

Must a Public Officer's Resignation Be Accepted in Order To Be Effective?



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When a North Carolina public official resigns, must the resignation be accepted, or may it become effective without an acceptance? Although it has been argued that North Carolina law requires acceptance, I believe that the basis for that argument is no longer reliable. Rather, the question in North Carolina is unsettled, and it would be useful for the General Assembly to resolve it.

The courts of the various states have not uniformly answered the question whether, under the common law, a resignation must be accepted in order to be effective. A majority of the courts that have considered the matter have required an acceptance, following the English rule. But a fair number have rejected the English precedents and held that no acceptance is necessary. The North Carolina picture is not so clear cut.

Those who argue that the North Carolina law is settled, and that an acceptance is required, point to the language of Chief Justice Ruffin in the very old case of *Hoke v. Henderson* (1833).¹ In the course of a long opinion Judge Ruffin said: "An of-

ficer may certainly resign; but without acceptance, his resignation is nothing and he remains in office."² The language certainly seems to be clear, and it has convinced both Judge John Parker, a longtime member of the federal Fourth Circuit Court of Appeals, and the State Attorney General. Both Judge Parker and the Attorney General have written that acceptance is required, citing *Hoke* as their authority.³

But, in fact, *Hoke* is very shaky authority, for Ruffin was addressing not *resignations* but instead the *property rights* of an officeholder. Therefore, Ruffin's observation about resignations was not a ruling on that topic but a part of his argument supporting the decision on the officeholder's property rights.

The question in *Hoke* was whether a public officeholder in North Carolina, as in England, had a property right in his public office and thus could not be deprived of the office without due process of law. The State Supreme Court held that he did have such a property right, and the discussion on acceptance

of resignations was an important part of the Court's logic. The argument presented to the Court was that it was not fair to give the officeholder a property right in the office (which effectively made it impossible to discharge the officeholder or reorganize the government) because the officeholder could quit at any time he pleased: the obligation was not mutual. It was in response to this argument that Ruffin discussed resignations. His point was that a mutual obligation did exist because an officeholder could *not* resign at his pleasure; his resignation was not effective until accepted.

Although the Court's ruling followed English precedent, it was out of step with American concepts of public service. North Carolina was quickly isolated as the only state to give this property right to officeholders, and the *Hoke* decision was eventually overruled in 1903—that is, officeholders no longer have a property right in their office.⁴ Thus there is no longer a quid pro quo for the obligation of the officeholder to remain in office.

Moreover, the common law background of the officeholder's obligations has changed a great deal since *Hoke* was decided. In his discussion of resignation, Ruffin wrote that the "public has a right

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1. 15 N.C. 1 (1833).

2. *Id.* at 28.

3. Judge Parker cited *Hoke* in *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929). The Attorney General's office cited *Hoke* in a letter to W. I. Thornton, dated Oct. 22, 1982.

4. *Mail v. Ellington*, 134 N.C. 131 (1903).

to the services of all citizens, and may demand them in all civil departments as well as in the military."⁵ In England this was certainly true. A person appointed or elected to a local government office in England was subject to criminal indictment if he refused to accept the office. In addition, the court could order him to accept the office and hold him in contempt of court if he refused to do so.⁶ Given the importance the law placed on accepting the burdens of office, it is no wonder that the English rule required acceptance of a resignation before those burdens could be given up.

But this strict view of the obligations of citizenship has never been the common law of North Carolina and has been a decreasing part of the state's statutory policy. Ruffin himself, in a case decided a few years after *Hoke*, held that while the legislature might make it a crime for a person to refuse to accept public office in North Carolina, it had not done so and therefore one could not be indicted under the state's common law for refusing office.⁷ Thus by 1842 the English and the North Carolina notions of public office had diverged.

Moreover, the legislature has further modified traditional notions of the demands of office. Until 1971 the general law affecting cities and towns provided that if a person was elected or appointed to one of several town offices and refused to serve, he was subject to a civil penalty.⁸ Present law, applicable to all public officers, is simply that refusal to serve creates a vacancy.⁹ This shift in attitude has been reflected over the years in other contexts. For example, throughout the nineteenth century male citizens were responsible for helping to maintain public streets and highways; each had an obligation to work on the roads a certain number of days a year. But this system was abandoned in the early twentieth cen-

tury, and no trace of it remains. Thus North Carolina legislative policy today seems in accord with the comments, eighty years ago, of the Nevada Supreme Court: "The suggestion that a civil officer in this country may be compelled against his will to hold an office, and that he is liable commonly for his refusal to do so, is not in accord with prevailing American ideas of liberty of action."¹⁰

Thus *Hoke* is a weak foundation indeed on which to build a case for the need for acceptance of resignations. Its ruling, which is closely tied to the resignation issue, has been discredited, and the legal context out of which the case's notion of public office emerged has been significantly modified. *Hoke* is not a reliable basis for a rule requiring acceptance.

There is one other possible present source for a requirement that resignations be accepted before they become effective. Both the State Constitution and the General Statutes provide that an officeholder is to remain in office until his successor has been appointed or elected and has qualified.¹¹ It might be argued that to permit a person to resign, without requiring acceptance, is inconsistent with this constitutional and statutory provision that he remain in office until there is a successor. But such an argument misconceives the purpose of the holdover provisions. This sort of provision is found throughout the states and indeed was part of the common law. Its purpose is to avoid an interval during which no one is available to exercise the duties or responsibilities of office. The provision accomplishes that purpose by *permitting* an officeholder to retain his office even after his term has ended, until a successor has been selected and has qualified. It does not *require* the officeholder to stay in office, however, and it has not been interpreted to do so.¹² After all, if the provi-

sion were read to require continuing in office, any resignation, whether accepted or not, would be inconsistent with that reading: a person could never leave office until his successor had qualified.

Thus current North Carolina law does not support the view that the resignation issue has been settled. The State Supreme Court seemed to say as much in a 1978 case, when it noted that "[d]ecisions in the various jurisdictions are not in accord with reference to the right of a public official to resign and whether an acceptance is required. That issue, however, is not presented here."¹³ If the matter were settled, there would be no issue to be presented to the Court.

Although it is unlikely today that a person could be kept in office against his will by a refusal to accept his resignation, the question of whether an acceptance is necessary continues to have practical effects. Because it is unclear whether an acceptance is necessary, it is unclear whether an officeholder may withdraw his resignation once offered. The general understanding is that a resignation may be withdrawn until it is accepted; if no acceptance is necessary, in some circumstances a chance for withdrawal may never occur. It may be that a resignation can be withdrawn before it takes effect, although that is not clear. If it were effective immediately, however, there would be no chance for a second thought. In addition, acceptance can set a date when the resignation becomes effective; without a need for acceptance, that time can be uncertain.

Thus there remains good reason to want the matter settled. Rather than depend on the chances of litigation to produce an opportunity for the courts to decide the question, it seems far preferable for the General Assembly to do so. It is not so important how the legislature settles the matter as that the issue be resolved. **P**

5. 15 N.C. At 29.

6. M. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS §§ 165, 166 (1892).

7. *State v. McEntyre*, 25 N.C. 171 (1842).

8. The statute was upheld in *London v. Headen*, 76 N.C. 72 (1877). In its final form, this statute was found at G.S. 160-26.

9. N.C. GEN. STAT. § 128-7.1.

10. *State ex rel. Ryan v. Murphy*, 97 P. 391, 394 (Nev. 1908).

11. N.C. CONST. art. VI, § 10; N.C. GEN. STAT. § 128-7.

12. *E.g.*, *Toole County v. De La Mare*, 59 P.2d 1155 (Utah 1936).

13. *In re Peoples*, 296 N.C. 109, 145 (1978).