VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 20-CV-00310

Marilyn Allen et al v. Town of Halifax

DECISION ON MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiffs have moved for judgment on the pleadings, arguing that Brad Rafus orally resigned from the board at a public meeting on June 26, 2020, that the statute applicable to resignations from Town boards, 24 V.S.A. § 961, does not bar an oral resignation and does not require acceptance of any such resignation by the board in question, and that the statute requires the board to post the vacancy within 10 days. Plaintiffs assert that Mr. Rafus's public statement of resignation is an effective resignation, binding him and the Town. Plaintiffs assert that the Town has failed to post the vacancy or fill that vacancy by any method permitted by the applicable statute.

The defendant Town opposes the motion, arguing that whether Mr. Rafus resigned is contested. The Town's position is that oral resignation is ineffective, that a written resignation is required, and that the board must accept a resignation before it is effective, because that is the pattern and practice in Halifax. The Town acknowledges that there is no direct Vermont caselaw on this issue, and that the statute does not, on its face, require either a writing or acceptance by the board. The Town also asserts that Mr. Rafus orally withdrew his resignation at a public meeting on July 21, 2020, and resumed his membership on the board.

Both parties have submitted legal memoranda stating their positions. Title 24, Chapter 33, Subchapter 6, Sections 961-963, of Vermont Statutes Annotated addresses vacancies in town offices. The relevant language in 24 V.S.A. § 961(a) states: "When a town officer resigns his or her office . . . such office shall become vacant. Notice of this vacancy shall be posted by the legislative body in at least two public places in the town, and in and near the town clerk's office, within 10 days of the creation of the vacancy." 24 V.S.A. § 961(a). And the relevant language of § 963 states that: "When a vacancy occurs in any town office, the selectboard forthwith by appointment in writing shall fill such vacancy until an election is had." 24 V.S.A. § 963(a). The court, like counsel for both parties, has searched Vermont case law and found none that is directly relevant to the interpretation of these statutes, or to the questions whether a town or other elected government official's resignation must be in writing, and whether any such resignation must be accepted by the other members of the board. Case law from other jurisdictions is mixed, and is often based on the specific language in statutes applicable in those locations. Courts first look to any governing statute. Courts may also consider the conduct of both the person resigning and the authority receiving the purported resignation to glean intent. In the absence of a governing statute, courts sometimes consider how resignations are treated by other statutes within the same jurisdiction, and the common law.

In Vermont, as in most jurisdictions, the courts look to applicable statutes first. If the statutory language is clear, it is applied. "'If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous, we implement the statute according to that plain language.'" *State v. Berard*, 2019 VT 65, ¶ 12 (quoting *Flint v. Dep't of Labor*, 2017 VT 89, ¶ 5, 205 Vt. 558). Sections 961 and 963 appear to be clear and unambiguous. They do not import or imply any requirement that to resign a selectboard member must put his or her intent into writing, nor do they require that the board accept that resignation before it is effective. The Town argues that its own pattern and practice of imposing those requirements should be implied. However, they provide no legal basis for that argument.

They argue that at "common law" these requirements were imposed, and it is true that under Vermont law, "[s]o much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this State and courts shall take notice thereof and govern themselves accordingly." 1 V.S.A. § 271. However, the Town provides no Vermont case law, or persuasive case law from any other jurisdiction, to demonstrate that these requirements, that resignation be submitted in writing, and be formally accepted by the board, are in fact a part of the "common law of England."

The court has found cases, particularly from Massachusetts, that state that at common law the operative issue was not whether a resignation was in writing, but whether the resignation had been accepted. "[A]ll that is required is that the resignation shall be voluntary and shall be accepted by the appointing power. It is not necessary that the resignation be in writing. Once accepted, the severance from office is complete." *Campbell v. City of Bos.*, 337 Mass. 676, 678 (1958) (citation omitted). The Supreme Judicial Court of Massachusetts stated in 1950 that "[t]he weight of authority in this country, where the common law has not been superseded by the provisions of constitution or statute, is in accord with this rule." *Warner v. Selectmen of Amherst*, 326 Mass. 435, 438 (1950) ("At common law acceptance of appointment to public office is compulsory and such office once assumed cannot be laid down without the consent of the appointing power.").

However, Ohio, Rhode Island, and Illinois took the opposite view. They all favor a right to resign and assert that this is in fact the general rule. "In many of the states, it is held that a resignation of an officer takes effect at once, without acceptance by any one, and that the holding of office is not compulsory. This is said to be the modern doctrine on this subject." *Reiter v. State ex rel. Durrell*, 51 Ohio St. 74, 81 (1894). This is the rule in Rhode Island: "Generally, absent any constitutional or statutory provision to the contrary, a public office may be vacated by resignation or abandonment. The resignation, unless otherwise provided, may be written, oral, or implied from conduct. Broadly speaking, one can resign 'by any method indicative of the purpose.'" *DeLuca v. Rhode Island State Bd. of Elections*, 119 R.I. 59, 62 (1977) (citations omitted). See also *Rohrback v. Illinois Dep't of Employment Sec.*, 361 Ill. App. 3d 298, 306 (Ill. App. Ct. 2005) ("The resignation takes effect not when the employee *signs* the letter of resignation but when the employee *communicates* to the employer, in writing or otherwise, an intent to unconditionally relinquish the position."); *People ex rel. McCarthy v. Barrett*, 365 Ill. 73, 84 (1936) ("It is our opinion that the public laws and decisions of this state indicate it to be our policy that an officer may resign when neither the rights of creditors nor the public convenience prevents, and that upon such resignation, as declared by statute, the office becomes vacant."). The court finds these policies more consistent with Vermont practices and approaches than

the Massachusetts requirement of acceptance. It would be shocking indeed if Vermont public officials were not permitted to resign from their offices at will.

Also, the limited Vermont case law that the court has found suggests that it is permissible for a government employee to resign orally, even if a regulation requires a writing. *In re Grievance of Baldwin*, 158 Vt. 644, 645 (1992).

But most importantly, based on § 961(a), which both parties agree is applicable here, the court concludes that an oral resignation is permitted, because nothing in the plain language of the statute bars that method of communicating the intent to resign. Also, there is nothing in the plain language of the statute that requires that the board from which the municipal officer is resigning accept that resignation to make it effective. The court concludes therefore that those grounds for contesting the plaintiffs' claims are ineffective.

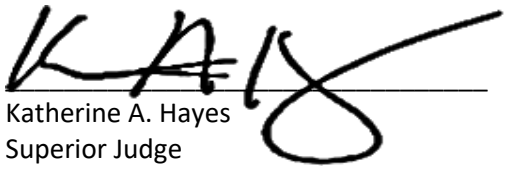
The court cannot, however, grant judgment on the pleadings to the plaintiffs at this phase of the proceedings. On a motion for judgment on the pleadings under V.R.C.P. 12(c),

[T]he issue is whether, once the pleadings are closed, "the movant is entitled to judgment as a matter of law on the basis of the pleadings." For the purposes of a motion for judgment on the pleadings "all well pleaded factual allegations in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false."

Messier v. Bushman, 2018 VT 93, ¶ 9, 208 Vt. 261 (citing *Thayer v. Herdt*, 155 Vt. 448, 456 (1990)). This is an extremely high burden, and the court is unable to conclude that the plaintiffs have met it. The court has yet to receive any undisputed sworn statements or *agreed* transcripts of the meeting at which Mr. Rafus is alleged to have resigned, for example. The Town also takes the position that a full understanding of the facts and circumstances surrounding his decision to make the statements that the plaintiffs assert amount to a resignation are important in determining whether he actually intended to resign. The Town now asserts that he made this statement under duress. The court concludes that if all of the assertions made by the defendant in its pleadings are assumed to be true, as required at this stage of the litigation, the plaintiffs may not be entitled to judgment. The court notes also that the above rulings as to the law regarding what is *not* required for a resignation (a writing and acceptance by the board are not required) do not demonstrate what *is* in fact required for an effective resignation.

The court will schedule a brief hearing on the issue of discovery in light of this ruling.

It is so ordered.



Katherine A. Hayes
Superior Judge
Signed electronically

October 16, 2020