

Opinion No. 62-145

December 12, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Walter R. Kegel, District Attorney, First Judicial District, County Court House, Santa Fe, New Mexico

QUESTION

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1. Is a person who was elected to the New Mexico Legislature for the first time at the general election in November of 1962 a member of the Legislature prior to being seated at the session to be convened in January, 1963?
2. Since the term of office of the person now holding this legislative position expires December 31, 1962, will the Board of County Commissioners have the power to fill the vacancy?

CONCLUSIONS

1. No.
2. Yes.

OPINION

ANALYSIS

Your first question arises because a successful candidate for the New Mexico Legislature for a term commencing in January, 1963, wishes to accept an appointive State office prior to the opening of the next legislative session. This person is not a hold-over legislator.

Article IV, Section 28 of our Constitution provides that "no **member** of the legislature shall, during the term for which he was elected, be appointed to any civil office in the State . . ." (Emphasis added).

Section 2-1-4, N.M.S.A., 1953 Compilation, provides that no **member** of the legislature shall receive compensation for services performed as an officer or employee of the State except compensation to which he is entitled as a member of the legislature.

The crucial issue then is whether a person who has been elected to the legislature, but who has not qualified, is a member of that body for purposes of the Constitutional prohibition against being appointed to any other civil office.

This exact question arose in 1961 in Arizona whose constitutional prohibition is practically identical to ours. **State ex rel. Pickrell v. Myers**, 89 Ariz. 167, 359 P.2d 757 (1961).

The Court pointed out that the disqualification as to holding other civil office does not apply under the same fact situation as here presented because the person does not become a **member** of the legislature simply by election thereto. The Court said:

"Until affirmative action is taken by the House by judging of the election and determining the qualifications of those seeking to be seated, a person elected may not become a member."

The same is true in this State where, under Article IV, Section 7, New Mexico Constitution, "Each house shall be the judge of the election and qualification of its own members."

The Court pinpointed the underlying reason for the Constitutional prohibition against a member of the legislator holding another civil office in the following language:

"The evil sought to be avoided is the participation by a legislator in the deliberations and enactments pertaining to a public office which might subsequently be held by him during his term as a legislator."

When the person elected to the legislature does not qualify and assume the duties of the office, the reason for the prohibition is inapplicable. The Wisconsin Court also held the same way in 1961. **Bank of Drummond v. Nuesse**, 13 Wis. 2d 74, 108 N.W. 2d 283.

The Federal courts have long since ruled that members of Congress do not include persons who have been elected until such time as they have been accepted and qualified as such by the branch of Congress to which they were elected and have embarked upon their duties. In the case of **United States v. Dietrich**, 126 Fed. 676, the Court said:

"When we speak of a member of Congress, we refer to one who is a component part of the Senate or House of Representatives; one who is in office -- not out of office; one who is sharing the responsibilities and privileges of membership."

Turning to your second question, we note that the legislative office to which the person who does not wish to qualify was elected is now held by one who was appointed to fill the unexpired term of a legislator who resigned.

Article IV, Section 4, New Mexico Constitution, provides that appointments to fill legislative vacancies "shall be for a term ending on December 31 subsequent to the next succeeding general election."

Consequently the term of the person who presently holds the office will expire at 12:00 o'clock midnight December 31, 1962. While this person holds over until his successor qualifies, there is at the expiration of this term of office a vacancy which, under Article IV, Section 4, the Board of County Commissioners has the power to fill by appointment.

The person who does not intend to qualify as a member of the legislature should simply notify the Board of County Commissioners of this fact. Thereafter, and following the expiration of the term of the incumbent representative the county commissioners in regular or special session may appoint the representative to fill the vacancy and certify the appointment to the Secretary of State.