



**MEMORANDUM**

**TO:** Art Shilosky, First Selectman, Town of Colchester  
Gayle Furman, Town Clerk, Town of Colchester

**FROM:** Bruce A. Chudwick and Matthew D. Ritter, Shipman & Goodwin LLP

**DATE:** November 2, 2016

**RE:** Board of Finance Vacancy

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**BACKGROUND; BRIEF ANSWER**

There will be a vacancy on the Colchester Board of Finance (the "Board of Finance") effective November 3, 2016 due to the resignation of Mr. James McNair. We have been asked to prepare a memorandum regarding what the political party affiliation should be of the successor member appointed to the Board of Finance.

Based upon guidance from the Office of the Secretary of State and our review of the applicable general statutes and Town Charter, the Board of Finance should appoint a successor member who is a member of the Colchester Independent Party. If there are no enrolled members of the Colchester Independent Party at the time said appointment is to be made, the Board of Finance should appoint a successor member who is not an enrolled member of the Republican Party so as to ensure compliance with Conn. Gen. Stat. § 9-167a.

**KEY FACTS**

Mr. McNair was elected to the Board of Finance in 2013 solely as a candidate of the Colchester Independent Party. However, at the time of his election to the Board of Finance and at all times thereafter, Mr. McNair has been an enrolled member of the Democratic Party.

On November 3, 2016, when Mr. McNair's resignation from the Board of Finance will be effective, the remaining five members of the Board of Finance will have the following party affiliations: four Republicans and one Democrat.<sup>1</sup>

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<sup>1</sup> It is our understanding that the four Republicans currently serving on the Board of Finance were enrolled members of the Republican Party and were elected solely as candidates of the Republican Party at the time of their respective elections to the Board of Finance. In addition, none of the four Republicans currently serving on the Board of Finance has changed his or her party affiliation since the time of his or her election to the Board of Finance.

### RELEVANT STATUTORY PROVISIONS

Conn. Gen. Stat. § 9-167a, titled “Minority representation,” in subsection (a)(1) provides that the “maximum number of members” of a six-person municipal board, such as the Board of Finance “who may be members of the same political party,” shall be four.

Conn. Gen. Stat. § 9-167a(d) provides that “[a]t such time as the minority representation provisions of this section become applicable to any board, commission, committee or body, any vacancy thereafter occurring which is to be filled by appointment shall be filled by the appointment of a member of the same political party as that of the vacating member.”

Conn. Gen. Stat. § 9-167a(g) further provides that:

“For the purposes of this section, a person shall be deemed to be a member of the political party on whose enrollment list his name appears on the date of his appointment to, or of his nomination as a candidate for election to, any office specified in subsection (a) of this section, provided any person who has applied for erasure or transfer of his name from an enrollment list shall be considered a member of the party from whose list he has so applied for erasure or transfer for a period of **three months** from the date of the filing of such application *and provided further any person whose candidacy for election to an office is solely as the candidate of a party other than the party with which he is enrolled shall be deemed to be a member of the party of which he is such candidate (emphasis added).*”

### RELEVANT TOWN CHARTER PROVISION

§ C-601.D. of the Town Charter provides that:

“In the event of a vacancy on the Board of Finance, the remaining members of the Board of Finance, within 60 days of the start of such vacancy, shall appoint by majority vote a successor member (the “successor member”) to membership on the Board of Finance . . .”

### SUMMARY OF LEGAL ANALYSIS

**Question #1.** Are the requirements of § 9-167a(d) triggered by the composition of the Board of Finance after the resignation of Mr. McNair?

Conn. Gen. Stat. § 9-167a(a)(1) provides that a maximum of four members from the same political party can serve on the Board of Finance. § 9-167a(d) further provides that “at such time as the minority representation provisions of this section become applicable . . . any vacancy thereafter occurring which is to be filled by appointment shall be filled by a member of the same political party as that of the vacating member.”

Based upon these two statutory provisions, any time there is a vacancy on the Board of Finance, one must first look at the composition of the Board of Finance after the vacancy has been created to determine whether §9-167a(d) or the Town Charter will be controlling for purposes of determining how to fill the vacancy.

In the current situation, the Board of Finance will be composed of four Republicans and one Democrat after Mr. McNair's resignation becomes effective. Therefore, the Board of Finance will still have the maximum representation that one political party can have pursuant to § 9-167a(a)(1) and the requirements of § 9-167a(d) are triggered because the "minority representation provisions" have become applicable.

Conversely, if a Republican member of the Board of Finance were resigning, the Board of Finance would be left with three Republicans. In that instance, the Town Charter would be controlling because the Board of Finance would not have achieved the maximum majority representation of four members from the Republican Party.

This legal analysis is supported by the Connecticut Supreme Court decision, *Grodus v. Burns*, 190 Conn. 39 (1983). In *Grodus v. Burns*, the plaintiff sued the Stratford Housing Authority (the "Authority") claiming that the Authority's composition was in violation of § 9-167a(d). In that case, prior to the resignation of one Republican member of the Authority, the Authority was composed of five members, three of them Republicans and two Democrats. After the resignation of a Republican member, the Authority was composed of two Republicans and two Democrats. The Stratford Town Council, which had the power to fill the vacancy on the Authority, appointed a Democrat to the Authority. Thereafter, the plaintiff filed a suit claiming that § 9-167a(d) required the Town Council to appoint a Republican because the statute requires that the vacancy be filled by a member of the same political party as that of the vacating member. The Connecticut Supreme Court ruled for the Town and permitted the appointment of a Democrat and held that "subsection (d) applies only to vacancies occurring in bodies that have already achieved maximum majority representation under subsection (a) of the statute and then only when the vacating member is of the minority party."

In the current situation, the Board of Finance has achieved the maximum majority representation of four and the vacating member is one of two members elected from parties that are in the minority on the Board of Finance. Therefore, § 9-167a(d) is triggered and is controlling for this legal analysis.

This conclusion is consistent with the advice given by the Office of the Secretary of State in its "Minority Representation" outline which is attached hereto as Exhibit A (See Number 10. of the attachment titled "Vacancy Appointments" which reiterates the holding in *Grodus v. Burns*).

**Question #2.** In determining the required political party of the successor member to be appointed to the Board of Finance, what political party is Mr. McNair a member of for purposes of § 9-167a(d)?

Since the minority representation provisions of § 9-167a are applicable to the Board of Finance, the vacancy must be filled by a member of the same political party as that of the vacating member. However, despite the fact that Mr. McNair was an enrolled Democrat at the time of his election to the Board of Finance and he has remained an enrolled Democrat since that time, § 9-167a(g) requires that Mr. McNair be deemed a member of the Colchester Independent Party. That statutory section provides that since his election to office was “solely as the candidate of a party other than the party with which he is enrolled,” he shall be deemed to be a member of the party of which he was a candidate. Therefore, the appointee should be a member of the Colchester Independent Party.

**Question #3.** When must the Board of Finance appoint a successor member to fill the vacancy?

The Board of Finance is still bound by the Town Charter to fill the vacancy within 60 days of the resignation of Mr. McNair. Therefore, the Board of Finance shall appoint a successor member by majority vote by no later than January 2, 2017.

**Question #4.** What party affiliation should the successor member be if there are no enrolled members of the Colchester Independent Party at the time of such appointment?

Based upon guidance from the Office of the Secretary of State, the Board of Finance should appoint any individual who is not a member of the Republican Party. This will ensure that the Board of Finance is not in violation of § 9-167a by having five Republicans. Therefore, members of any other political party and unaffiliated voters will be eligible for appointment to the Board of Finance if there are no eligible members of the Colchester Independent Party.

As of the date hereof, it is our understanding that one person in Town, who was previously enrolled as a Democrat, has recently enrolled in the Colchester Independent Party. It should be noted that § 9-167a(g) provides that “any person who has applied for erasure or transfer of his name from an enrollment list shall be considered a member of the party from whose list he has so applied for erasure or transfer for a period of three months from the date of the filing of such application.”

Similarly, Conn. Gen. Stat. § 9-59 provides that “[a]ny elector whose name has been transferred from one enrollment list to another or who has applied for erasure or transfer of his name from an enrollment list shall not be entitled to ... be appointed as a member of any board or commission that is political in nature ... for a period of three months from the date of the filing of his application for transfer or for erasure.”

CONCLUSION

§ 9-167a(d) is controlling because the Board of Finance will have reached its maximum representation from one political party even after the resignation of Mr. McNair. §9-167a(d) requires that the appointment be filled by a member of the same political party as that of the vacating member.

In addition, § 9-167a(g) requires the Board of Finance to replace Mr. McNair with a member of the Colchester Independent Party since he was elected to office solely as a candidate of that party in 2013. If there are no enrolled members of the Colchester Independent Party, the Board of Finance should appoint a successor member who is not an enrolled member of the Republican Party.

EXHIBIT A

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FROM THE OFFICE OF THE SECRETARY OF THE STATE  
30 Trinity Street  
Hartford CT 06106

MINORITY REPRESENTATION

(Outline)

A. Two Ways to Achieve

1. §9-167a - Ceiling - use after election in declaring elected.
2. Restrictive Voting - (and nomination - §§9-414 and 9-250).

Bd. of Ed.	§9-204 (unless Charter provides otherwise or unless town has acted under §9-204a or §9-204b)
Selectmen	§9-188
Constables	§9-200
Assessors §9-199 (vote 1, elect 1 -and- vote 1, elect 2)	Legislative body can provide vote 2, elect 2
Bd. of Assessment Appeals	§9-199 (vote 1, elect 1 -and- vote 1, elect 2) Legislative body can provide vote 2, elect 2

- a. Provides for greater degree of minority representation, so supersedes §9-167a. (§9-167a(e)). (§9-167a still ceiling re vacancies).
- b. Does not guarantee minority representation on each term (if nominating petition or vacancies). Lobsenz v. Davidoff, 182 Conn. 111 (1980).

B. Rules

1. LEGISLATIVE BODY - §9-167a applies to legislative bodies
2. NONPARTISAN ELECTIONS - §9-167a does not apply to nonpartisan elections (Atty. Gen. Opn. July 17, 1959). But see Bennet v. Glynn, 154 Conn. 237 (1966) - "no opinion" on the above Atty. Gen. Opn.
3. REGIONAL BOARDS OF EDUCATION - §9-167a and §9-204, etc., do not apply to Regional Board of Education (§10-46(c)).
4. ALTERNATES
  - a. ZONING BOARD OF APPEALS & ALTERNATES ] - two separate boards for purposes of minority representation (Atty. Gen. Opn., Sept. 28, 1961 and July 8, 1965).
  - b. PLANNING AND ZONING COMMISSION & ALTERNATES ] - two separate boards for purposes of minority representation, Dyer v. Beisiegel, 14 CLT 5 (Superior Court, District of New London at Norwich, Docket No. 89322, Nov. 27, 1987).
5. NEW BOARD - Fill terms in order listed in ordinance establishing. Adams v. DePaolo (Superior Court, Hartford County at New Britain, Docket No. 185273, December 19, 1973).
6. DEFERRED TERM - Fill term that begins immediately first, then deferred term.

The eligibility of a candidate to a deferred term is determined on election day, but is based on the composition of the board as it will be on the day that the term begins, taking into consideration who, as of election day, will be on the board when the deferred term begins. (Atty. Gen. Opn., April 17, 1961)
7. CANDIDATES win or lose for the office and term for which they receive votes, and votes cast for a candidate for a particular office and for a particular term may not be counted as votes for such candidate for other offices or terms (only exception in the General Statutes is Selectmen - loser for First Selectman gets his votes counted for Selectman). (§9-188)
8. VACANCIES - ORDER ON BALLOT - Full Term, vacancy (§9-250).

9. VACANCIES - ORDER FOR MINORITY REPRESENTATION - Fill vacancy, then full term §9-167a(d).

- a. But watch out for full terms beginning two weeks later! If vacancy begins election day and full term begins two weeks later, you must look at the party of the person left on the board, whose term ends two weeks after election.

Example (for 11/7/89 election):

- 3 Board of Finance Alternates (elect 1 each election for 6-year term)
- |                    |  |
|--------------------|--|
| 1. R ends 11/16/93 |  |
| 2. R ends 11/21/89 | 2. R won full term 11/21/89 - 11/21/95   |
| 3. Vacancy         | 3. R won vacancy term 11/7/89 - 11/19/91 |

Here, R who received the most votes for the vacancy term cannot be declared elected because for two weeks there would be three R's on the Board. Consequently, the D candidate for the vacancy term is declared elected to the vacancy term. Therefore, the R who won the full term may be declared elected to the full term.

- b. If two vacancies in different terms, fill in order that vacancies occurred (Atty. Gen. Opn., June 28, 1961).
- c. TWO VACANCIES ON BOARD OF EDUCATION - When two vacancies occur on the same Board of Education term, each voter may only vote for, and each party may only nominate, one. §9-204 and *Apres v. Grasso*, Superior Court, Litchfield County, Docket No. 18,595, Oct. 1, 1965.
10. VACANCY APPOINTMENTS - Under §9-167a(d), a vacancy filled by appointment must be filled with a member of the political party of the person who vacated only when the board has already achieved maximum majority representation, and then only when the vacating member is of the minority party. *Chapman v. Tinker*, 25 Conn. Supp. 436 (1964); *Grodus v. Burns*, 190 Conn. 39 (1983).
- 11.) CANDIDACY OVERCOMES PARTY ENROLLMENT - §9-167a(g) - For purposes of minority representation, a candidate is deemed a member of the party in which he is enrolled at the time that he is nominated, except if he is a candidate only of a party other than the one in which he is enrolled (even if he is unaffiliated), then he is deemed a member of the party who nominated him or, if he is unaffiliated and is nominated by two parties, he is deemed a member of the party under whose name he received the most votes. *Santaniello v. O'Connor*, 30 Conn. Supp. 74 (1972)

Note re transfer party affiliation under §9-59

R nominates R who transfers to D = R (for purposes of minority representation)

D nominates R who transfers to D = D (for purposes of minority representation)

If you change party during your term, you are not removed from the board, but when the next vacancy on the board occurs and is filled, your party affiliation on the day it is filled is taken into consideration in filling the vacancy.

12. NOMINATING PETITIONS

- a. A petitioning candidate is considered a member of the party in which he is enrolled.
- b. A candidate who runs under a party designation is considered a member of his "party designation" party for purposes of minority representation. With regard to the discretionary disaffiliation provisions of Sections 9-60 through 9-63, see *Marchitto v. Knapp*, 807 Fed. Sup. 916 (D. Conn. 1993); *Mandanici v. Fischer*, 10 CLT 27 (Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. 213618, February 22, 1984); *Fand v. Legnard* (Superior Court, Judicial District of Danbury, Docket No. CV 94-0316063S, October 31, 1994 and February 17, 1995); and *Mazzucco v. Verderame*, 2 Conn. Ops. 425 (April 22, 1996) (Superior Court, Judicial District of New Haven, Docket No. CV 96-0382136S, March 22, 1996); Atty. Gen. Opn. September 19, 1961; *Miner v. Marsh*, 102 Conn. 600 (1925); *Fields v. Osborne*, 60 Conn. 544 (1891)

13. CONNECTICUT LAW REVIEW VOL. 2, #1, June 1969.

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