

January 17, 2018

Gentlemen:

As you know, under the Whitehall Doctrine, a town board member cannot be appointed to hold another subordinate town office.

The NYS Attorney General in many opinions states that the town could use local law to overcome the Whitehall Doctrine providing that the adopted local law includes language to show that the "overall public interest would be served".

However, Municipal Home Rule Law only allows a municipality "to adopt or amend local laws relating to its "property, affairs or government" which are not inconsistent with the provisions of the Constitution or of any general law".

James D. Cole who at the time of his writing served as Special Counsel with the Association of Towns of the State of New York, writes in the [NYSBA/MLRC Municipal Lawyer | Summer 2004 | Vol. 18 | No. 3:](#)

"Under the common law rule, the acceptance of a second office that is incompatible with the first results in the vacating of the first office by operation of law." (People ex. rel. Ryan v. Greene, 58 N.Y. 295 at 304–305)

Further, in an opinion of the Attorney General which is similar to the situation facing the Town of New Hartford, the question is whether a town supervisor can be appointed to do part-time work to maintain a town park. The Attorney General in that opinion refers to the language in Town Law 64 (5) which, by the way, is similar to those of James Cole of the NYSBA..

Town Law Section 64 General powers of town boards

5. Vacancies. Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the members thereof, may appoint a qualified person to fill the vacancy. If the appointment be made to fill a vacancy in an appointive office, the person so appointed shall hold office for the remainder of the unexpired term. If the appointment be made to fill a vacancy in an elective office, the person so appointed shall hold office until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. **A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment.**

Therefore, the NYS Attorney General concluded that a local law cannot in this instance be used to overcome the compatibility of office issue of the Whitehall Doctrine.

It would, therefore, appear that the resolution naming Paul Miscione as Parks Director must be rescinded. Supervisor Miscione needs to decide whether to remain as town supervisor or resign his elected position in order to seek the position of Parks Director.

Respectfully,

Cathy Lawrence