

Opinion No. 69-106

September 12, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Justin Reid, Assistant Attorney General

TO: Mr. Foster Dickerson, Councilman, City of Grants, P.O. Box 879, Grants, New Mexico

QUESTIONS

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1. If the mayor of a municipality resigns, does a vacancy in office exist prior to the effective date of the resignation?
2. May the resigning mayor appoint his successor?
3. May the resigning mayor cast a vote either to confirm the election of a successor or to break a tie, in the naming of a new mayor?
4. May the city council elect a new mayor prior to the effective date of the present mayor's resignation?

CONCLUSIONS

1. No.
2. No, but see analysis.
3. The mayor may vote only in the event of a tie.
4. Yes.

OPINION

{*171} ANALYSIS

1. The office of mayor is not properly regarded as vacant so long as the present mayor retains the authority to conduct the affairs of that office. The fact that he may have tendered to the city council a prospective resignation effective at a future date does not compromise or defeat his legal authority to act as mayor until that date. This retention of authority is sufficient under New Mexico law to prevent the office from being described as "vacant." In **Mayes v. Bassett**, 17 N.M. 193, 125 P. 609 (1912), the New Mexico Supreme Court stated:

"An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it."

Thus, until the effective date of the present mayor's resignation, there is no vacancy in the office.

2. A distinction must be drawn between nominating or suggesting persons whom the city council might consider as a successor and the actual power of the mayor to make such a nomination binding. The succession to the mayor's office in the event of a resignation is governed by the provisions of Section 14-10-2, N.M.S.A., 1953 Compilation, which declare:

"In case of the death, disability, resignation or change of residence, from the municipality, of the mayor, the governing body shall appoint by majority vote a qualified elector to fill the vacancy for the unexpired term of office."

Members of the city council possess the authority to select the resigning mayor's successor. The resigning mayor may not appoint his successor. The city council would be at liberty to entertain the resigning mayor's suggestions or nominations but would be under no obligation to follow them.

3. The voting power of any mayor under the "mayor-council" system of local government is limited. As provided by Section 14-10-3, N.M.S.A., 1953 Compilation, the mayor may vote only when the vote of council members results in a tie.

{*172} "The mayor of a municipality is the presiding officer of the governing body. In all municipalities the mayor shall vote only when there is a tie vote."

Since, as noted below, it is contemplated that the council's action in actually selecting the resigning mayor's successor would be taken before the effective date of the former's resignation, the resigning mayor would still possess all powers normally associated with his office and would be authorized to cast a deciding vote in the event of a tie on the choice of a successor.

4. As discussed in the first portion of this opinion, an actual vacancy does not occur in the mayor's office until the present officer is no longer legally empowered to act in the capacity of mayor. That termination of authority occurs on the effective date of the present mayor's resignation. It is proper, however, for the council to select an individual who, at the effective date of resignation, will succeed immediately to the office. Provided that the necessary statutory procedures are followed, and that all provisions of the city charter and municipal code are observed, the council may designate the next mayor, who will assume office as soon as the office has become vacant. The rule is best stated in **Montana ex rel. Koch v. Lexcen**, 131 Mont. 161, 308 P.2d 974 (1957):

"The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment. * * *"

In summary, the city council is charged with the responsibility of selecting the individual who will succeed the resigning mayor. The council must select the next mayor by vote of the council members, and the present mayor may cast a vote only in the event of a tie. The present mayor may nominate or suggest the names of possible successors to the council, but the council is not bound to follow those suggestions. The council may choose the successor before the effective date of the present mayor's resignation, but the successor does not acquire any authority or power by way of that selection and may not assume such power or authority until the office becomes vacant.

We recommend that the resignation of the present mayor be accepted by the council prior to the election of a successor.