

Opinion No. 59-34

April 6, 1959

BY: FRANK B. ZINN, Attorney General

TO: Honorable W. T. Scoggin District Judge Third Judicial District County Court House
Las Cruces, New Mexico

County Commissioners have power to determine a vacancy in the office of the justice of the peace to exist by reason of abandonment by the elected incumbent and to appoint another person to fill the vacancy.

OPINION

{*51} In substance, your recent request for an opinion presents the following question:

A man was duly elected as justice of the peace and after January 1st, he gave bond as required by law. Since the election he has not actually resided in the precinct nor in the county in which his precinct is located. He had been absent from the precinct and county some forty (40) days when the commissioners declared the office vacant. On the state of facts presented, do the county commissioners have the power to declare the office vacant?

In answering your question, I will assume that the man is pursuing a gainful occupation elsewhere than in the precinct of his alleged residence.

It is my belief that regardless of the particular statute upon which the commissioners base their action, that it is their prerogative to determine that the office of justice of the peace to be vacant if in their opinion the official has by reason of his absence abandoned the office.

Section 5-3-40, N.M.S.A., 1953 Compilation, reads as follows:

"Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the {*52} state, (other than service in the armed forces of the United States of America) for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of **thirty (30)** successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

The statutes of the State of Ohio are somewhat similar to the statutes of this state as regards the question at hand. In the case of **State ex rel. Trago v. Evans**, 166 Ohio State, Reports 269, cited a provision of statute which state generally that whenever a county officer is absent from the county for ninety (90) consecutive days except in case of sickness or injury or while in active military service, his office shall be deemed vacant and that the county commissioners shall declare a vacancy to exist. In that case it was held that when a sheriff was absent from the county for ninety (90) consecutive days and his absence was not caused by sickness or injury, the county commissioners had a ministerial and mandatory duty to perform, that is to declare that a vacancy existed in the office of sheriff.

In this case there is cited the case of **Steubenville v. Culp**, 38 Ohio State 18, to the effect that offices are held in this country, neither by grant or contract, and that no person has a vested interest or private right of property in them.

The last paragraph of the Trago case states:

"Any candidate for any county office is bound to know the provisions of this statute and is bound to know that if elected his office will become vacant in case of his absence as outlined in the statute, and, therefore, since his office is a public privilege and not a property right, he can have no redress if a vacancy in his office occurs in accordance with a statute. If, at times, harsh consequences may ensue as a result of the enforcement of the law, the remedy for those consequences is a province of the legislative and not the judicial branch of the government."

Although the facts and the statutes are perhaps not identical, it is my belief that it is a common rule of law in our sister states that an officer cannot wilfully abandon an office to which he has been elected and continue to hold such office.

The power of the Commissioners to appoint a person to fill a vacancy in the office of justice of the peace is clearly set forth in Section 5-31-42, New Mexico Statutes Annotated, 1953 Compilation.

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