

## **Opinion No. 60-151**

August 15, 1960

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

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

### **QUESTION**

#### QUESTION

Justice James B. McGhee announced his retirement from the New Mexico Supreme Court, the effective date being July 31, 1960. Acting pursuant to the authority granted him by Article XX, Section 4 of the Constitution of the State of New Mexico, the Governor appointed Mr. M. E. Noble to fill the vacancy created by Justice McGhee's retirement.

Can the Secretary of State place Mr. Noble's name on the ballot for the general election to be held in November, 1960?

#### CONCLUSION

No.

### **OPINION**

#### **{\*536} ANALYSIS**

The resolution of the issue at hand requires consideration and interpretation of Article XX, Section 4 of the Constitution of the State of New Mexico, which reads as follows:

"If a vacancy occur in the office of district attorney, judge of the supreme or district court, or county commissioner, the Governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term."

The language, "until the next general election", has been frequently construed by the courts of other jurisdictions with constitutional provisions similar to ours. According to one line of cases, the election indicated by the phrase "next general election" is the next election at which a successor to the incumbent of the office would have been elected if there had been no vacancy. Other courts interpret the same language as indicating the intention that the affected officer must stand for election at the next general election in point of time. 132 ALR 574. While the New Mexico courts have not spoken upon this question, we concede that there is reason to believe that the framers of our Constitution

intended that an officer in Justice Noble's position should stand for election at the next succeeding biennial general election. First, the constitutional provision under consideration is an expression of the principle that the people should have the right not only to select their officers originally but to do so as soon as it can conveniently be done when any of the offices become vacant. A further reason for such a construction is found in the last sentence of the subject constitutional provision to the effect that a person so elected "shall hold his office until the expiration of the original term." This last sentence could have no effect if the phrase "until the next general election" were construed as meaning the next election for that particular office. See **State ex rel. Patterson v. Lentz**, 50 Mont. 322, 146 P. 932. We discuss this aspect of the problem at some {\*537} length not because we feel that its solution will solve the problem at hand but rather to make it clear that our conclusion is not reached on the basis of our interpretation of the constitutional provision alone.

It is our opinion that even if Article XX, Section 4 of the Constitution, be construed as disclosing the intention that the affected officer stand for election at the next general election in point of time, the answer to the specific question herein considered must still be answered in the negative. In reaching this conclusion, we approve the rationale of **State ex rel. Oleson v. Minor**, 105 Neb. 228, 180 N.W. 84, wherein a constitutional provision, similar to ours, was considered. In that case, two supreme court justices had been duly elected for identical six-year terms, commencing in January, 1917. In December, 1919, one of the judges died and the vacancy was filled by appointment of the governor. The appointed judge was subsequently able to secure the filing of a nominating petition and was properly nominated in time for his name to appear upon the primary election ballot. However the second of the two judges elected for the term commencing in 1917 also died in the spring of 1920 at a date too late for placement of a successor's name on the primary ballot. It was sought by writ of mandamus to provide for blank spaces on the ballot to permit write-in votes for a successor to the second deceased judge. In denying the writ, the court construed the following constitutional provision:

"In case the office of any judge of the Supreme Court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be elected and qualified **and such successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened.**" (Emphasis added).

The remarkable similarity between the Nebraska and New Mexico provisions is obvious. In fact, the Nebraska provision is perhaps less ambiguous than is our own. Furthermore, the positions of Justice Noble and the second appointee of the Nebraska governor are, for all practical purposes, identical. The Nebraska court did not question the obvious intention of the subject constitutional provision. However, it held that under the peculiar circumstances of the case, **the provision** could not be implemented without enabling legislation.

"We do not agree with relator's argument that the foregoing section of the Constitution is self-executing. No provision is made in that section for the nomination or the naming of candidates to be voted for at the general election to the end that the general election feature to which the section refers may be carried into effect."

It is our conclusion that the same want of enabling legislation prohibits the placing of Mr. Noble's name, or that of any other candidate, upon the general election ballot for November, 1960.

Still another reason for the conclusion herein reached is the fact that the office of Secretary of State is strictly a creature of positive law and, therefore, the Secretary of State has only such powers and authority as specifically granted by the Constitution or by statute. The Secretary of State has no inherent or implied power to certify candidates not selected in a manner specifically provided by law. Section 3-3-3, N.M.S.A., 1953 Comp., dealing with the filling of vacancies on the ticket, is of no assistance under the peculiar circumstances of this case. Since Justice McGhee was not to run for reelection at the November general election, no vacancy in the list of {\*538} candidates certified resulted from his retirement. Therefore, said section is not applicable nor is it available to remedy the present dilemma. Furthermore, this writer finds no other provision in the present election statutes whereby the general election ballots may include Justice Noble's name or that of any other candidate for the Supreme Court seat vacated by Justice McGhee.

By: F. Harlan Flint

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