

## Opinion No. 68-12

January 29, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Honorable Jerry Apodaca State Senator Legislative Executive Building Santa Fe, New Mexico

### QUESTIONS

Does the Governor have authority to appoint highway commissioners to succeed the two interim appointees made by the State Highway Commissioners and submit his appointments to the State Senate of the Second Session of the Twenty-Eighth Legislature?

### CONCLUSION

No.

### OPINION

#### {\*22} ANALYSIS

Prior to November 7, 1967 vacancies on the State Highway Commission were filled pursuant to Article V, Section 14 of the New Mexico Constitution which provided in part as follows:

The governor shall submit the appointment of commissioners to the state senate for confirmation not later than the 5th day of each regular session of the legislature. A three-fifths (3/5's) vote of the senate shall be required for confirmation. The appointment of such commissioner or commissioners shall become effective upon the date of confirmation by the senate and no commissioner shall be appointed in any event without confirmation of the senate except that **commissioners may be appointed by a majority of the remaining members of the highway commission, to fill vacancies until the next regular session of the legislature, at which time an appointment shall be made for the balance of the unexpired term.** (Emphasis added)

Subsequent to the last regular session of the legislature and prior to November 7, 1967 two vacancies occurred on the State Highway Commission. A majority of the remaining members of the Highway Commission filled the vacancies pursuant to Article V, Section 14 of the New Mexico Constitution. These Commissioners are still serving on the State Highway Commission and there are no vacancies on the Commission. Then on November 7, 1967, Article V, Section 14 of the New Mexico Constitution was repealed and a new constitutional provision was adopted by the voters to take its place. The new amendment to the New Mexico Constitution provides as follows:

{\*23} There is created a "state highway commission". The members of the state highway commission shall be appointed, shall have such power and shall perform such duties as may be provided by law. Notwithstanding the provisions of Article 5, Section 5, of the constitution of New Mexico, state highway commissioners shall only be removed as provided by law.

Upon certification of passage of the above constitutional amendment by the Secretary of State, Chapter 266, Laws of 1967 became effective. Section 1 B of Chapter 266, supra, provides as follows:

**The highway commissioners holding office on the effective date of this act shall serve out the remainder of their unexpired terms and thereafter commissioners shall be appointed** for staggered terms of six years each commencing on January 1 so that the terms of not more than two commissioners expire on December 31 of each even-numbered year. Any vacancy shall be filled by appointment of the governor with the approval of the senate for the remainder of the unexpired term. (Emphasis added)

A repealed constitutional provision may not be looked to for authority after its repeal unless there is some directive to do so by subsequent constitutional or statutory provision. Section 1 B refers us back to Article V. Section 14 only for the purpose of determining the terms of office of highway commissioners. The provisions of Article V, Section 14 of the New Mexico Constitution related to appointment of members to the State Highway Commission can no longer be considered when looking for the appointing powers of the Governor. We therefore must look to Chapter 266, Laws of 1967 to determine when and how the Governor may appoint members to the State Highway Commission.

As pointed out above, Section 1 B of Chapter 266 provides that the Highway Commissioners holding office on November 20, 1967, the effective date of Chapter 266, are to serve out the remainder of their terms of office and thereafter appointments may be made by the Governor. "Holding office" means qualifying and thereby entering into the office and assuming its obligations and duties. It is no more and no less than filling an office. **State ex rel Bland**, 13 So.2d 161, 166 (Ala., 1943). Thus it cannot be disputed that the two interim appointees of the State Highway Commission were "holding office" on November 20, 1967 as that phrase is used in Section 1 B of Chapter 266, supra.

Section 1 B, supra, provides that those Commissioners holding office on November 20, 1967 are to serve out the remainder of their unexpired terms. Obviously the legislature is referring to the unexpired terms of office of those holding office on November 20, 1967, and therefore we must define the phrase "term of office" as used in Section 1 B, supra. It is clear that "term" is not always to be equated with the tenure of the officer holding office, and a person may occupy an office without serving a "term of office". **Barber v. Blue**, 52 Cal. Rptr. 865, 417 P.2d 401 (Sup. Ct. Cal., 1966); **Spears v. Davis**, 398 S.W.2d 921 (Sup. Ct. Tex., 1966). In **Palmer v. Commonwealth**, 92 S.W. 588, 589 (Kv., 1906), this distinction was explained as follows:

There is a difference between the right of incumbency and the term of office. If one who is in office becomes ineligible to hold it longer -- as that he moves out of the district -- his term of office does not expire although his right of incumbency ceases. His successor is elected or appointed to fill out his unexpired term.

Thus when the State Highway Commission appointed the two interim appointees referred to above, {\*24} they were not appointed to fill a term of office, but only to serve until the next regular session of the legislature. However, this all changed when Article V, Section 14 was repealed and Section 1B, Chapter 266, supra became effective on November 20, 1967. It appears they are now "frozen" in office until their terms expire pursuant to Chapter 266. As will be seen below, this type of situation is not as unique as it first appears as similar situations have occurred in other states.

In **State v. Duncan**, 88 P. 2d 73 (Mont., 1939), the Supreme Court of Montana had occasion to consider the effect of a constitutional amendment increasing the terms of officers from two to four years. It was argued that this constitutional amendment did not take effect until after the next general election and that those in office could not have their terms lengthened. The Supreme Court of Montana disagreed holding that the constitutional amendment took effect as of the date of election. The Montana Supreme Court pointed out that:

It is clear from the authorities generally . . . that public offices may be created, abolished or the term shortened or lengthened by constitutional amendment at any time the sovereign power in our government, the people, choose to express their will to that effect in the manner provided in the Constitution.

On November 7, 1967, the people of New Mexico expressed their will to repeal all existing constitutional provisions relating to the office of State Highway Commissioner, thereby taking the power of the Governor to appoint successors to the interim appointees. Subsequently on November 20, 1967, an act of the legislature took effect providing for the appointment and term of office of the commissioners. In **Pennev v. Salmon**, 217 N.C. 276. 7 S.E.2d 559 (1940), the Supreme Court of North Carolina recognized that a legislature has the power to shorten or lengthen the term of a purely statutory office by statute and to make such an act applicable to those in office when the act becomes effective. Thus when Section 1 of Chapter 266 became effective on November 20, 1967, the legislature apparently lengthened the time of service of the two interim appointees discussed above and required that they serve the full term of their predecessors as set forth in Article V, Section 14 of the New Mexico Constitution. Thereafter the Governor may make appointments replacing these individuals.

We have carefully considered all constitutional and statutory provisions applicable to the appointment of members to the State Highway Commission and can find no authority for the Governor to make appointments at this session of the legislature for those commissioners now holding office.

We recognize that this is a matter of great public interest and importance; consequently, we will cooperate with all interested parties in seeking a judicial determination of the question, if desired.

By: Gary O'Dowd

Assistant Attorney General