

Legal Q&A

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Q What is the order of events after an election?

A The Secretary of State recommends that post-election procedures take place in the following order:

1. Canvass the election
2. Issue certificate of election to newly elected officers
3. Newly elected officers complete the statement of officer
4. Newly elected officers take the oath of office
5. Generally, newly sworn officers may assume the duties of their office
6. Report electronic returns to Secretary of State.

See Tex. Const. Art. XVI, § 1; Tex. Elec. Code §§ 67.004 – 67.006, 67.016, 67.017.

Q When and where can canvassing take place?

A Canvassing is the general process in which a city tabulates the total number of votes in a recently completed election. Canvassing can only take place at an open meeting of the city council, but only two members of city council are required to be present to conduct the canvass. *Id.* §§67.003(b), 67.004(a).

The canvass may not be conducted until the early voting ballot board has: (1) qualified and counted all provisional ballots if a provisional ballot has been cast in the election; and (2) counted all timely received overseas ballots if a ballot by mail was provided to a person outside the United States. *Id.* § 67.003(a). Additionally, no newly elected official may qualify for office before the official canvass of the election has been conducted or would have been conducted in the case of a cancelled election. *Id.* § 2.053(e).

Q Who issues the certificate of election?

A After canvassing is complete, the presiding officer of the canvassing authority is required to prepare a certificate of election for each candidate who is elected to an office. *Id.* § 67.016(a). The Secretary of State recommends that the presiding officer of the canvassing authority issue the certificate of election. In the case of a city, the “presiding officer of the canvassing authority” is the mayor. In the event a recount petition has been filed, the issuance of a certificate of election and qualification for the office involved in the recount is delayed pending completion of the recount. *Id.* §§ 212.033, 212.0331.

Further, an unopposed candidate who is declared elected shall be issued a certificate election in the same manner and at the same time as provided for a candidate at the election. *Id.* § 2.053(e).

Q Who is required to subscribe to the statement of officer and take the oath of office?

A The Texas Constitution requires all appointed and elected officers, including city council members and mayors, to take the official oath of office “before they enter upon the duties of their offices.” Tex. Const. Art. XVI, § 1(a). An official taking the constitutional oath swears to faithfully execute the duties of the office and to preserve, protect, and defend the constitution and laws of Texas and the United States. *Id.* Before taking the oath of office, the official is required to subscribe to a statement swearing that the official has not paid or promised to pay a thing of value or promised employment to obtain the office. *Id.* § 1(b). The subscribed statements are filed with the city secretary. *Id.*

Article XVI, section 1 does not spell out the public officers who must take the oath of office. But the Texas Supreme Court has adopted standards for determining whether a person occupying a particular position is a public officer for constitutional purposes. Whether a municipal officer is considered an officer for purposes of the subscribing to the statement of officer and completing the oath of office depends on whether the position “exercises a sovereign function of government largely independent of the control of others.” *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578 (Tex. 1955) (citing *Dunbar v. Brazoria Cnty.*, 224 S.W. 2d 738, 740-41(Tex. Civ. App.—Galveston 1949, writ ref’d). “In other words, a public ‘officer’ is authorized by law to independently exercise functions of either an executive, legislative, or judicial character, and the exercise of this power by the officer is subject to revision and correction only according to the standing laws of this state.” *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994). As such, if a position in a city is independent of the direction of the council or other city employee and performs a legislative, executive, or judicial function that is not reviewed and voted on by the governing body, such position is likely an office. For example, in most cities, a city manager would usually not be an officer required to take the oath because a city manager is an employee and takes direction from the city council.

However, the following officers in a Type A general law city are required, under state law, to take the oath of office before performing the duties of their office with the city: the city secretary, city treasurer, city tax assessor and collector, city attorney, city marshal, and city engineer. Tex. Loc. Gov’t Code §§ 22.005, 22.071. Additionally, any other offices that are created by the city council as “municipal offices” under Section 22.071 of the Local Government Code may also be required to take the oath of office. *Id.* Also, the governing body of a Type A general law city may, by ordinance, require a municipal officer to take “an additional oath that the governing body considers is best calculated to secure the faithful performance of the officer’s duties.” *Id.* §22.005(b).

In a home rule city, the charter may also require that persons holding certain positions with the city take the oath of office. Also, nothing prohibits a city from requiring members of committees or boards who are not otherwise considered officers from taking the oath of office. That is true even if the board or committees are advisory only and do not fall under the definition of “officer.”

Q Are police officers required to take the oath of office?

A While no court has opined that the oath of office is mandatory for police officers, the attorney general advises that city police officers should take the oath of office. *See Op. Tex. Att’y Gen.*

No. DM-381 (1996) (“[w]e therefore advise you to err on the side of caution and assume that a police officer must take the oath of office . . . until the courts answer this question.”).

However, DM-381 concludes that police officers in civil service cities who take the oath of office do not need to repeat the oath every two years. The opinion, unfortunately, is unclear about whether police officers in non-civil service cities must repeat the oath. The argument for doing so is that public officers typically serve only two-year terms. *See* Tex. Const. Art. 16 § 30(b). Most cities view their rank-and-file police officers as regular employees, rather than appointed public officers. Thus, it may seem strange to suggest that police officers have “terms” that expire, which may require re-appointment and a new oath. Nevertheless, until the legislature, a court, or the attorney general offers more guidance on the issue, the safest practice is for police officers in non-civil service cities to perform the oath and filing process every two years.

Q Who may administer the oath of office?

A An oath of office must be administered by an individual who is authorized to do so by Texas law. Section 602.002 of the Government Code lists multiple persons who carry the power to administer the oath of office. *See* Tex. Gov’t Code § 602.002.

They include, among others: a judge, retired judge, or clerk of a municipal court or court of record, as well as a senior judge or commissioner of a court of record; a justice of the peace or clerk of a justice court; a notary public; a legislator or retired legislator; a peace officer, if the oath is administered when the officer is engaged in the performance of his duties and the administration of the oath relates to his duties; and a city secretary or city clerk in a matter pertaining to the official business of the city. *Id.* § 602.002. Please review the statute for a complete list of those authorized to give the oath of office. In addition, the mayor of a general law type A city may administer the oath of office. Tex. Loc. Gov’t Code § 22.042(d).

Q What happens if an elected official fails to take the oath of office?

A While the law is not completely clear on the issue, failure to take the oath of office could mean that an official cannot assume the duties of his office.

In a Type A general law city, a municipal office is considered vacant if the officer-elect fails to qualify for his or her office within 30 days after the election. *Id.* §22.007. For type B and some Type C general law cities, the statutes known as the “borrowing provisions” (found in Chapter 51 of the Texas Local Government Code) may mean that the same reasoning applies in those cities. The statutes provide that a Type B general law city has “the same authority, duties, and privileges” as a type A city, unless it is in direct conflict with another state law that specifically applies to Type B cities. Tex. Loc. Gov’t Code § 51.035. Similar language gives the governing body of a type C city with between 501 and 4,999 inhabitants the same authority and duties as a type A city, unless a conflicting law applies specifically to Type C cities. *Id.* § 51.051. Because there is no similar provision for Type B or C cities, the consequences of an elected official failing to take the oath may apply in a Type B or C city as they do in a Type A city.

A home rule city should confer with its city attorney because the charter will control whether the failure to take the oath within a specific period of time creates a vacancy.

Note that—if the elected official is an incumbent—he or she may continue to serve, even if the office is declared vacant for failure to qualify. The Texas Constitution provides that, in most cases, an elected official continues to serve past the end of his or her term until replaced, usually by election or appointment. Tex. Const. Art. XVI, § 1. Thus, if a councilmember were already serving in a council position and for some reason was found not to have qualified within the required time period, he or she would still be a member of the governing body under the “holdover” provision, because he or she was not replaced.

In instances in which an elected or appointed officer has performed his or her duties without taking the constitutional oath or subscribing to the statement of officer, it is possible that such officer may be considered a “de facto officer.” See Op. Tex. Att’y Gen. No. LO-96-056 (1996). “A de facto officer is one who has the reputation of being the officer, and yet is not a good officer in point of law; in other words, the de facto officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take the oath, give a bond, or the like.” *Id.*; *Williams v. State*, 588 S.W.2d 593, 595 (Tex. Crim. App. [Panel Op.] 1979) (quoting *Weatherford v. State*, 21 S.W. 251, 251 (Tex. Crim. App. 1893)); see also *Forward v. City of Taylor*, 208 S.W.2d 670, 673 (Tex. Civ. App.—Austin), *aff’d*, 214 S.W.2d 282 (Tex. 1948); *Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. 607, 609 (Tex. Civ. App.—Waco 1924, writ *ref’d*). The law validates the acts of de facto officers to the public and third parties, thus protecting the interests of individuals and the public who have been affected by their acts. *Martin*, 208 S.W. 2d at 609; Op. Tex. Att’y Gen. No. DM-381. Whether an official qualifies as a de facto officer is a fact-intensive inquiry and cities facing this issue should consult with their city attorney.

Q When may a newly elected city official assume the duties of office?

A All elected and appointed officers must take the oath of office and the sworn statement before assuming the duties of their offices. Tex. Const. Art. XVI, § 1(a)-(b). A state statute provides the same for elected or appointed officials in Type A general law cities. Tex. Loc. Gov’t Code § 22.005.

In a Type A general law city, a newly elected officer may not assume the duties of the office until beginning on the fifth day after the date of the election, excluding Sundays. *Id.* §2 2.006. Additionally, on the fifth day after the date of the election, excluding Sundays, or as soon as possible after the fifth day, the newly elected governing body of a Type A general law city must meet at the usual meeting place and be installed. *Id.* §22.036.

Additionally, before an elected or appointed marshal in a Type B general law city may begin to perform the duties of the office of marshal, the marshal must execute a bond within five days after the date the marshal is elected or appointed. *Id.* §23.024(b). If the marshal fails to execute the bond within the prescribed time frame, the governing body may appoint another person to the office. *Id.* §23.024.