

Opinion No. 47-5103

November 19, 1947

BY: C. C. McCULLOH, Attorney General

TO: C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*109} In your letter dated November 19, 1947, relative to a certain town board, you state the following facts:

One member has accepted employment elsewhere and has changed his residence to be near the place of employment and has not attended a board meeting for over a year. Another member has been ill for four months and is confined in a hospital out of the state and expects to be there for another six or eight months. A third member is seriously ill and will probably be unable to attend meetings for the balance of his term. This leaves the Board with a Mayor and one councilman, and none of the other {*110} members are willing to resign their position.

In the absence of a quorum, you inquire whether the Mayor can transact duties vested in the Board, and, if not, what recourse may be had. In Section 10-301 of the 1941 Compilation, among other circumstances creating a vacancy in a municipal board, are sub-sections 5 and 6 which are as follows:

"5. When the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected;

"6. Absence from the county for six (6) consecutive months, and in cases of municipal officers, absence for such length of time from the village, town or city for which he is elected; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause;"

The member of the board who has accepted employment elsewhere and changed his place of actual residence undoubtedly has created a vacancy by removing from the town in which he was elected, under sub-section 5, and if he has been absent for six consecutive months or more, this circumstance would create a vacancy under sub-section 6. Such a vacancy can be filled at any time under the provisions of Section 14-1605 of the 1941 Compilation, which provides that vacancies shall be filled by appointment by the Mayor of such town by and with the consent and advice of the Board of Trustees. Since there is no quorum left on the Board, consent to the appointment by the Mayor could not be given. However, such appointee would at least be a de facto officer and could legally perform the duties of such an officer and enable the Board to have a quorum for the transaction of business.

Since illness or incapacity to perform the duties of the office because of illness is not a circumstance which creates a vacancy, the office held by the person who is ill in an out of state hospital does not become vacant until he has been absent from the town for six consecutive months, at which time the office would become vacant, and could be filled as above outlined.

As to the third member who is seriously ill and unable to attend meetings, I assume he is still residing in the town and has not been absent therefrom, in which case no vacancy is created and such place could not be filled. Until a new member is appointed and qualifies for the office which may be vacant, the old member continues to hold over in spite of the fact that the circumstances create a vacancy, since the Supreme Court has held that under our Constitution, except possibly in the case of death of an officer, no office is ever vacant but a condition merely exists making it possible to select or appoint someone to the office where the circumstances exist causing a vacancy in such office.