

Opinion No. 57-30

February 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General

TO: Hon. W. C. Wheatley, State Senator, New Mexico State Senate, Santa Fe, New Mexico

QUESTIONS

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1. In the event the Senate should fail to confirm the two appointments of the Governor to the Highway Commission, how will the two districts involved be represented during the succeeding two years?
2. In the event the Senate should fail to confirm only one of the two appointments, is the answer the same or would one of the appointments be filled by another method?

CONCLUSIONS

1. The two districts will be represented by the commissioners who have been confirmed by the Senate and who will hold over until the Governor can make an appointment during the first five days of the next legislature, unless a vacancy is created by reason of the happening of a possible event such as death, resignation, moving from the district or in some other fashion becoming ineligible to hold office.
2. The answer is the same for one commissioner as for two.

OPINION

ANALYSIS

Art. V, § 14 of the New Mexico Constitution, which is the 1955 amendment to the Constitution of New Mexico, provides as follows for the appointment of highway commissioners:

"C. The members of the commission shall be appointed by the governor with the advice and consent of the senate for overlapping terms of six (6) years each. One member shall be appointed from each of the five (5) aforesaid highway commission districts and such member shall reside in the district from which he shall be appointed. Change of residence of a highway commissioner to a place outside of the highway district from which he was appointed shall automatically terminate the term of such commissioner. No more than three (3) of the said commissioners shall belong to the same political party. Each of the said commissioners, in order to qualify as such, shall take the usual

oath and execute in favor of the state a surety company bond, in a form approved by the attorney general, in the amount of twenty-five thousand dollars (\$ 25,000.00) conditioned upon the faithful performance of his duties.

"The governor shall submit the appointment of commissioners to the state senate for confirmation not later than the 5th day of each regular session of the legislature. A three-fifths (3/5's) vote of the senate shall be required for confirmation. The appointment of such commissioner or or commissioners shall become effective upon the date of confirmation by the senate and no commissioner shall be appointed in any event without confirmation by the senate except that commissioners may be appointed by a majority of the remaining members of the highway commission, to fill vacancies until the next regular session of the legislature, at which time an appointment shall be made for the balance of the unexpired term.

"In the event the governor should refuse or fail to submit the highway commissioners to the senate for confirmation in the manner above provided, the senate shall appoint and confirm the highway commissioners.

"The members first appointed shall determine by lot from among their group two (2) members to serve two (2) year terms, two (2) members to serve six (6) year terms, and one (1) member to serve a four (4) year term."

You will note that this provides for the appointment in the initial stage within five days after convening of the legislature. In the event the governor fails to inform the Senate of such appointments, the Senate shall appoint and confirm. In the event there is a vacancy, the remaining members of the highway commission shall select a person to fill such vacancy until the succeeding session of the legislature. Thus, the question is: "Does the failure or refusal to confirm an appointment by the governor, after the expiration of the term for which the incumbent commissioner was appointed, create a vacancy?"

Art. XX, § 2 of the New Mexico Constitution, reads as follows:

"Every officer, unless removed, shall hold his office until his successor has duly qualified."

This provision is a constitutional enactment of the law that was in effect and has been in effect in this State since 1881, when the Supreme Court of New Mexico, in the case of **In The Matter of the Attorney General of New Mexico**, 2 NM 49 and 2 NM 63, construed a provision of the territorial law, which required absolutely and unequivocally that the legislature must confirm the appointment of the attorney general. In that case, the last confirmed appointee died and one Henry Waldo was appointed to succeed him. This appointment was not confirmed at the next regular session of the territorial assembly and at the expiration of the territorial assembly, the governor attempted to appoint a successor to Mr. Waldo, one Eugene A. Fiske. Both Mr. Waldo and Mr. Fiske

claimed the office. They submitted the matter to the Supreme Court of the Territory and the Supreme Court held that in view of the failure of the legislature to confirm Mr. Waldo, and in view of the absolute requirement that such confirmation be made, Mr. Waldo could not serve as attorney general. They further held that in view of the fact that the regular session had expired and no confirmation was made at that time by the legislature, that the governor was not empowered to appoint Mr. Fiske. Hence, New Mexico had no attorney general.

The next case in the line of decisions on this point is **Territory ex rel. T. J. Curran et al v. Thomas C. Gutierrez et al**, 12 NM 254. This case defines the method of creating a vacancy and holds that death, resignation, permanent removal from the territorial limits of the office are vacancies contemplated but the expiration of a term is not.

The third case, chronologically, involved in this decision is **Territory of New Mexico ex rel. George S. Klock v. Edward A. Mann**, 16 NM 744. This case is squarely in point and we believe it to be the controlling case on the subject. It also has been specifically approved in later cases since statehood and the language contained therein has been adopted as recently as 1953 by the Supreme Court of this state. In that case, the facts were substantially as follows:

Klock was appointed district attorney of the Sixth District of New Mexico by the governor and his appointment was confirmed by the legislature. His term was for two years. After the expiration of the two year period, the governor attempted to remove him from office and appoint another person, one Edward A. Mann. Mr. Mann, under the appointment from the governor, ousted Mr. Klock from office and an action was filed in quo warranto to regain that office by Mr. Klock. A decision was rendered in favor of Mr. Klock by the trial court and a writ of ouster was served upon Mr. Mann. Mr. Mann then proceeded to Santa Fe and obtained a second appointment from the governor of the state, thence to the office of the district attorney and then for the second time ousted Mr. Klock. Mr. Klock, at this point, filed this action in the trial court and was given judgment in quo warranto for a second time, together with a writ of ouster and no supersedeas was granted, thus Mr. Klock was reinstated in office. This appeal followed. The argument of Mr. Mann was to the effect that the expiration of the two year period was an automatic creation of a vacancy in view of the specific two year term provided for the office of district attorney at that time. Mr. Klock claimed his right to office by reason of the hold-over provision, similar to that contained in Art. XX, § 2 of our Constitution. The court, in an opinion which I commend to the reading of any person interested in this point of law in its entirety said, in part, as follows:

"An office is not vacant so long as it is supplied in the manner provided by the constitution, or law, with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. It is also well settled that the right to holdover continues until a qualified successor has been elected or appointed by the body electorate; or the appointing power, which by law is entitled to elect or appoint

such successor. *State ex rel. Carson v. Harrison*, cited *supra*, and cases cited therein. The power of appointment of district attorneys in New Mexico rests jointly in the Governor and Legislative Assembly, except in cases of vacancy in the office. The governor acting alone can only appoint to fill vacancies, which appointments shall expire on the commencement of the next Legislative Assembly thereafter. In the case at bar the relator, having the right to hold-over until a duly elected and qualified successor should demand the office, has the right to the office of district attorney and can hold the same until some qualified person appointed by the governor by and with the advice and consent of the Legislative assembly appears and demands the office. **Counsel for the respondent contend that such a view of the law practically ties the hands of the governor and ask what the result would be in event the governor should nominate some one whom the Legislative Council would refuse to confirm. Clearly, there would be no vacancy until such time as the governor and the Legislative Council should unite in an appointment and the previous incumbent of the office being entitled to hold until such appointment was duly made, would continue in such office unless removed pursuant to law.** Such being our views upon the first contention advanced by the relator, it is not necessary for us to consider the effect of the Enabling Act of June 10th, 1910, upon the term of office of the relator."

This case also held that the office was not occupied by a defacto officer but in all respects, the hold-over officer was de jure.

The question of hold-over until the successor was qualified was discussed in the case of **The Bowman Bank & Trust Co. v. The First National Bank of Albuquerque and The Regents of the New Mexico College of Agriculture and Mechanic Arts**, 18 NM 589, wherein the territorial court held that the appointment or election of an officer did not entitle him to the office, nor did it terminate his predecessor's title and right as a de facto officer until fully qualified under the law, i.e., filing of a bond according to law.

The case of **Jaramillo v. State ex rel. Board of County Commissioners of Sandoval County**, 32 NM 20, 250 P. 729, held that the officer whose term had expired but whose successor had not duly qualified was, in all respects, the incumbent and was entitled to hold office until the successor was duly qualified despite the fact that the term had expired.

The last case decided by the Supreme Court was that of **State ex rel. Rives v. Herring**, 57 N.M. 600, 261 P 2d 442. In this case, the county clerk of Chaves county who was elected in the November election was the incumbent. During December, and before she qualified the second time for offensive, she resigned and her successor, one Dorothy Herring, was appointed. The expiration of the term for which Mrs. Herring was appointed, would be December 31, 1952 at midnight. However, the former incumbent, Miss Chandler, was not present to qualify and did not qualify at any time prior to the hearing. The county commissioners, however, took the view that the expiration of the term for which Miss Chandler was elected was midnight on December 31, 1953, that they were authorized to appoint a person to fill that office. They attempted to do so and this action was commenced.

After quoting extensively from the various cases in New Mexico, and particularly the case of **Territory of New Mexico ex rel. Klock v. Mann**, held that the incumbent, Dorothy Herring, was the county clerk for all purposes, a de jure officer, and entitled to hold that office against all assaults except a qualification by Miss Chandler.

This problem is discussed at length in an annotation at **164 ALR 1248** and the majority view in the United States is in accordance with this opinion. There are, however, minority jurisdictions which hold that the expiration of the term creates a vacancy. This view was expressly disproved in the case of **State ex rel. Rives v. Herring**, supra.

The two officers involved are separate offices, one is highway commissioner for District No. 3 and the other is highway commissioner for District No. 4. Therefore, the rule stated in this opinion applies to each office and the incumbent commissioner is entitled to hold his office until he is replaced at the next session of the legislature, unless confirmed by this legislature, or unless a vacancy is created in any of the ways possible, at which time the filling of the office may be accomplished in any of the ways provided in the Article above partially quoted.

Therefore, it is the opinion of this office that in the event the present session of the legislature should fail to confirm the appointments made by Governor Mechem, of Mr. Cornman or Mr. Atchley, or either of them, that the person holding that office is entitled to hold that office until his successor is qualified in any of the ways provided in the Constitution, unless a vacancy in that office is created by death, resignation, permanent removal from the district or state, or removal from office pursuant to provisions of that Article. It should be noted that the appointment is a joint one and the Governor cannot appoint without the concurrence of the State Senate under any circumstance whatsoever. The Governor has only one chance to appoint under this Article, that within 5 days after the legislature convenes. Failure by the State Senate to concur in his appointment is a right given in this Article and is a strictly discretionary prerogative of the State Senate as is the nomination by the Governor in the first instance a discretionary action.