

Opinion No. 65-01

January 1, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: New Mexico Legislative Council, Room 201 /- State Capitol, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. May a municipality postpone an election for members of a board of arbitration under annexation procedures after the date of election has been set and notice published?
2. May a municipality rescind its action in connection with annexation proceedings including an election for members to a board of arbitrators after the date of such election has been set and notice thereof published?

CONCLUSIONS

1. No, but see analysis.
2. Yes.

OPINION

{*2} ANALYSIS

Proceedings have been initiated by a municipality to annex abutting or contiguous territory under the provisions of Sections 14-6-2 through 14-6-7, N.M.S.A., 1953 Compilation. Under the provisions thereof the municipality adopts a resolution and the same thereafter shall, together with a plat of the land desired to be so annexed, be filed with the county clerk. Upon such filing a board of arbitration is created. Its composition is determined by an election held within the territory to be annexed at which three members are elected; by the municipality appointing three members on or before 10:00 A.M., on election day; by the selection by such six members of a seventh member, or in default thereof by the district judge. When the seven members of the board are selected they are required to investigate and make a determination as to the advisability of the annexation. If they determine that the area should be annexed their decision is final. If they determine that the area should not be annexed, the municipality cannot again seek to annex the territory for a period of at least two years.

The notice of the election is published by the clerk within ten (10) days after the filing of the resolution and plat setting forth the election date and places of election. The election

places and officials are selected by the county commission and the date of election is required to be set on a day not less than thirty (30) days, nor more than sixty (60) days after the date of the notice. Nominations for the positions to be filled by the election shall be made not less than ten (10) days prior to the date of the election.

All costs incident to the annexation, including those of the election, are to be paid by the municipality.

There is no procedure available under our law by which the date of election, once established and notice published can be postponed and re-set for a later date under the same proceeding. There being no such procedure available, the election may not be postponed by the municipality and the answer to the first question is in the negative. However, in view of the conclusion reached in answer to your second question, the same result can be reached by the cancellation of the election entirely and filing of a new resolution and plat as set forth in this analysis.

The second question involves an attempt to rescind the initiation of the annexation proceeding before the election to fill some of the {*3} offices of the arbitration board is held. In spite of the apparently mandatory language used in some instances in the statutes in question it is generally held that procedural matters concerning an election are usually construed as directory only. **McQuillan, Municipal Corporations**, Vol III, Sec. 12, 13.

The case of **Territory v. Roswell**, 16 N.M. 340, 117 P.2d 46, 35 L.R.A. (N.S.) 1113 is analogous. In that case a petition was presented calling for an election for a commission form of government. Before action by the city, a number of petitioners requested that their names be withdrawn from the petition. The council permitted this and there were then insufficient signatures to require the election. Our Supreme Court held that the withdrawal of the names was valid even though there was no specific statutory authority permitting such withdrawal, so long as no rights of others had attached by final action.

Similarly, we have here a comparable resolution. An election has been scheduled as a consequence, but no rights of others have attached, so far as has been called to our attention, and it is difficult to conceive of any rights that could have attached at this point of the proceedings. If the resolution is withdrawn, in much the same manner as the petitioners' names were withdrawn in the above cited case, the basis for the election is lost. No rights of others having accrued, there is no reason why here, as in the cited case, the initiators (here the governing body of the municipality) could not change their minds and remove the basis for the required action. Until the time of election and subsequent naming of arbitrators, no final action has been taken which would prejudice others if the resolution is withdrawn. If the resolution is withdrawn there is no basis for holding an election to fill the offices of members of the board of arbitrators since such positions would no longer exist.

There would appear to be no bar against a subsequent filing of a new resolution followed by the other procedures required before annexation could be completed.

Although not in terms a postponement of the election or members of the board of arbitrators, the net effect would be the same.

So long as rights of others have not attached as a result of the filing of the resolution for annexation, the same **may** be withdrawn by the city commission prior to the election called for under the proceedings. When withdrawn, the basis for such further proceedings fails and no further proceedings would be authorized. **McQuillan, Municipal Corporations**, Vol. II, Sec. 7.28.

1964

64-159

64-158

64-157

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