

## **Opinion No. 70-106**

December 31, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Philip L. Manly Attorney New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

### **QUESTIONS**

#### **FACTS**

A vacancy existed in the office of county commissioner prior to the 1970 primary election. Under Article 20, Section 4 of the state constitution, the governor filled the vacancy by appointing Mr. X. The names of Mr. X and Mr. Y both appeared on the primary election ballot, and Mr. Y won against Mr. X in the 1970 general election.

#### **QUESTION**

Does Section 3-15-21(B), N.M.S.A., 1953 Comp. allow Mr. Y to assume the office immediately after receiving his certificate of election?

#### **CONCLUSION**

See Analysis.

### **OPINION**

#### **{\*191} ANALYSIS**

Article 15 of the Election Code (Chapter 3, Articles 1-2, N.M.S.A., 1953 Comp.) is entitled "Presidential Electors, Senators, Congressmen and Expiring Terms." Section 3-15-21(B), N.M.S.A., 1953 Comp. of this article states that:

Any candidate whose name is placed on the direct primary ballot in the primary election for the term next succeeding the expiring term shall be conclusively presumed to have declared as a candidate for both the expiring term and the succeeding term.

Further, Section 3-15-23(A), N.M.S.A., 1953 Comp., provides that if a candidate runs for the expiring term and the next succeeding term his name shall only appear once on the ballot followed by the words "full and expiring terms."

Upon first glance, the above statutes, if they apply to state elections rather than only federal, appear to alleviate the problems presented in determining whether an elected official can assume office immediately after receiving his certificate of election where his

predecessor was appointed by the governor to fill a vacancy under the provisions of Article 20, Section 4 of the New Mexico Constitution. A review of Section 4 and Section 3 of the Constitution, however, creates some doubt as to {<sup>\*192</sup>} the constitutionality of Section 3-15-21(B), **supra**, insofar as it applies to the office of county commissioner.

Article 20, Section 4, **supra**, sets forth the procedure to be followed if a vacancy occurs in the office of county commissioner, as well as the office of district attorney and judge of the Supreme or district court:

If a vacancy occur in the office of district attorney, judge of the 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.

In **State ex rel. Swope v. Mechem**, 58 N.M. 1 265 P.2d 326 (1954) the New Mexico Supreme Court stated that the last sentence of Section 4, Article 20, **supra**, does not apply to the office of county commissioner. Because the office is a two-year term (N.M. Const. art. 10, § 2), the court evidently assumed that a county commissioner is never elected to fill a vacancy.

Next we must consider the effect of Article 20, Section 3 of the New Mexico Constitution.

This section of the Constitution provides as follows:

The term of office of every state, county or district officer, **except** those elected at the first election held under this Constitution, and **those elected to fill vacancies**, shall commence on the first day of January next after his election. (Emphasis added.)

If the last sentence of Article 20, Section 4 does not apply to the office of county commissioner, we must conclude for the same reason that the exception of Article 20, Section 3, **supra**, does not apply to the office of county commissioner. Thus under Article 20, Section 3, **supra**, the term of office of every county officer shall commence on the first day of January next after his election.

Following the dicta in **State ex rel. Swope v. Mechem** and the reasoning necessarily implied therefrom there is a serious doubt as to the constitutionality of Section 3-15-21(B), **supra**, insofar as it applies to the office of county commissioner. Because of our doubt as to the constitutionality of this section of the New Mexico Statutes, we suggest that legislation be prepared for consideration by the New Mexico legislature.

By: Leila A. Andrews

Assistant Attorney General