

Opinion No. 70-99

December 17, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Ernestine Evans Secretary of State Legislative-Executive Bldg. Santa Fe, New Mexico 87501

QUESTIONS

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Is it within the authority of the present Governor to make appointments to offices when existing terms to such offices do not expire until January 1, 1971? Are the appointments which have so been made legal?

CONCLUSION

No.

OPINION

{*174} ANALYSIS

There will be no vacancies in the offices in question until January 1, 1971, because the present appointments do not expire until that date. No appointments to these offices can be effective on December 31, 1970, for there is a rule of law that "an appointment to fill a vacancy in an office is void when there is no vacancy." **Mosby v. Board of Comm'rs of Vanderburgh**, 134 Ind. App. 175, 186 N.E.2d 19 (1963) and **Hansen v. Highland**, 237 Ind. 516, 147 N.E.2d 227 (1958). Thus, if the Governor's appointments are to be valid, they cannot take effect until January 1, 1971, the time at which the old appointee's terms of office expire.

While it is proper for the Governor to make an appointment in anticipation of a future vacancy, a New York court has recently held that such anticipatory appointment is valid only where the appointing authority is still in office when the vacancy occurs. **Milk v. Gottschalk**, 29 A.D.2d 698, 286 N.Y.S.2d 39 (1968). A similar rule has been formulated by the Indiana courts in **Mosby v. Board of Comm'rs of Vanderburgh, supra**. The Indiana Appellate Court said:

One cannot forestall the rights of his successor by making an appointment to fill an office which would be vacated during the term of the appointing officer's successor.

The Indiana court said the rule was a corollary to Art. XV, § 3 of that state's constitution, which provides that "every officer shall hold his office until his successor has been elected and qualified." The New Mexico Constitution contains a similar provision:

Every officer, unless removed, shall hold his office until his successor is duly qualified.
N.M. Const. art. XX, § 2.

We find the logic and policy of the Indiana and New York rules applicable to your question. An outgoing public officer should not be allowed to usurp the powers of his successor by making appointments to vacancies which will arise after his successor has taken office.

The new Governor is the only person with the authority to fill the vacancies in question. The present appointments are void.