

Opinion No. 61-119

November 27, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Jack M. Campbell, Speaker of the House, Twenty-fifth Legislature, P.O. Drawer 640, Roswell, New Mexico

QUESTION

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Is the certified statement of Board of County Commissioners of Socorro County that a vacancy has occurred in the office of State Representative for Socorro County sufficient to constitute a proper finding as to a vacancy in such office, and does such certified statement by the Board of County Commissioners naming a successor, constitute the appointment of a successor to such office, subject to such person being sworn in as a member of the House of Representatives?

CONCLUSION

See Analysis.

OPINION

ANALYSIS

The factual situation as set forth in your letter and the enclosed certificate of the Socorro County Clerk, indicates that on October 2, 1961, at the regular commissioners' meeting held by the Board of County Commissioners of Socorro County, Socorro, New Mexico, by motion of one commissioner, duly seconded by a second commissioner and which motion was duly carried, Mr. Frank J. Dailey was appointed State Representative to fill the vacancy of Mr. E. E. Bartee who moved out of Socorro County. The certificate verifying such action by the Commission was signed by the three members of the Board of County Commissioners of Socorro County, and certified by the County Clerk of such county.

In determining the sufficiency of the action taken by the Board of County Commissioners as set out above, in declaring a vacancy occurring in the office of State Representative for Socorro County, and the issue of whether the certified statement indicating the action by the Commission in appointing a successor to such office is sufficient to constitute a proper finding as to the fact of a vacancy in such office, it is necessary initially to consider several New Mexico State constitutional provisions and their application to the issue presented.

Under Article IV, Section 3, of the New Mexico State Constitution, it is provided in applicable part as follows:

"* * * If any senator or representative permanently removes his residence from or maintains no residence in the county from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. * * *"

Article IV, Section 4, of the New Mexico Constitution referred to in the preceding section, provides in part:

"* * * If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment. * * *"

In addition to the above constitutional provisions, the language of Article IV, Section 7, of the New Mexico State Constitution has particular bearing upon the issue presented above and provides in part as follows:

"Each house shall be the judge of the election and qualifications of its own members. * * *"

As prescribed in Article IV, Section 3, above, whenever a State Representative no longer maintains his residence in the county from which he was elected, then he is deemed to have resigned from such office, and his successor is to be selected as prescribed in Article IV, Section 4. The manner by which the board of county commissioners must determine whether or not a vacancy has in fact occurred is not expressly governed by constitutional provision or by applicable state statute.

The question of whether or not a senator or representative has actually permanently removed his residence from the county wherein he was elected, or whether such absence is merely temporary in character and not permanent, so as to create a vacancy in such legislative office, must necessarily be considered by the Board of County Commissioners as a prerequisite to their appointing a successor to fill such vacancy.

In any instance wherein a question of procedure arises as to the action of the Board of County Commissioners in making a determination of the fact of vacancy in such legislative office, or in certifying or in evidencing the action taken by such county commission, the ultimate authority to decide such issue rests solely in the particular branch of the legislature wherein the vacancy is alleged to have occurred.

It has been generally held that under constitutional provisions prescribing that each house of the legislature shall be the judge of the qualifications and election of its own members, that the final determination of the eligibility of individuals for legislative office is within the exclusive power of the particular legislative body itself to rule upon. **State ex rel. Evans v. Wheatley**, 125 S.W. 2d. 101, 197 Ark. 997; **State ex rel. Boze v.**

Superior Court, 129 P. 2d. 776, 15 Wash. 2d. 147; **Covington v. Buffett**, 45 Atl. 204, 90 Md. 569, 47 L.R.A. 622. Under such constitutional provisions empowering legislative bodies to determine the qualifications of its members, this authority has been also held to extend to the matter of determining whether or not a vacancy has occurred in the legislature for which a replacement may be seated.

This rule as stated in 81 C.J.S., "States", Section 43, at page 943, states:

"In the exercise of such power each body of the legislature acts as a judicial tribunal, and may take such proof and incur such expenses as may be reasonably necessary for it to decide a contest of office. The decision of the legislature is conclusive of the courts, at least in the absence of a denial of due process of law, and the courts are ordinarily without jurisdiction either to hear and determine election contests as to legislators, or to pass on their qualifications or eligibility for office. * * *"

In **Covington v. Buffett, et al.**, 45 Atl. 204, 90 Md. 569, 47 L.R.A. 622, it was held that:

"* * * It is too clear, we think, for serious controversy, that * * * the constitution names the only tribunal which has the power to decide the question, and that is the senate * * * it provides that 'each house shall be the judge of the qualifications and elections of its members,' and we are all of the opinion that until that tribunal, which is entrusted with the exclusive authority, decides whether a vacancy exists, the courts are without jurisdiction to interfere. * * * It cannot be doubted that either branch of the legislature is thus made the final and exclusive judge of all questions, whether of law or of fact, respecting such elections, returns, or qualification, so far as they are involved in the determination of the right of any person to be a member thereof, and that while the constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein cannot be disputed or revised by any court or authority whatever."

Based upon the above constitutional provisions, and authorities, it is implicit that it is incumbent upon the Board of County Commissioners to fill vacancies in the office of State Senator or State Representative by appointing a qualified successor. The precise procedure by which such Board of Commissioners, pursuant to Article IV, Section 3, and Article IV, Section 4, of the State Constitution, performs its duty in determining the fact of actual vacancy in cases wherein the incumbent permanently removes his residence from the county so as to effect an automatic resignation from such office, or by which the board performs its duties of filling such vacancies as occur, is not expressly designated by statute.

It is evident, however, that the Board of County Commissioners must in fact make a determination that a vacancy has occurred in such legislative body, and that if such vacancy is deemed to have occurred by reason of the removal of the elected representative from the county, that such removal was permanent. With or without such a determination reflected in the minutes of the Board of County Commissioners, the

legislative body may well question the validity of the appointment and the qualifications of the appointed successor.

From the foregoing, we conclude that while the State Constitution requires under Article IV, Section 3, and Article IV, Section 4, that in the event of a vacancy occurring by reason of the fact that a legislator has permanently removed his residence from a county, or because such legislator no longer maintains any residence in the county wherein he was elected, that the Board of County Commissioners must, upon determining such vacancy exists, act to appoint a successor to such office. We believe that the better practice in such cases would be for the Board of County Commissioners to make a formal finding of fact entered in the minutes of such body that a vacancy in fact has occurred in the office of State Representative by reason of the permanent removal of such legislator from the county. Any question as to the actual fact of a vacancy or the sufficiency of the action by the Board of County Commissioners in determining the fact of such vacancy or in filling the vacancy is for the House of Representatives to determine, and is solely within the province of such body to resolve.