

## Opinion No. 64-139

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**BY:** OPINION OF EARL E. HARTLEY, Attorney General By James V. Noble, Assistant Attorney General

**TO:** Maralyn Budke, Assistant Fiscal Analyst, Room 206, State Capitol Santa Fe, New Mexico

### QUESTION

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Where an appointment is made to fill a vacancy in the office of county commissioner, and no one is elected to fill the balance of the unexpired term, does such appointee continue to exercise the authority of such office until January 1st next succeeding the general election?

#### CONCLUSION

Yes.

### OPINION

#### ANALYSIS

The facts supplied indicate that a vacancy existed in the office of county commissioner for one of the districts prior to the last general election. Such vacancy was filled by gubernatorial appointment. A general election was held November 3rd and a candidate elected to the office of county commissioner for said district. The term for which he was elected was not specified on the ballot.

Article XX, Section 4, New Mexico Constitution reads as follows:

"If a vacancy occurs in the office of district attorney, 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."  
(Emphasis supplied)

Article XX, Section 2, New Mexico Constitution reads as follows:

"Every officer, unless removed, shall hold his office **until his successor has duly qualified**." (Emphasis added.)

There is no basis for construction of the first sentence of Article XX, Section 4, *supra*. The term of office of the appointee is limited to a period expiring at the next general election, which is now past. There being no ambiguity in the language so far as this point is concerned, there is no basis for construction. However, a person other than the appointee having been elected as county commissioner for a regular term of two years at such general election, the interesting question of who, if anyone, exercises the duties and authority of county commissioner for said district for the period from the next general election to January 1, 1965 arises.

One of the earlier cases of this state involving a somewhat similar question is that of **Territory v. Mann**, 16 N.M. 744, 120 P. 313. The question there involved was whether, after expiration of the express term for which appointed, a vacancy existed giving authority to the governor to make an interim appointment. Unless such vacancy existed, the approval of the territorial council of the appointment, was also required. The Court held that the incumbent hold over until his successor was duly appointed and qualified and that no vacancy in the office existed permitting an interim appointment. The Court said:

"It is also well settled that the right to hold-over continues until a qualified successor has been elected or appointed by the body electorate; or the appointing power which by law is entitled to elect or appoint such successor."

Another case in point is that of **State v. Haymaker**, 22 N.M. 400, 163 P. 248, which involved the question of whether a vacancy, permitting appointment, existed if the claimant held an incompatible office. The argument involved a construction of Article XX, Section 2, *supra*. The court there held that the person holding the incompatible office was entitled to continue to act at least until such time as someone else was elected or appointed to the office and qualified therefor. Although the holding of the incompatible office might be considered, the equivalent of a resignation, yet Article XX, Section 2 acted to prevent a vacuum from occurring in the exercise of the office until someone else could legally act. The only case where such might occur would apparently be if the office-holder died or otherwise was physically incapacitated from acting.

In the case of **State v. Herring**, 57 N.M. 600, 261 P.2d 442, the question was whether a person appointed prior to January 1st succeeding the general election was entitled to continue in office after such January 1st or whether a vacancy then existed so that a new appointee could be named? This again required a construction of Article XX, Section 2, *supra*. The court held that the appointee hold office until his successor was elected and qualified. Until then no vacancy permitting the making of another appointment existed. The court further held that an officer holding over until his successor duly qualified was a *de jure* officer entitled to all of the emoluments of the office and to perform all the duties and exercise all the authority of the office.

The case of *State v. Fiorina*, 67 N.M. 366, 355 P.2d 497, involved a somewhat different question since there the question was whether an appointee could require that his name

be placed on the general election ballot as a candidate for the unexpired term of his predecessor. However, much of the reasoning involved in an interpretation of Article XX, Section 4, supra, is of aid. The court held that the limitation on the term of the appointment was self-executing but that the second sentence was not and that such must be interpreted as giving one the right to his name placed on the ballot for the balance of the unexpired term. We do not here have such a question since no one was nominated for or elected to the office in question for the balance of the unexpired term, i.e. from the date of the general election to and until January 1st next succeeding.

Two other Constitutional provisions are in point. The first of these is Article X, Section 2, New Mexico Constitution. The second is Article XX, Section 3, New Mexico Constitution. Article X, Section 2, supra, provides in part in substance that all county officers shall be elected for a term of two years. Article XX, Section 3, supra, provides in part in substance that the terms of office shall commence on January 1st next after his election unless elected to fill a vacancy.

Under the Constitutional provisions cited and the cases cited, the inescapable conclusion is that the term of office of the appointee terminated at the time of the general election next succeeding his appointment. However, no one was elected to fill the unexpired term of the elected incumbent. Since the newly elected commissioner was elected to a regular term his term of office would be for a period of two years commencing on January 1st next succeeding his election and his qualification is for a term commencing such January 1st.

This view is strengthened by Section 2, Chapter 3, New Mexico Session Laws, 1964, which provides in substance that where any expiring term and the next succeeding term for the office of U.S. Senator, U.S. Representative or elective state or district officer, were to be voted on at any general election, the same individual could be a candidate for both terms. In view of this act it is apparent that the legislature also interpreted the language of Article XX, Section 4 as placing the individual elected to the full term in office prior to the usual January 1st date. Although such construction is not mandatory, it is persuasive. The fact that the office of county commissioner is omitted from this section is not material to any question here presented.

Since no one qualified as the successor to the appointee he would continue to hold and to act as de jure county commissioner until January 1st next succeeding the general election and the qualification of the person elected to take such office at such time. Such holding gives effect to all of the provisions of our Constitution and applies the interpretations and rulings of our Supreme Court as to such provisions.