

## Opinion No. 59-173

October 27, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Mrs. Betty Fiorina Secretary of State Santa Fe, New Mexico

{\*266} This opinion is in response to your recent request on the following questions:

1. Can Boards of County Commissioners still appoint Boards of Registration and alternates pursuant to Section 3-2-13, N.M.S.A., 1953 Compilation (P.S.)?
2. In the event they cannot so appoint, would the Boards of Registration and alternates appointed in 1957 serve until 1961?

In our opinion the answer to your first question is No.

Our answer to your second question is Yes, the boards appointed in 1957 will hold over until 1961.

From your letter, it would appear that by inadvertence, a Board of County Commissioners failed to make the necessary appointment of members of boards of registration on or before the first Monday of March, 1959, as provided by Section 3-2-13, N.M.S.A., 1953 Compilation (P.S.) It is now October, 1959.

In support of our answer to your first question, we cite Article XX, Section 2, New Mexico Constitution:

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

Also a recent case decided by our Supreme Court, **State ex rel., Rives v. Herring**, 57 N.M. 600. In this case Judge Seymour, speaking for the Court said:

"[3] . . . The best summary of the law is found in the annotation, 164 A.L.R. 1248, entitled, "Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected is holding over." It is stated on page 1249 thereof:

"The great number of cases have held that during the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do until the election and qualification of a successor, **there is no vacancy** in office **which may be filled** by an interim {\*267} appointment." (Emphasis Supplied)

We cite also Pollack v. Montoya, 55 N.M. 391 as to who measures up to the standard or who is a "public officer." (2, 3) of said case stated:

"[2, 3] We believe that in 22 Ruling Case Law, page 381, Section 12, the chief elements of a "public office" are well summed up. The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the government power. A position which has these three elements is presumably an "office" while one which lacks any of them is a mere "employment." Taking these as the criteria, was Tom O. Montoya occupying an "office." We think it obvious that he was. The Act created his position; it defined his duties, and it involved the exercise of some portion of sovereign power. He was not a mere stenographer or clerk in the employ of the Division of Liquor Control, or a gardner, or a janitor working about the capitol building."

By virtue of the wording in Article XX, Section 2, New Mexico Constitution, supra, and the law established by the Herring and Montoya decisions, supra, it is our belief that an appointment of new boards of registration at this late date is ill advised, particularly so if any of the incumbent board members should see fit to contest being replaced.

Therefore, our answer to your question No. 1 is as stated, supra, new boards of registration cannot be appointed now.

The law we have cited in support of our answer to your question Number 1 applies with equal force to our answer to your question Number 2. It would be superfluous to quote anything other than that portion of Section 3-2-13, N.M.S.A., 1953 Compilation, (P.S.), which reads:

". . . Such board of registration **shall hold office until their successors are appointed** and qualified as herein provided. The members of such boards of registration shall qualify by taking and filing in the office of the County Clerk the oath required of County officials. . . ." (Emphasis Supplied)

Therefore, our answer to your question number 2 is as stated, supra, Yes, the boards appointed in 1957 will hold over until 1961.

Carl P. Dunifon

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