

Opinion No. 73-56

July 31, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable R. Leo Dow State Senator 8808 Rio Grande Blvd., N.W. Albuquerque, New Mexico 87114 Honorable Kurt Lohbeck State Representative, District 14 Post Office Box 7511 Albuquerque, New Mexico 87104

QUESTIONS

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Was the appointment of Kurt Lohbeck as state representative for District 14 to fill a vacancy caused by the death of Representative Eugene R. Cinelli, at a meeting of the Board of County Commissioners of Bernalillo County which was not attended by the county clerk or her deputy, valid?

CONCLUSION

Yes.

OPINION

{*111} ANALYSIS

In answering the question posed, it is necessary to determine whether the provisions of Sec. 15-39-4, N.M.S.A., 1953 Comp. (Repl. Vol. 3), that the county clerk or her deputy "shall attend the sessions of the board (of county commissioners) . . . and keep a record of the proceedings of the board" are mandatory or directory. It is the considered opinion of this office that they are directory, not mandatory, and that failure to fulfill these directions does not invalidate Mr. Lohbeck's appointment as state representative.

The statute to be construed, which dates back to 1876, reads as follows:

"15-39-4. Duties -- Ex officio clerk of board of county commissioners. -- The county clerk shall be ex officio clerk of the board of county commissioners, {*112} shall attend the sessions of the board in person or by deputy, keep the seals, records and papers of said board of county commissioners, and keep a record of the proceedings of said board in a book as required by law, under the direction of the county commissioners."

Immediately following the foregoing section is a further statement of the duties of the county clerk as ex officio clerk of the board of county commissioners:

"15-39-5. Duties as clerk of county commissioners. -- It shall be the general duty of the clerk of the board of commissioners:

"First. To record in a book to be provided for that purpose all proceedings of the board.

"Second. To make regular entries of all their resolutions and decisions in all questions concerning the raising of money.

"Third. To record the vote of each commissioner on any question submitted to the board if required by any member.

"Fourth. To sign all orders issued by the board for the payment of money, and to record in a book to be provided for that purpose, the receipts of the county treasurer of the receipts and expenditures of the county.

"Fifth. To preserve and file all accounts acted upon by the board with their action thereon, and he shall perform such special duties as are required by law."

First, it should be observed that if the territorial legislature, or any of its successors, had wished to provide that the county commissioners could not meet and transact business in the absence of the county clerk, it easily could have done so. It did not.

Second, it is apparent that the purpose of Sec. 15-39-4 is not to confer validity on meetings of the county commissioners but to provide the board with a clerk to keep its records.

Third, an absurdity would result if the county clerk could, by absenting herself from the board's meetings, bring the county's business to a halt. (No reflection on the Bernalillo county clerk is intended, for this office is not informed as to the reason for her absence from the meeting in question).

Fourth, there is no showing that anybody has been prejudiced by the county clerk's absence from the meeting.

In **State ex rel. Sun Company v. Vigil**, 74 N.M. 766, 398 P. 2d 987 (1965), which involved whether a statute requiring publication of municipal ordinances was mandatory or directory, the Supreme Court said, at pp. 773 and 774:

"After all, in determining whether a provision is mandatory or directory, a reasonable construction must be given rather than one which would render the statute absurd. *Winston v. Vaughan* (W.D. Okl. 1935), 11 F. Supp. 954. Generally, in considering whether a requirement of a statute is mandatory or directory, courts look to the subject matter, the importance of the requirement, and its relation to the general object intended to be secured by the act.

"Those directions in the statute which are not the essence of the things to be done are not commonly considered mandatory, particularly where, by failure to obey, no prejudice will result to those whose rights are protected by the statute. See 2 Sutherland Statutory Construction, Sections 2803-4. See also *Ross v. State Racing Commission*, 1958, 64 N.M. 478, 330 P. 2d 701; and *Farmers' Development Co. v. Rayado Land & Irrigation Co.*, 1923, 28 N.M. 357, 213 P. 202 Were we to adopt the position urged upon this court by the appellee, it would be contrary to the pronouncement made by this court in *Cox v. City of Albuquerque*, 1949, 53 N.M. 334, 207 P. 2d 1017, where we stated: 'Statutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardships, or injustice, to favor public convenience, and to oppose all prejudice to public interests. Although imperfect in form, they should be sustained by the courts, if they can be {*113} so construed as to give them sensible effect. * * *'"

See also **State v. Lindwood**, 79 N.M. 439, 440, 444 P.2d 766 (Ct. App. 1968), where the Court said:

"Directions in a statute which are not the essence of things to be done are not commonly considered mandatory, particularly where failure to comply does not result in prejudice."

Since the county clerk could be and no doubt was informed regarding Mr. Lohbeck's appointment, so that appropriate minutes could be made, it does not appear that any harm has resulted from her absence, and that of her deputy. Incidentally, Sec. 5-6-5, N.M.S.A., 1953 Comp. (Repl. Vol. 2), requires that a monthly summary of the minutes of the meetings of the board of county commissioners be prepared and published monthly, and this duty is imposed on the board itself, not the clerk. This will provide another record of Mr. Lohbeck's appointment. Sec. 5-6-6, N.M.S.A., 1953 Comp., requires this summary to be filed with the clerk and that copies thereof be furnished to "every legal newspaper published in the county."

There is nothing to keep the board of county commissioners, at any subsequent meeting, from ratifying actions previously taken. This is not to say that the board may reconsider an action such as that here involved, where an official has been appointed and has been sworn into office. There is no procedure for changing such an appointment, once validly made.

Mr. Lohbeck has also inquired, "Were there any legal irregularities in my appointment by the Bernalillo County Commission?" We are unable to answer this question in the absence of further information.

By: Dee C. Blythe

Assistant Attorney General