

## **Opinion No. 70-50**

May 13, 1970

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

**TO:** E. C. Serna District Attorney Sixth Judicial District P.O. Box 1025 Silver City, New Mexico 88061

### **QUESTIONS**

#### QUESTIONS

1(A) If a vacancy in the office of county sheriff occurs during the sheriff's term of office, does it become the duty of the board of county commissioners to appoint a sheriff immediately?

1(B) How soon must said board appoint a county sheriff?

2(A) If a vacancy in the office of county sheriff occurs during the sheriff's term of office, does the appointment or employment of said sheriff's deputies terminate with said sheriff's resignation?

2(B) Are said deputies entitled to the same pay and benefits as before said sheriff's resignation?

2(C) What are the powers and duties, if any, of said deputies?

2(D) From what authority do said deputies derive their power, duties and obligations during said vacancy?

2(E) Who is in charge of the office of county sheriff during said vacancy?

#### CONCLUSIONS

1(A) See Analysis.

1(B) See Analysis.

2(A) No.

2(B) Yes.

2(C) See Analysis.

2(D) See Analysis.

2(E) See Analysis.

## OPINION

### {\*83} ANALYSIS

1(A) Section 5-3-2, N.M.S.A., 1953 Comp., provides authority for the county commissioner to appoint a successor to fill a vacancy in a county office. No mention is made of the time in which the appointment must be made. This specific issue has not been treated by the New Mexico Appellate courts. Therefore, recourse must be made to general law. The case of **Walker v. Board of County Commissioners of Talbot County**, 208 Md. 72, 116 A.2d 393 (1955) held that county commissioners should act with reasonable promptness in filling an appointive vacancy. The court held that a delay of two months was not unreasonable.

1(B) Based on this case, we can only conclude that in the absence of any directives, the appointment must be made within a reasonable time.

2(A) Section 15-40-9, N.M.S.A., 1953 Comp., states that appointed deputies shall remain in office "during the pleasure of said sheriffs." Implied in this statute is the power of the sheriff to remove or discharge the deputy.

Upon the occurrence of a vacancy in the office of the sheriff, the deputies continue in office unless or until the successor or appointee to the vacated office removes the deputies. See **Kaufman v. Stone**, 25 Ark. 336 at 344 S.W. (1869) where the court held under an appointment of a person "to continue in office during the pleasure of the Governor . . ." that the appointment did not cease by operation of law upon completion of the Governor's term.

2(B) Said deputies are entitled to the same pay. Even though a vacancy exists in the office, the policy of the office holder continues until a successor assumes the office.

Until a successor in office is appointed, a vacating officer holds over in his office as a de jure officer. **Territory ex rel. Kloch v. Mann**, 16 N.M. 744, 120 P.313 (1911).

2(C) The power of deputies is to discharge all duties which belong to the office of the sheriff. Section 15-40-11, N.M.S.A., 1953 Comp.

2(D) Deputies derive their power from Section 15-40-11, N.M.S.A., 1953 Comp., see also answer to 2(B), **supra**.

2(E) Depending on policy and other arrangements made by the sheriff, it is our opinion that the deputy next in command would assume charge of the office.

By: Frank N. Chavez

Assistant Attorney General