

Opinion No. 74-09

February 20, 1974

BY: OPINION of DAVID L. NORVELL, Attorney General

TO: The Honorable Betty Fiorina Secretary of State State of New Mexico Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Chapter 301, Laws of 1973 [Sections 16-3-3.2 and 16-3-3.5, NMSA, 1953 Comp. (1973 P.S.)] provides for four additional district judges in the second and one in the fifth judicial districts. The law further states that the governor shall appoint the additional judge in the fifth judicial district and two of four additional judges in the second judicial district, effective July 1, 1973 to serve until the "next general election," with the remaining two judges of the second judicial district to be appointed July 1, 1974 "to serve until the next general election."

QUESTIONS

1. Under Chapter 301, Laws of 1973 when will the appointed terms expire?
2. If the terms expire in 1974, the next General Election, when do the terms of judges elected in 1974 expire?

CONCLUSIONS

See analysis.

OPINION

{*16} ANALYSIS

Your questions involve a determination of whether the term "next general election," as used in Chapter 301, Laws of 1973, means the 1974 General Election; and if so, whether the terms of those judges who are elected in 1974 will expire in 1978 to coincide with the present terms of all other district judges. The Supreme Court of New Mexico has responded to both quires in **State ex rel. Swope v. Mechem**, 58 N.M. 1, 265 P.2d 336 (1954), an original proceeding in mandamus against the Governor of New Mexico by district judges he appointed pursuant to legislation increasing the number of judges in three judicial districts.

Although **Mechem** does not include a discussion of whether the term "next general election" means the general election after the appointment of judges, the opinion stated that the judges had already run and were elected "in the first general election following their appointment." **State v. Mechem, supra**. Thus, in our opinion, the Court, and all parties to the action, accepted the commonly held definition of the term, wherein the "next general election" refers to that election at which all statutory and constitutional requirements for the measure or office are met. **Direct Sellers Ass'n v. McBrayer**, 16 Ariz. App. 231, 492 P.2d 727 (1972); cf. **State ex rel. Noble v. Fiorina**, 67 N.M. 366, 355 P.2d 497 (1960). Absent clearly expressed legislative intent requiring otherwise, words in statutes are given their usual ordinary meaning. **Tafoya v. New Mexico State Police Bd.**, 81 N.M. 710, 472 P.2d 973 (1970); **Davis v. Comm. of Rev.**, 83 N.M. 152, 489 P.2d 660 (Ct. App. 1971), **cert. denied**, 83 N.M. 151, 489 P.2d 659.

While in our opinion this definition makes it clear that the positions of judges who took office July 1, 1973 expire at the {17} "next general election," the 1974 General Election, a further problem is evident in determining when terms expire for those judges taking office July 1, 1974. As stated above, the "next general election" must be that general election at which "all statutory and constitutional requirements for the . . . office are met."

Under New Mexico law, general elections shall be held in the state on Tuesday after the first Monday in November in each even-numbered year. New Mexico Constitution Article XX, Section 6. In respect to the Primary Election Law, Section 3-8-11, NMSA, 1953 Comp. requires the governor to issue a public proclamation on the "first Monday in March of each even-numbered year," calling a primary election to be held in each county and precinct of the State. This proclamation must contain the names of the qualified political parties participating in the primary election; the office for which each political party shall nominate candidates; and the date on which declaration of candidacy shall be filed. Section 3-8-12, NMSA, 1953 Comp.

Whether this law is applicable to an office prior to the time such office comes into legal existence is not clear, see Section 3-8-16, NMSA, 1953 Comp.; but we find it difficult to presume that the governor can proclaim an election for an office to be filled at the next general election when such office does not exist. We further note that Section 3-8-15, NMSA, 1953 Comp. allows the governor to amend the primary proclamation **only** "to include an office becoming vacant by removal, resignation or death, or to provide for any corrections or omissions." This section, in our opinion, expresses legislative intent that only those offices existing at the time of the proclamation be placed on the primary election ballot.

While at first glance **State ex rel. Noble v. Fiorina, supra**, appears to hold counter to this conclusion, in our opinion that decision in an original mandamus proceeding to require the Secretary of State to place the petitioner's name on the general election ballot has no bearing on the question at issue here. The reasons for this conclusion are many. In **Noble** the petitioner had been certified by the state central committee as its candidate to fill an unexpired term of a justice who retired after the primary election, but

prior to the general election. The Court, relying on Article XX, Section 4 of the New Mexico Constitution, held that the statutes providing for the **filling of a vacancy** occurring after the primary election constituted an implementation of the constitutional provision for filling a vacancy at the next general election.

Although the Court in **Noble** specifically rejected the respondent's argument that because there is an absence of legislation permitting the placing at the general election the name of any candidate for office which was not voted on in the primary, the term "next general election" should mean "the next general election at which a candidate can be properly nominated for office," in our opinion this result must be limited to the facts in **Noble** where the office became vacant after the primary, and there was an available method for filling the slot on the ballot.

In the present case, since the office will not exist until after the primary election, it will be impossible to comply with all statutory requirements for the placing of names on the ballot, and there is no constitutional or statutory provision specifically responding to such a situation. We therefore conclude that the judgeship positions which will become effective July 1, 1974 will expire at the 1976 General Election.

Once this difficult question is settled, one need only look at the well-reasoned opinion in **Mechem** to determine whether the terms of judges elected in the "next general election" will be for six years, Article VI, Section 12, New Mexico Constitution, or until 1978, to coincide with the present terms of all other district judges. Basing its decision on the intent of the framers of the New Mexico Constitution, the Court in **Mechem** concluded {**18*} that in order to preserve the uniformity so obviously written into the Constitution in respect to the terms of district judges and district attorneys, such terms will begin and end at the same time. Thus, in response to your query, the terms of all judges elected pursuant to Chapter 301, Laws of 1973, will expire in 1978 to coincide with the present terms of all other district judges, even though such judges will be elected in 1974 or 1976.

"To reach to opposite conclusion would require two interpretations of the same phrase in a single sentence, namely: That 'original term,' in the case of a vacancy following an incumbent, means 'unexpired term'; that in the case of a newly created district judge, it means a term of six years from the general election following appointment by the governor. Such an interpretation is too strained." **State v. Mechem, supra**, at 8.

By: Leila Andrews

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