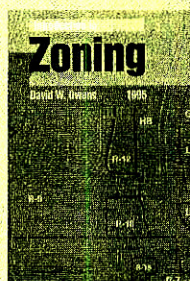
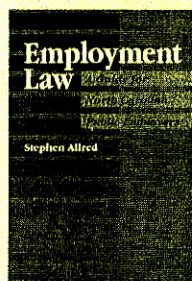


**Selected Local Government  
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**Employment Law: A Guide for  
North Carolina Public Employers**

Second edition, 1995

Stephen Allred

419 pages; ISBN 1-56011-249-2

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1995

David W. Owens

120 pages; ISBN 1-56011-275-1

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For ordering information, telephone  
(919) 966-4119.

**Questions I Am Frequently Asked:  
May We Fill a Vacancy Before It Occurs  
(and May a Board Member Participate in  
Filling His or Her Own Vacancy)?**

**David M. Lawrence**

Sometimes local government officials or members of local government boards resign with the understanding that the resignation will take effect at some future date. The question then often arises: May the official or board with power to fill the vacancy do so before the vacancy actually occurs? And, if the vacancy is within the membership of the appointing board itself, may the board member who is resigning participate in filling her or his own vacancy? Although this set of questions is not directly answered by statute in North Carolina and has not been litigated in this state, the answer to both questions appears to be yes. The chain of reasoning is as follows:

First, a member of a local government board clearly may resign effective some date in the future.<sup>1</sup> Once the resignation is accepted, it may not be withdrawn, but it takes effect upon its own terms.

Second, the case law nationally is clear that when an appointing board or official knows of a vacancy that will occur at a specific future date, the board or official may appoint someone to fill the vacancy before that future date. Numerous cases support this rule; two will illustrate it. In *Board of Education v.*

*Nevels*,<sup>2</sup> the school board, acting in December 1975, reappointed the superintendent for a term to begin the succeeding July. A new board took office in January 1977 and sought to have the reappointment invalidated. The Kentucky court upheld the reappointment, writing that "[i]t has long been the rule in Kentucky that there can be a valid appointment to an office in advance of the time the vacancy actually occurs. Prospective appointments to office are generally deemed to be valid."<sup>3</sup> In *State ex rel. Oklahoma Tax Commission v. Mourer*,<sup>4</sup> the state tax commission made its appointment to a county board of equalization on December 13, for a term beginning the upcoming January 1. The enabling statute also called for appointments to the board of equalization by the board of county commissioners but prohibited the tax commission and the county commissioners from appointing persons residing in the same commissioners' district. On January 2 the county commissioners purported to make their appointment to the board of equalization but appointed a person who resided in the same commissioners' district as the tax commission appointee. When the tax commission sued to uphold their appointment, the Oklahoma court ruled in favor of the earlier appointment: a board may make an appointment before a vacancy actually

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occurs. Therefore, the tax commission appointment was valid, and, having been first, the tax commission appointment had precedence.<sup>5</sup> I have found no cases disagreeing with this basic rule, and therefore I expect the North Carolina courts would adopt it as well, should they face the question. The rule, after all, does make sense: it allows an appointing official or board, knowing of an impending vacancy, to make sure there is no interruption in the performance of the duties associated with the office or position in question.

There is one important exception to this general rule, one that would probably be accepted in North Carolina along with the rule. When the vacancy will not become effective until after the conclusion of the terms of some or all of the members of the appointing body, the vacancy may not be filled by the current members of the appointing body. For example, in *State ex rel. Norman v. Viebranz*,<sup>6</sup> a school board appointed one of its members (Marcial) to a regional vocational education board as the school board's *ex officio* representative on that regional board. Marcial was then defeated for reelection, which also cost him his seat on the regional board. In anticipation of Marcial's leaving the regional board, the remaining members of the school board appointed another school board member, Norman, to the seat on the regional board. Shortly thereafter, the new members of the school board qualified for office, and they appointed Viebranz to the same seat on the regional board. In a suit between Norman and Viebranz, the Ohio Supreme Court held that it was the new school board, rather than the retiring board, that was empowered to make the appointment.<sup>7</sup>

Third, until the effective date of the resignation, a resigning board member remains a full member of his or her board, as entitled (or required) to participate in board matters as any other

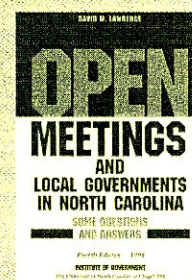
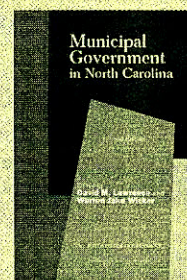
member.<sup>8</sup> When a board is filling a vacancy in its own membership, as county commissioners and city councils are authorized to, and therefore the person resigning is resigning as a member of that board, he or she still remains a member of the appointing board until the resignation becomes effective. The North Carolina statutes impose a duty on the members of city councils and boards of county commissioners to vote on all matters that come before the board, unless excused as permitted by statute.<sup>9</sup> The statutes limit the reasons that justify such an excuse, and those reasons are inapplicable to filling one's own vacancy.<sup>10</sup> Therefore, if the board acts to fill the vacancy in its own membership before the vacancy in fact occurs, the resigning member not only may, but must, vote on the issue.

In conclusion, then, when it becomes settled that a vacancy in an office will occur at some date in the future, the official or board with authority to fill the vacancy may do so before the vacancy in fact occurs; the only exception to this rule occurs when the vacancy will not become effective until after the end of the term of the appointing official or of the terms of some or all of the members of the appointing board. In addition, if the board is filling such a future vacancy among its own membership, the member whose resignation is causing the vacancy may participate in filling it.

### Notes

1. See *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), in which a district court judge had resigned with a future effective date and the court clearly assumed such a resignation was possible and proper.
2. *Board of Educ. v. Nevels*, 551 S.W.2d 15 (Ky. Ct. App. 1977).
3. *Nevels*, 551 S.W.2d at 18.
4. *State ex. rel. Oklahoma Tax Comm'n*, 596 P.2d 882 (Ok. 1979).
5. Another relatively recent case accepting this general rule is *Morrison v. Michael*, 159 Cal. Rptr. 568 (Cal. Ct. App. 1979), in which the court upheld a pros-

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