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# COUNTY OF ERIE

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DEPARTMENT OF LAW

April 27, 2026

Honorable Timothy Meyers  
Chairman, Erie County Legislature  
92 Franklin Street  
Buffalo, New York 14202

Dear Chairman Meyers:

I write to explain the submission to this Honorable Body by the County Executive to reappoint Commissioners Bray, Rybicki and Bylewski to complete their termed appointments.

On or about April 8, I began receiving a series of emails from the email address of markusa323@aol.com. As best as I can tell from the emails sent, this person has a lawsuit against the City of Buffalo. He was demanding that the Deputy County Clerk file a default judgment on his behalf against the City of Buffalo. As so often occurs, upon receiving a refusal by the Deputy County Clerk to enter such a judgment, this person claimed a failure to file an oath card and/or the failure to post a bond or undertaking for several public officers. They then proclaimed that the positions are vacant. I can provide these emails upon request. The emails sent were of no particular concern to me and I saw no reason to take any action up to this point.

However, this gentleman then apparently sent materials to the County Legislature. As a result, I was contacted by Clerk Olivia Owens and Bryan Fiume. At that point, I decided to take a closer look at the issue in anticipation of future questions from the Erie County Legislature.

The first issue raised was the failure of certain officials to file a bond or an undertaking, as required by New York State Public Officer's Law. However, in the annual County budget, the Erie County Legislature permits the purchase of an insurance policy that covers wrongdoing by public officials (see Budget B Book, page R-63). This policy is purchased through the Law Department and satisfies the requirements required by the Public Officer's Law. This has been long-standing policy of the County.

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The second issue raised was my failure to file my own oath card. He argued that because I had not filed an oath card since 2012, I was not the County Attorney and all decisions I made are a nullity. This argument is incorrect and ignores clear law to the contrary. Section 15 of the Public Officer's Law, entitled "Validation of official acts performed before filing official oath or undertaking", specifically contemplates a Public Officer acting without the proper filing.

If a public officer, duly chosen, has heretofore entered, or shall hereafter enter on the performance of the duties of his or her office, without taking or filing an official oath, or executing or filing an official undertaking..., his or her acts as such officer, so performed, shall be as valid and of as full force and effect as if such oath had been duly taken and filed...

Therefore, even if my oath card was somehow no longer valid, there is no real consequence to the County and there is no legal justification to unwind any decisions I have made as the County Attorney, nor any prohibition to my continuing to perform the duties of County Attorney, albeit in an acting capacity.

That said, anticipating questions from the Erie County Legislature, I continued to look into the issue. At this point, I brought the Commissioner of Personnel into the discussion about the process for filing the oath cards. That conversation led me and staff from the County Executive's Office to review every oath card on file for every management confidential and elected official using the online search tool on the Erie County Clerk's website ([https://ecclerk.erie.gov/recordsng\\_web/](https://ecclerk.erie.gov/recordsng_web/)). What we discovered was the filing of an oath card by County public officers has been inconsistent. It appears the oath card is a part of the on-boarding packet put together by the Department of Personnel for new hires. However, there is no mechanism in place to ensure that when a current employee who moves into a new position requiring an oath card is actually given an oath card that is then executed and filed. As best as I can tell, this problem goes back decades.

We also found one elected official who had apparently not filed a new oath card upon his reelection in 2025. It was at this point, I hired Hodgson Russ to fully investigate this arcane area of law and fully explore the consequences of the failure to file the oath card and to help advise the County the best way forward. I have attached their memo for your review.


As explained above, the failure to take and file an oath card for public officers has no impact on the actions they have taken. However, it does mean that their positions are technically vacant and they are in acting capacities. To rectify that problem for the three termed County Commissioners, the most prudent action to take is to have the County Executive reappoint them and ask the Legislature to reconfirm them. This does not extend their term, but clears up any ambiguity as to the propriety of their appointment.

The problem is more complicated for an elected official who fails to file an oath card because there is no way to simply recreate the election. However, §402 of the New York County Law exempts the Clerk, the District Attorney and the Sheriff from the standard consequence of failing to file an oath card, ie: vacancy. However, that same section goes on to say that until the necessary oath is taken and filed they “shall not perform any duties of the office, nor be entitled to any compensation.” I am unclear how to reconcile these two provisions of the law. There is no simple answer and only one case was found that explored the interplay between the Public Officer’s Law and the New York County Law.

My office, in conjunction with the Department of Personnel and the County Executive’s office, are in the midst of setting up an internal system whereby no future public officer within the administration fails to take and file their oath of office at the proper time. Independent elected officials will still be expected to monitor this for their own offices as has always been the case.

Thank you for your attention to this matter.

Respectfully yours,

By   
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JCT/lda

MEMORANDUM FROM

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**To:** Jeremy C. Toth, Erie County Attorney  
**Date:** April 16, 2026  
**Re:** Oath Requirements for Public Officers

We are writing at your request to review the general legal requirements for taking and filing an oath of office for public officers in Erie County, as well as to address specific questions that you have raised regarding the application of those requirements to current circumstances.

***The General Legal Requirement to Take and File an Oath of Office***

Pursuant to Section 10 of the New York Public Officers Law, “Every officer shall take and file the oath of office required by law, and every judicial officer of the unified court system, in addition, shall file a copy of said oath in the office of court administration, before he shall be entitled to enter upon the discharge of any of his official duties.” N.Y. Pub. Off. L. §10. The statute differentiates between “state” officers and “local” officers, however it expressly notes that both elected officials as well as appointed officials fall within either the state or local officer definition.<sup>1</sup> N.Y. Pub. Off. L. §2. Since the definition of “officer” explicitly includes both elected and appointed officials, courts have interpreted the oath of office requirements to apply equally whether the individual is elected or appointed to their public office.

The oath must be administered “by a judge of the court of appeals, the attorney general, or by any officer authorized to take, within the state, the acknowledgment of the

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<sup>1</sup> The difference between state and local officer depends on the jurisdiction of the office. The term “state officer” includes elected and appointed officers authorized to exercise official functions throughout the entire state. The term “local officer” includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state.

execution of a deed of real property, or by an officer in whose office the oath is required to be filed or by his duly designated assistant, or may be administered to any member of a body of officers, by a presiding officer or clerk, thereof, who shall have taken an oath of office.” N.Y. Pub. Off. L. §10. For local municipal officials (such as elected or appointed public officers who are part of Erie County’s government), the oath of office form must be filed in the office of the County Clerk. *Id.*<sup>2</sup>

As distinct from the oath requirements applicable to public officers, there is a separate oath of office requirement applicable to most public “employees,” *i.e.*, for those who are not public “officers.” N.Y. Civ. Serv. L. §62. This requirement applies to “Every person employed by the state or any of its civil divisions, except an employee in the labor class.” *Id.*

Oath requirements applicable to public employees under the Civil Service Law differ from those applicable to public officers under the Public Officers Law in that they are “required only upon original appointment or upon a new appointment following an interruption of continuous service, and shall not be required upon promotion, demotion, transfer, or other change of title during the continued service of the employee, or upon the reinstatement pursuant to law or rules of an employee whose services have been terminated and whose last executed oath or statement is on file.” N.Y. Civ. Serv. L. §62.<sup>3</sup> By contrast, public officers are required by the Public Officers Law to file an oath within thirty days after notice of appointment to any public office or within thirty days of the commencement of the term of office. N.Y. Pub. Off. L. §30[1][h].

### ***The Effect of Failing to Timely File a Required Oath***

The oath requirement applicable to public officers is strictly construed, and the failure to timely file the oath results in the forfeiture of election or appointment. New York State

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<sup>2</sup> For the general form of the public officer oath to be filed, see [public-officer-oath-affirmation-and-public-officers-law-78-certificate.pdf](#).

<sup>3</sup> For the general form of the public employee oath to be filed, see [2187-fstate-employee-statement-in-lieu-of-oath-pursuant-to-civil-service-law-ss62.pdf](#)

Public Officer's Law § 30(1)(h) specifies that an office "shall be vacant upon . . . [an official's] refusal or neglect to file his official oath or undertaking, if one is required, before or within thirty days after the commencement of the term of office for which he is chosen, if an elective office, or if an appointive office, within thirty days after notice of his appointment, or within thirty days after the commencement of such term." N.Y. Pub. Off. L. §30(1)(h).<sup>4</sup>

The courts have affirmed that the failure to timely file a required oath of office results in the office being deemed to be vacant, without the need for any further action or proceeding. For instance, in *Comins v. County of Delaware*, 66 A.D.2d 966 (3<sup>rd</sup> Dept., 1978), the court observe that, "When a person appointed to office fails to timely file his oath of office, neither notice nor judicial procedure is necessary, the office is automatically vacant and may be filled by proper appointive power [citations omitted]." *Id.* As further observed by the court in *Scro v. Board of Education*, 31 Misc.3d 1029 (Onondaga Cnty., 2011), "The requirement for the taking and filing of an oath of office is not an obscure requirement, but instead is fundamental and of significant import inasmuch as a public officer working in the public sector is vested with the public trust; as such, the requirement is not waivable and is strictly construed."

Of note, the language of Section 30 explicitly allows an oath to be filed *before* the commencement of the term of office for elected officials. The only potential caveat here is that an oath of office filed *more than* thirty (30) days before the term of office is scheduled to commence could be argued to be invalid, based on the statutory language.<sup>5</sup> We further note that, with respect to appointed officials, the requirement is to file the oath within 30 days *after* notice of appointment or commencement of the term of the appointment, and there is no specific reference to a valid filing of the oath *before* such notice or commencement of term, as there is with respect to elected officials.

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<sup>4</sup> There is a limited exception if the failure to timely file the required oath was the result of the officer being on active duty in the armed forces and absent from his or her county of residence at the time of election or appointment.

<sup>5</sup> We are not aware of any legal authority that resolves this question.

***Oath Requirements Applicable to Sheriff, County Clerk and District Attorney***

There is a companion provision in the New York County Law with respect to oath requirements for public officers, which affirms the general requirement for taking and filing an oath of office for County officials, but which also specifically addresses the oath requirement with respect to the offices of Sheriff, County Clerk or District Attorney. County Law § 402 provides that, “Every officer paid his compensation from county funds shall take and file an official oath in the manner prescribed in section ten of the public officers law. The refusal or neglect to take and file such oath within the time prescribed by section thirty of the public officers law, except in the cases of the sheriff, county clerk and district attorney, shall be deemed a refusal to serve and the office may be filled as in the case of a vacancy. Until the sheriff, county clerk or district attorney shall take and file the required oath, he shall not perform any duties of the office, nor be entitled to any compensation [emphasis added].”<sup>6</sup>

The Court in *People vs. Rossney*, 178 A.D.2d 765 (3<sup>rd</sup>. Dept., 1991), app. den. 79 N.Y.2d 1007 (1992), addressed the application of County Law § 402 to an individual appointed to the office of Special District Attorney, and who did not file his oath until more than 8 months after taking office.

The Court first found the office of Special District Attorney to be the functional equivalent of the office of District Attorney for purposes of application of Section 402.<sup>7</sup> The Court then upheld the legitimacy of actions undertaken by the Special District Attorney prior to

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<sup>6</sup> Section 611 of the Alternative County Government Law specifies that the provisions of Public Officers Law § 10 and County Law § 402 apply to all officers in a county organized under the Alternative County Government Law. Alternative County Government Law § 611(1). Similarly, the Sheriff, County Clerk and District Attorney are addressed in the same manner with respect to the failure to file an official undertaking under Public Officers Law § 11 and County Law § 403. Alternative County Government Law § 611(2).

<sup>7</sup> The Court did not provide any analysis for its conclusion that a special district attorney was the equivalent of a district attorney for purposes of application of County Law § 402. In fact, a later court specifically rejected that conclusion, finding that a special district attorney is not subject to an oath requirement on the basis that the appointment “is temporary in nature, limited in scope to one case and having no degree of permanency.” *People v. Schongar*, 140 Misc.2d 66 (Albany Cnty., 1988).

filing the oath, referencing Section 15 of the Public Officers Law, which establishes that actions taken prior to the taking and filing of an official oath are deemed “valid and of full force and effect as if such oath had been duly taken and filed.” N.Y. Pub. Off. L. §15. The Court determined that Public Officers Law §15 applied in this case, and that all actions taken by the special district attorney prior to the filing of the oath valid and enforceable, as the filing of the oath (albeit more than 8 months after taking office) cured any defect through retroactive validation under the legal principle of *nunc pro tunc*: “While the law provides that a Special District Attorney shall not perform duties of the office until an oath is filed, any duties so performed are performed as a de facto officer and are enforceable and valid [*see*, Public Officers Law § 15; *People v Williams*, 139 AD2d 138, 143, *revd on other grounds* 73 NY2d 84]. Additionally, it has been held that upon the filing of an oath, it shall be considered filed *nunc pro tunc* as of the date of appointment [*People v Williams, supra*, at 143].”<sup>8</sup>

The *Rossney* court further found that no vacancy was created as a consequence of the Special District Attorney’s failure to timely file the oath, referencing Section 402 without any further comment or analysis reconciling that conclusion with the usual standards under the Public Officers Law § 30 (which, if applied, would have resulted in the office being deemed to be vacant): “Furthermore, it is statutorily provided that no vacancy shall occur upon the neglect of a Special District Attorney to file an oath within the prescribed time (*see*, County Law § 402).” *Id.* at 765-66.

The court in *Rossney* did not at all address the status of compensation paid to the special district attorney during the 8 months between taking office and filing the oath, and specifically whether there was an obligation or right to recover any such monies paid, or whether payment was ratified under the principle *nunc pro tunc*. There is general authority to pay a public officer for duties performed prior to filing an oath under the Public Officers Law.<sup>9</sup>

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<sup>8</sup> See also *Sonnellitter v. Wilson*, 85 Misc.3d 1219 (S. Ct. Albany Cnty. 2025) (noting that filing an oath cures an initial filing failure *nunc pro tunc* and that the actions of the public officials were retroactively validated by such action).

<sup>9</sup> See 1979 N.Y. Op. Atty. Gen. 29 (N.Y.A.G.), 1979 WL 34265 (finding that officials who begin to perform their duties before taking and filing their oaths are entitled to payment for the period prior to the time they

However, the statutory directive of County Law § 402 is clear that those named officials are not entitled to compensation until they file their oath, language that is not found in the Public Officers Law.

The *Rossney* case is the only instance of which we are aware where the courts have addressed the interaction of County Law § 402 with the usual oath requirements and consequences under the Public Officers Law with respect to (a) whether a vacancy occurs if a Sheriff, County Clerk or District Attorney fails to timely file an oath, and (b) whether there is any right to recovery of monies paid to those county officers prior to the filing of the oath. In light of the unique language in Section 402, and the scarcity of case law interpreting it, we cannot conclude whether a different court would agree with the *Rossney* court's conclusions, or how such court would apply the compensation prohibition in Section 402.

#### ***Oath Requirements upon Re-election or Re-appointment***

Case law establishes that a public officer must file a new oath of office upon re-election or re-appointment to the same position for which they had previously filed an oath of office.<sup>10</sup>

This issue was addressed in detail in *Boisvert v. Ontario County*, 89 Misc.2d 183 (Ontario Cnty., 1977), *affd.*, 57 A.D.2d 1051 (4<sup>th</sup> Dept, 1977), where the Court held that the County Commissioner of Social Services had forfeited his seat by failing to comply with the oath requirement set forth in Public Officer's Law Section 30. The Commissioner was appointed to

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actually filed the oath); *See also* 1903 N.Y. Op. Atty. Gen. 4887 (N.Y.A.G.) (reasoning that the services rendered by the officers prior to them taking and filing an official oath were valid, lawful and official acts and thus the officers were entitled to be paid for the performance of such duties).

<sup>10</sup> There is no exception to this rule requiring public officers to refile an oath of office with each successive reappointment or reelection. However, this often gets confused with the civil service oaths for public employees which only need to be filed upon original appointment and which extends to any title in which the person may serve as an employee during the period of continuous service. *See Fanelli v. O'Rourke*, 146 A.D.2d 771 (1989) (finding that the role of Director of Probation of the County was classified as public employment and not public office, ruling that it was wrongful to terminate the petitioner's employment for failure to file an official oath and holding that the oath filed when Petitioner was initially appointed as the Assistant Director of Probation for the County was sufficient to satisfy the requirements under civil service law).

this position for a five-year term on or about July 1, 1966 and shortly thereafter filed an oath of office with the Clerk of Ontario County. The Commissioner was subsequently reappointed to this position for successive five (5) year terms in the summers of 1971 and 1976. The Commissioner never filed another oath of office in conjunction with his reappointments in 1971 and 1976. The County Board of Supervisors thus deemed the Commissioner's position to be vacant on the basis of failure to timely file the required oath of office upon reappointment. The court upheld the declaration of vacancy, finding that, "The Board acted within its powers on July 29, 1976, and in any event the office then became vacant. At that time plaintiff had not taken or filed his oath," and further affirmed that the Commissioner would continue to serve in a holdover capacity until a successor was duly appointed.

The requirement to file a new oath upon reappointment was upheld in *Staniszewski v. Lackawanna Mun. Housing Authority*, 191 A.D.2d 1048 (4<sup>th</sup> Dept., 1993). In *Staniszewski*, the court upheld the determination of the Mayor of the City of Lackawanna that the position held by Francis Anticoli as a member of the Lackawanna Municipal Housing Authority was deemed vacated due to Anticoli's failure to file his oath of office within 30 days of his reappointment to that office. The appellate court, in reversing the lower court's decision, noted that, "Because Anticoli failed to file his oath of office within 30 days of his reappointment as required by section 30 of the Public Officers Law, his appointment was vitiated and his office became vacant." *See also* *Vescio v. City Manager of City of Yonkers*, 69 Misc.2d 68 (Westchester Cnty. N.Y. 1972) (ruling that a Commissioner of Public Safety had forfeited his office by failing to file a renewed oath of office upon reappointment, but requiring that he be restored as a holdover Commissioner until a successor was appointed).

### ***Holdover Status***

It is well-established in New York that the incumbent of a public office (whether elected or appointed) will "hold over" past the expiration of the term of office until such time that a successor is duly elected or appointed and files the oath of office. The Public Officers Law provides that "Every officer . . . having duly entered on the duties of his office, shall, unless

the office shall terminate or be abolished, holdover and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified.” N.Y. Pub. Off. L. §5.<sup>11</sup>

The courts have recognized that the purpose of the holdover provision contained in section 5 of the Public Officers Law is to ensure continuity of government, *i.e.*, to “prevent a hiatus in governmental operations pending the appointment of a successor.” *Cutrone v. Village Bd. Of Trustees of Village of Harrison*, 226 A.D.2d 459 (2<sup>nd</sup> Dept, App. Div. N.Y.) (affirming a judgment for backpay against the Village of Harrison where a holdover was removed from office, but the village failed to appoint a successor). It is the burden of the appropriate appointing authority to properly select and qualify a successor in order to extinguish a holdover’s rights under the Public Officers Law. *Id.* The holdover provision has been applied broadly to various appointed positions including commissioners, town attorneys, village administrators, and other municipal officials. *E.g.*, *Reister v. Reilly*, 138 Misc.2d 68 (S. Ct. Albany Cnty., N.Y., 1988).

Holdover status applies even if the vacancy is created by the failure of the *incumbent* of the office to file an oath upon reappointment or re-election. An early case is instructive. In *Vescio v. City Manager of City of Yonkers*, 69 Misc.2d 68 (Westchester Cnty. N.Y. 1972), *affd.*, 41 A.D.2d 833 (1973), a Commissioner of Public Safety neglected to timely file an oath of office upon reappointment. Applying Public Officers Law § 5, the court found that the office had become vacant, but further noted that, since no successor had been appointed, the incumbent was authorized to continue to perform his duties on a holdover basis. *Id.* The court further noted that no oath of office was required to be filed when acting on a holdover basis, as that status necessarily flows from application of Section 5. *Id.*

The State Comptroller has also affirmed holdover status in a manner that is aligned with the state courts. For instance, in evaluating a circumstance where a village treasurer

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<sup>11</sup> The concept of a holdover status is not unique to New York and similar statutes have been adopted in a number of states across the U.S. including but not limited to: California (Cal. Gov. Code §91522), Illinois (65 I.L.C.S. 5/3.1-10-50, 65 I.L.C.S. 5/3.1-10-51), Texas (Tex. Const. Art. 16 §17) and Wisconsin (Wis. Stat. Ann. §§ 17.20 – 17.23).

had failed to file an oath of office within 30 days of reappointment, the Comptroller found that “the treasurer would be deemed as holding over in the vacant office of village treasurer.” 34 N.Y. State Comp Opinions, Opinion 78-833, p. 167 (1978). The Comptroller observed that the failure to file an oath of office does not affect the treasurer’s status as a holdover, which would continue until a successor is chosen and qualified to fill the vacancy. *Id.*