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# Vacancy in the Office of Sheriff

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## I. Vacancy in the Office of Sheriff

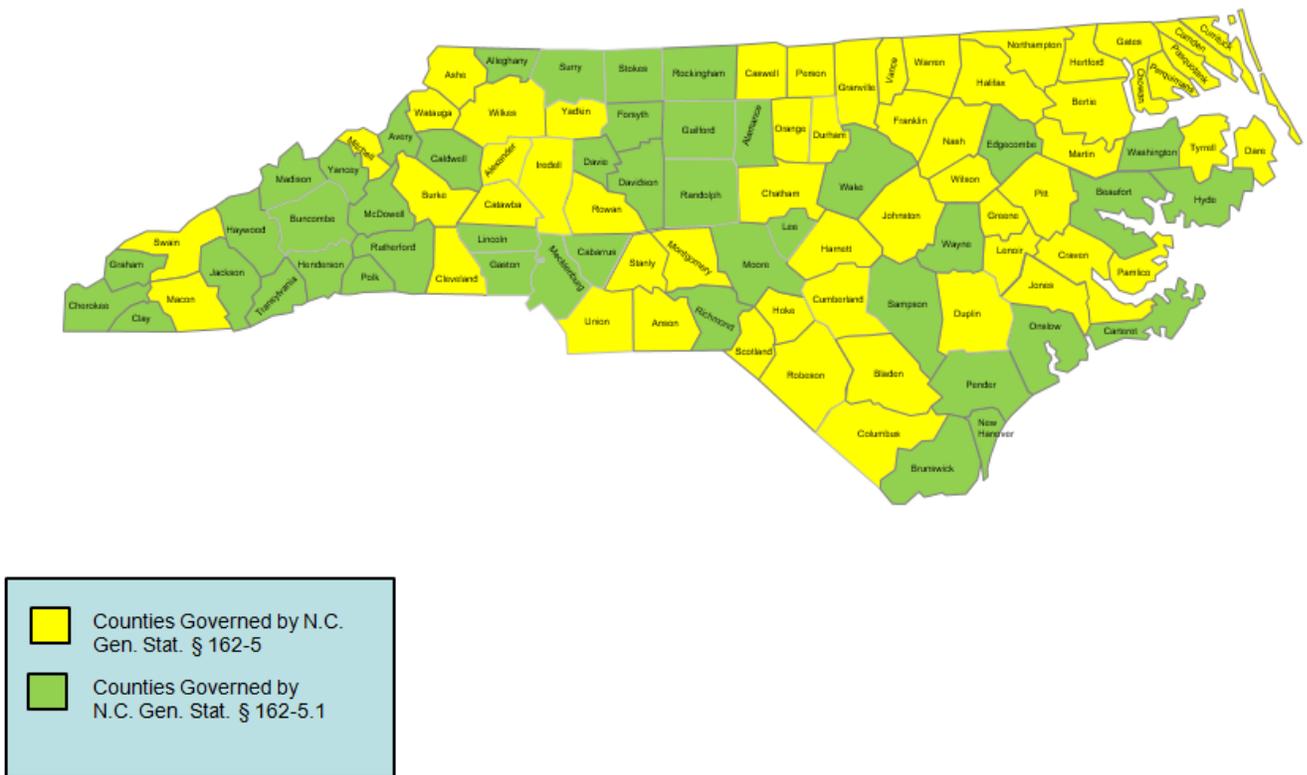
A vacancy in the Office of Sheriff can occur in the following ways:

- 1) death;
- 2) resignation or retirement;
- 3) removal;
- 4) suspension pending a removal hearing;
- 5) failure to qualify for the office; or
- 6) failure to pay a bond or have a bond approved.

(For more in depth discussion of items 2-6 above, see Section VI.)

## II. Appointment Process Under Either N.C. Gen. Stat. § 162-5 or § 162-5.1

For all counties, the procedure for appointing a new sheriff to serve the remainder of the outgoing sheriff's term is governed by either N.C. Gen. Stat. § 162-5 or § 162-5.1.



### **III. Counties Governed by N.C. Gen. Stat. § 162-5 [Counties Shaded Yellow]**

If there is a vacancy in the Office of Sheriff in a county governed by N. C. Gen. Stat. § 162-5, the statute states that:

- 1) The coroner of the county shall execute all process directed to the sheriff until the first meeting of the county commissioners next succeeding such vacancy.
- 2) The board of county commissioners will then elect a new sheriff to fill the vacancy for the remainder of the sheriff's term, and if the board fails to elect a new sheriff, the coroner will continue to discharge the duties of sheriff until the vacancy is filled.
- 3) In the counties where the office of coroner has been abolished, the chief deputy sheriff shall perform the duties of the sheriff until a person is appointed by the county commissioners.
- 4) If there is no chief deputy sheriff, then the senior deputy in years of service shall perform the duties of sheriff until a person is appointed by the county commissioners.
- 5) During the interim period, the regular deputy sheriffs will continue to perform their duties with full authority. Only when a new sheriff is appointed will they need to be re-sworn to their oath of office.

### **IV. Counties Governed by N.C. Gen. Stat. § 162-5.1 [Counties Shaded Green]**

If there is a vacancy in the office of sheriff in a county governed by N. C. Gen. Stat. § 162-5.1, the statute states that:

- 1) The coroner of the county shall execute all process directed to the sheriff until the first meeting of the county commissioners next succeeding such vacancy.
- 2) The board of county commissioners will then elect a new sheriff to fill the vacancy for the remainder of the sheriff's term, and if the board fails to elect a new sheriff, the coroner will continue to discharge the duties of sheriff until the vacancy is filled.
- 3) If the sheriff was elected as a nominee of a political party, the board of commissioners shall consult the county executive committee of that political party before filling the vacancy, and shall elect the person recommended by the county executive committee of that party, if the party makes a recommendation within 30 days of the occurrence of the vacancy.

If the executive committee of the political party that nominated the sheriff fails to make a recommendation within 30 days of the occurrence of the vacancy, the board of commissioners is not bound by any such recommendation, and may fill the vacancy with any person who meets the legal requirements to serve as sheriff.

- 4) In the counties where the office of coroner has been abolished, the chief deputy sheriff shall perform the duties of the sheriff until a person is appointed by the county commissioners.
- 5) If there is no chief deputy sheriff, then the senior deputy in years of service shall perform the duties of sheriff until a person is appointed by the county commissioners.
- 6) During the interim period, the regular deputy sheriffs will continue to perform their duties with full authority. Only when a new sheriff is appointed will they need to be re-sworn to their oath of office.

## **V. Items of Note Related to Vacancy and the Appointment Process**

- 1) The appointment of a person to fill a vacancy in the Office of Sheriff shall be “for the residue of the term” of the departed sheriff.
- 2) The vacancy must be filled by a person “who shall possess the same qualifications, enter into the same bond, and be subject to removal, as the sheriff regularly elected.”
- 3) While the board of county commissioners is required to “elect a new sheriff,” there is no time period within which they must do so. Usually, the board of county commissioners promptly appoints a new sheriff to fill the vacancy, but there have been instances where the board of county commissioners waited several months before appointing a new sheriff. While the statute does imply that the vacancy will be filled by the board of county commissioners at their meeting “next succeeding such vacancy,” there is a provision for the person discharging the duties of the office of sheriff to continue doing so, and there is no penalty if the board of commissioners decides to wait for some period of time before filling the vacancy.
- 4) A majority of counties have either abolished the office of coroner or do not currently have an individual filling that office; therefore it will be a rare occurrence that a county will utilize a coroner for the interim period prior to filling the vacancy in the Office of Sheriff. As of 2020, only Avery, Bladen, Hoke, Montgomery and Yadkin counties had a county coroner. However, effective June 17, 2020, the office of coroner in Montgomery County is abolished. In addition, effective January 1, 2021, the office of coroner in Avery, Bladen, and Hoke counties are also abolished. Any coroner elected in the 2018 or 2020 general election in these counties will be allowed to finish the remainder of their current term, and if a vacancy in the office of coroner should occur following the 2018 or 2020 general election in these counties, a new coroner may be appointed to fulfill the remainder of the term. Yadkin County is now the only county that has not abolished the office of county coroner.
- 5) If there is no chief deputy sheriff designated by the outgoing sheriff, then during the period of vacancy the duties of sheriff are performed by the “senior deputy in years of service.” Note that the senior deputy in years of service is not necessarily the highest ranking deputy in the sheriff’s office. In fact, the “senior deputy in years of service” may be currently serving in a position with no supervisory or managerial responsibility whatsoever.

- 6) There is no official title of “acting sheriff” or “interim sheriff.” The statutes provide for a person to “discharge the duties of sheriff” until a new sheriff is appointed, but that person retains their original position and acquires the additional duties of the office of sheriff. That person is not made an acting sheriff or interim sheriff, as a matter of law.

A person “discharging the duties of sheriff” during a vacancy in the Office of Sheriff retains the same title (Coroner, Chief Deputy, etc.) and salary for which they are currently employed.

- 7) The person who has been selected by the board of county commissioners to fill the vacancy in the Office of Sheriff becomes the sheriff of the county.

Currently there is a disagreement among some attorneys as to whether the appointed sheriff receives the same salary as the previous outgoing sheriff. N.C. Gen. Stat. § 153A-92(b)(1) provides, in pertinent part, “The board of commissioners may not reduce the salary, allowances, or other compensation paid to an officer elected by the people for the duties of his elective office if the reduction is to take effect during the term of office for which the incumbent officer has been elected...” (emphasis added) Some attorneys are of the opinion that this language restricting the ability of the board of commissioners to reduce the salary of the sheriff during his term of office applies only to the elected sheriff, thus allowing the board to reduce the salary of an appointed sheriff.

Until this issue is resolved by either our courts or the General Assembly, the person selected by the board of county commissioners to fill the vacancy in the Office of Sheriff should have discussions with the board of commissioners and settle on the salary before accepting the appointment.

## **VI. In Depth Explanation of Ways Vacancy is Created**

### *A. Resignation or Retirement (N.C. Gen. Stat. § 162-3)*

A sheriff may vacate the office, whether resigning or retiring, by “resigning the same to the board of county commissioners.”

An outgoing sheriff may decide to retire prior to the newly elected incoming sheriff being formally sworn into office. In this case, there is a vacancy in the position until the sheriff-elect is formally sworn in. Thus, the vacancy statute determines the proper process for filling the vacancy.

The sheriff-elect can be appointed pursuant to the vacancy statute and be sworn in as sheriff for the remainder of the outgoing sheriff’s term. However, the sheriff-elect must be sworn in again to begin the term for which they were elected.

### *B. Removal of Sheriff (N.C. Gen. Stat. §§ 128-16 – 128-18)*

Under N.C. Gen. Stat. § 128-16, a sheriff can be removed only for the following six reasons:

- 1) For willful or habitual neglect or refusal to perform the duties of the office.

- 2) For willful misconduct or maladministration in office.
- 3) For corruption.
- 4) For extortion.
- 5) Upon conviction of a felony.
- 6) For intoxication, or upon conviction of being intoxicated.

N.C. Gen. Stat. § 128-17 sets forth the process for which the sheriff can be removed from office.

It states that an official can be removed from office upon the filing of a petition by the following three classes of persons:

- 1) five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney or district attorney;
- 2) the county attorney; or
- 3) the district attorney.

Additionally, it shall be the duty of the county attorney or district attorney to appear in court and prosecute this proceeding.

Any action to remove a sheriff not in accordance with this statute is not proper, and no vacancy would exist in the Office of Sheriff.

It is important to note that no other person, office holder, or governing body has the authority to remove a sheriff outside of the process specified in this statute.

*C. Suspension Pending a Removal Hearing (N.C. Gen. Stat. § 128-19)*

A vacancy in the Office of Sheriff can exist when the sheriff has been suspended through an order of the court pursuant to N.C. Gen. Stat. § 128-19. This statute grants a superior court judge the authority to suspend a sheriff if the judge finds sufficient cause after reviewing the removal petition and accompanying affidavits.

It is important to note that an indictment and a suspension are two separate things. An indicted sheriff, whether a state or federal indictment, remains the sheriff and retains all of the authority and responsibility of the office of sheriff, thereby not creating a vacancy in the office, unless the indicted sheriff resigns, is removed or is suspended through an order of the court pursuant to N.C. Gen. Stat. § 128-19.

*D. Failure to Qualify for the Office (N.C. Gen. Stat. § 128-7.1)*

If a sheriff-elect “becomes disqualified for the office before qualifying for the office” or “refuses to qualify for the office,” that office will become vacant.

Before entering “on the duties of the office,” a sheriff must take the three separate oaths of office required by the North Carolina Constitution and the North Carolina General Statutes. The penalty for not doing so is the loss of \$500 “to the use of the poor of the county in or for which the office is to be used” and “being ejected from his office or place by proper proceeding for that purpose.” (*N.C. Gen. Stat. § 128-5*)

Additionally, a person is disqualified from holding elected office if they:

- 1) deny the “being of Almighty God;” [Note: Requirement violates U.S. Const., Amend. 1, 41 N.C.A.G. 727 (1972)]
- 2) are not qualified to vote in an election for that office;
- 3) have been found guilty of treason, any felony or corruption or malpractice in any office; or
- 4) have been removed from any office. (*N.C. Const. Art. VI, § 8*)

A person is specifically disqualified from holding the Office of Sheriff if the person has pled guilty to, been found guilty of, or pled no contest to any felony. (*N.C. Const. Art. VII, § 2*)

*E. Failure to Pay Bond or Have Bond Approved (N.C. Gen. Stat. § 162-10)*

A vacancy will be created if a sheriff fails to pay the appropriate bond required under N.C. Gen. Stat. § 162-8.

The amount of the bond is determined by the board of county commissioners but cannot exceed \$25,000.

The board of county commissioners:

- 1) “shall take and approve” the bond;
- 2) which they shall cause to be registered and deposited with the clerk of superior court for safekeeping; and
- 3) shall take the bond on the first Monday of December next after the election for sheriff.

N.C. Gen. Stat. § 162-10 states that if a sheriff fails to pay the bond prescribed by the board of county commissioners, “the board shall give written notice to the sheriff to appear before the board within 10 days and provide a sufficient bond.”

If the sheriff fails to provide a bond after this notice, “the sheriff shall forfeit his office, and the commissioners shall elect a suitable person in the county as sheriff for the unexpired term...”

*F. Conviction of Election Laws (N.C. Gen. Stat. § 163-276)*

Under N.C. Gen. Stat. § 163-276, any public official (including a sheriff) convicted of either of the following provisions, shall be removed from office by the judge presiding:

- 1) voting law violation under N.C. Gen. Stat. §§ 163-165 – 163-166 (such as by distributing campaign literature inside the buffer zone or soliciting votes inside the voting place); or
- 2) disruption of election under N.C. Gen. Stat. §§ 163-271 – 163-273 (such as by intimidating a voter or interfering with a voter while they are voting).

## **Appendix A – N.C. Gen. Stat. § 162-5**

### **§ 162-5. Vacancy filled; duties performed by coroner or chief deputy.**

If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the first meeting of the county commissioners next succeeding such vacancy, when the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bond, and be subject to removal, as the sheriff regularly elected. If the board should fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled.

In those counties where the office of coroner has been abolished, the chief deputy sheriff, or if there is no chief deputy, then the senior deputy in years of service, shall perform all the duties of the sheriff until the county commissioners appoint some person to fill the unexpired term. In all counties the regular deputy sheriffs shall, during the interim of the vacancy, continue to perform their duties with full authority.

## **Appendix B – N.C. Gen. Stat. § 162-5.1**

### **§ 162-5.1. Vacancy filled in certain counties; duties performed by coroner or chief deputy.**

If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bond, and be subject to removal, as the sheriff regularly elected. If the sheriff were elected as a nominee of a political party, the board of commissioners shall consult the county executive committee of that political party before filling the vacancy, and shall elect the person recommended by the county executive committee of that party, if the party makes a recommendation within 30 days of the occurrence of the vacancy. If the board should fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled.

In those counties where the office of coroner has been abolished, the chief deputy sheriff, or if there is no chief deputy, then the senior deputy in years of service, shall perform all the duties of the sheriff until the county commissioners appoint some person to fill the unexpired term. In all counties the regular deputy sheriffs shall, during the interim of the vacancy, continue to perform their duties with full authority.

This section shall apply only in the following counties: Alamance, Alleghany, Avery, Beaufort, Brunswick, Buncombe, Cabarrus, Caldwell, Carteret, Cherokee, Clay, Davidson, Davie, Edgecombe, Forsyth, Gaston, Graham, Guilford, Haywood, Henderson, Hyde, Jackson, Lee, Lincoln, Madison, McDowell, Mecklenburg, Moore, New Hanover, Onslow, Pender, Polk, Randolph, Richmond, Rockingham, Rutherford, Sampson, Stokes, Surry, Transylvania, Wake, Washington, Wayne, and Yancey.

**Appendix C – N.C. Gen. Stat. § 163-276**

**§ 163-276. Convicted officials; removal from office.**

Any public official who shall be convicted of violating any provision of Article 14A or 22 of this Chapter, in addition to the punishment provided by law, shall be removed from office by the judge presiding, and, if the conviction is for a felony, shall be disqualified from voting until his citizenship is restored as provided by law.