

Opinion No. 56-6452

May 31, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Nils T. Kjellstrom, Assistant District Attorney, Seventh Judicial District, Truth or Consequences, N.M.

On January 30, 1956, the City of Truth or Consequences adopted the Commission-Manager form of government. A Special election was set for April 30, 1956, to elect commissioners as well as a police judge. Only five candidates for commissioners qualified on filing day. No one filed for the office of police judge. Because of this, the election set for April 30 was not held. The incumbent police judge, who served while the city operated under the alderman form of government, continues to exercise the duties of that office, although his elected term expired in March of this year. The commissioners, under § 14-11-12, N.M.S.A., 1953, will hold office until the first Monday in February, 1957, and the next regular city election will be held on the second Monday in January of 1957.

Regarding the matter of the police judge's office, the following questions arise:

1. Should the Commissioners elected under a change to the Commission-Manager form of government, 14-11-1, N.M. Stats., designate a Justice of the Peace as Police Judge, or provide for the election of a Police Judge under Sec. 37-1-1 N.M. Stats.?
2. Assuming no election for Police Judge is now held and assuming the Commission is not required to designate a Justice of the Peace as Police Judge, does a vacancy exist from now until the next City election in January of 1957?
3. As no regular election, at the expiration of a two-year term of the incumbent Police Judge was held in March, does he continue legally in office? Does a vacancy exist?
4. Does the provision in the first clause of Sec. 37-1-5, notwithstanding the title, leave in effect the provision for the appointment of a Justice of the Peace to the office of Police Judge, pursuant to Sec. 14-11-20, so that 37-1-1 to 37-1-5 does not supersede the earlier provision, and if so, is the designation of the Justice of the Peace mandatory on the commission under Sec. 14-11-20 to preclude the appointment or designation of any other person?

The acts which empowered cities to operate under the Commission-Manager form of government are Chapter 21, Laws of 1921 (14-11-1 et seq., N.M.S.A., 1953), for cities with a population of between 3,000 and 10,000, and Chapter 121, Laws of 1919 (14-10-1 et seq., N.M.S.A., 1953), for cities having a population of over 10,000. Within these two acts are found identical sections relating to the manner in which a police judge shall be designated within cities operating under these acts. Article 4, § 4, Chapter 121, Laws

of 1919, (14-10-19, N.M.S.A., 1953, and Article 3, § 4, Chapter 21, Laws of 1921, (14-11-20, N.M.S.A., 1953), provide:

"The commission shall designate one (1) justice of the peace, holding his office in one (1) of the precincts of the city operating under this act, as police judge of said city, who shall hold office at the will of the commission."

In 1939, the Legislature passed a general act creating and establishing a police magistrate court and providing that he should be elected. Chapter 230, Laws of 1939, (37-1-1 et seq., N.M.S.A., 1953).

The basic question is whether or not Chapter 230, Laws of 1939, repeals §§ 14-10-19 and 14-11-20, N.M.S.A., 1953. Section 6 of Chapter 230, Laws of 1939, provided that "All acts and parts of acts inconsistent herewith are hereby repealed."

There is no specific reference to either § 14-10-19 or § 14-11-20 in the repealing section above. However, it seems to us that the inconsistency is patent and that, therefore, these two sections are repealed.

Approached from another view this conclusion is further strengthened. Until the passage of Chapter 230, Laws of 1939, there did not exist in this State a "police magistrate" court as such. This was held by our Supreme Court in 1932 when it had occasion to construe § 14-11-20, supra:

". . . We do not think the objection that this provision is unconstitutional because it provides for the designation by the commission instead of by election as required for the office of 'police magistrate' in section 26 of article 6 of the Constitution is serious. **Justices of the peace are elected, and designating a justice of the peace as police judge is not the creation of the office of 'police magistrate' authorized by the Constitution to be 'established by law.'** Designating a justice of the peace as 'police judge' is not creating a new court, but giving an additional name to an existing court. . . ." Stout v. City of Clovis, 37 N.M. 30 at page 34. (Emphasis Supplied)

Section 1, Chapter 30, Laws of 1939, (37-1-1, N.M.S.A., 1953), provides that:

"There is hereby created and established a police magistrate court in all incorporated cities and towns, which court shall be presided over by a police magistrate, to be known as a 'Police Judge.'"

Thus, where before in cities operating under the Commission-Manager form of government, or under any other form for that matter, there existed no "police magistrate" courts as such, such courts were created in these cities by Chapter 230, Laws of 1939. The language ". . . in all incorporated cities and towns . . ." seems all inclusive and to us admits of no exception.

We are informed further that several cities in this state operating under the Commission-Manager form of government have for a long time elected their police judges in accordance with the procedure set out in Chapter 230, Laws of 1939, apparently entertaining the view that these provisions supersede §§ 14-10-19 and 14-11-20. This long established practice is a factor which has been given weight by us in arriving at our conclusion above.

Now, since an election was not held for the office of police judge at the time the last regular city election was held, the person holding the office prior to that date continues to hold it. Section 2, Article 20 of the New Mexico Constitution provides that "Every officer, unless removed, shall hold his office until his successor has duly qualified." Now, the fact that there has been a change in the system of government of the city is to us of no significance as it relates to this question. As we see it, the office of "police magistrate" is the same under any form of city or town government. And the change in form does not interrupt its continuity.

Now, § 4, Chapter 230, Laws of 1939, (37-1-4, N.M.S.A., 1953), provides specifically for vacancies:

"Such police judges shall be elected for a term of two (2) years at each regular city election, **and vacancies may be filled by the mayor, subject to the approval of the city council.** . . ." (Emphasis supplied)

Section 5-3-1, N.M.S.A., 1953, provides that:

"Any office belonging to the class mentioned in section 3954 (5-3-3) becomes vacant under any of the following circumstances:

. . .

4. Expiration of the term of office when no successor has been chosen as provided by law;

. . ."

Since no successor was chosen as provided by law, i.e., no election was held, there now exists by virtue of § 5-3-1 above a "vacancy" which can be filled by appointment under § 37-1-4. Once he is appointed and qualifies by giving his bond, he takes office from the incumbent who remains in that office under § 2, Article 20 of our Constitution.

From the foregoing, your questions are answered as follows:

1. The mayor, with the approval of the commission, may appoint a person to hold the office of police magistrate in your city. This is not a designation under § 14-11-20, but an appointment to fill a vacancy under § 37-1-4. And at the next regular city election provision should be made for election of a judge to this office.

2. A vacancy exists from now until the next regular city election.

3. The police judge who held office prior to the last regular city election continues in that office until his successor is either appointed or elected, whichever occurs first.

4. This question is answered in the negative. The first clause of § 37-1-5 to us indicates no more than that a justice of the peace may be elected to the office of police magistrate or that he may be appointed to that office in the event that a vacancy exists under § 37-1-4.

I trust the above answers your inquiries.

By Santiago E. Campos

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