office statutes apply to city officers?**

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**A:** The statute that governs city charters, RSA chapter 49-C, mandates that “every person elected or appointed to any city office before entering upon the duties of his office shall take and subscribe to an oath of office, as provided by law, which shall be filed and kept in the office of the city.” In addition, under RSA 46:4 when first convening after being elected, the mayor, aldermen and council members must take the oath of office, which must be recorded by the clerk. RSA 46:5.

**Q:** When should elected town officials be sworn in?

**A:** The applicable statute, RSA 42:3, is slightly confusing. It could plausibly be interpreted to allow a newly elected official to be sworn in after the recount period but before the business session, but only if she was running in a contested race. However, the better interpretation is that all newly elected officials should not be sworn in until after the business session ends. In 2020, this was modified in Emergency Order #23, paragraph 9, which allowed the swearing in of newly elected officers before the business meeting was concluded due to town meeting postponements in 2020. However, where a town uses Emergency Order #83 to postpone an annual meeting, all office holders whose terms would have expired in 2021 have their terms of office extended until the business meeting is concluded. In those circumstances, those who were elected at the official ballot voting day cannot take the oath of office and assume office until the conclusion of any postponed business meeting.

**Q:** Who can administer the oath of office?

**A:** The moderator, town clerk, one of the selectmen or a justice of the peace are authorized to administer the oath of office. RSA 42:2

**Q:** Who records and keeps on file a certificate of taking the oath of office

**A:** The town clerk must make a record of every oath of office taken in open town meeting, or taken at any other time and place, and shall record and keep on file every oath of office certificate. RSA 42:8.

**Q:** What happens if we are not sure that all our officials have taken an oath of office. How does that affect the decisions they have already made?

**A:** Fortunately, the acts of officials who inadvertently have failed to take an oath of office are generally valid as the decisions of “de facto” officials. “It is held here and everywhere that one who assumes a public office under color of an election or appointment illegal in fact is a de facto officer, and his official acts are valid as to third persons when they are not from their nature or by express statutory enactment void.” *State v. Boiselle*, 83 N.H. 339, 341 (1928). “To qualify as a de facto officer, the officer’s title need not be good in law but she must be in unobstructed possession of her office and discharging its duties in full view of the public.” *State v. Doyle*, 156 N.H. 306, 310 (2007). Needless to say, the official should be sworn in as soon as the error is detected.

**Q:** What happens if a term of office has expired but we have not yet appointed or reappointed an office holder?

**A:** Under RSA 41:3 “all town officers shall continue in office until the next annual meeting and until others shall be chosen or appointed and qualified in their stead, except in cases where the law otherwise directs.” This means that for elected officials they continue to hold office, and may conduct public business until any newly elected officials are sworn in. For appointed officials, RSA 41:57-a provides that “the term of office of any appointed town officer shall begin upon his or her appointment and qualification for office and shall end upon the appointment and qualification of his or her successor.” So, if the incumbent is willing, he or she is entitled to serve on a holdover basis until a replacement is appointed and sworn in. The terms of office of land use board members are explicitly extended until a successor has been appointed and qualified. RSA 673:5, III.

**Q:** What happens if a person who has been elected fails to take the oath of office?

**A:** A vacancy is declared if after his election a person fails to take the oath of office within the prescribed time period. RSA 652:12, IV. Under RSA 42:6, the time for taking the oath is not later than 30 days after the person’s election (except for a delay occasion by postponement under Emergency Order #83).

**Q:** How does the oath of office govern the conduct of the office holder?

**A:** In general, not complying with the oath of office by not upholding the New Hampshire or US Constitutions, or by not discharging public duties consistent with New Hampshire law and regulations, can be a basis for being removed from office. RSA 42:1/

Under RSA 42:1-a, the Superior Court can remove an office holder for divulging confidential information learned by virtue of his official position, or in the course of his official duties if:

(a) A public body properly voted to withhold that information from the public by a vote of 2/3, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or would render proposed municipal action ineffective; or

(b) The officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

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