

Opinion No. 75-01

January 13, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Philip J. Lynch New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

QUESTIONS

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Must a councilman appointed to fill a vacancy on the Gallup City Council run for reelection at the next municipal election if the term to which he was appointed has not expired?

CONCLUSION

No.

OPINION

{*31} ANALYSIS

Article II, Section 8 of the Gallup City Charter provides:

"FILLING OF VACANCIES -- When a vacancy occurs in any office, the council, by majority vote of its remaining membership, shall within thirty-one (31) days, fill the vacancy of the office for the unexpired term."

In resolving the apparent conflict between the Gallup City Charter and the Municipal Code, Chapter 14, NMSA, 1953 Comp. (Repl. Vol. 3, 1973 Supp.) with regard to the term of office for those appointed to fill vacancies on the city council, it is important to note that only a few municipalities have adopted charters. Hence, the applicable Municipal Code provision, to wit:

"14-11-1(A). **Vacancy on governing body.** -- Except as provided in subsection B of this section, any vacancy on the governing body of a mayorcouncil municipality shall be filled by appointment of a qualified elector by the mayor of the municipality, with the advice and consent of the governing body. Any qualified elector appointed to fill a vacancy on the governing body shall serve until the next regular municipal election, or any special election called in accordance with subsection B of this section, at which time a qualified elector shall be elected to fill the remaining unexpired term, if any."

should be deemed to apply to municipalities which have not adopted charters. In non - charter municipalities, then, the Municipal Code is controlling and an appointee serves only until the next election.

For municipalities with charters, however, the Municipal Code provides that as between the Municipal Code and a city charter, the charter will be controlling.

The statute states:

"14-14-11. **Charter controls when statute is inconsistent.** -- A municipality organized under the provisions of sections 14-14-1 through 14-14-14 New Mexico Statutes Annotated, 1953 Compilation, shall be governed by the provisions of the charter adopted pursuant to sections 14-14-1 through 14-14-14 New Mexico Statutes Annotated, 1953 Compilation, and no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality."

{*32} Moreover, this interpretation conforms to Attorney General Opinion No. 70-41 which holds that charters not adopted pursuant to a constitutional home rule provision will, when in conflict with state law concerning municipal organizational as opposed to governmental matters, prevail over state law.

Although the Gallup City Charter was not enacted pursuant to the Home Rule Amendment, Article X, Section 6 of the New Mexico Constitution, adopted November 3, 1970, the statutes under which it was enacted require conformity with the Constitution. That is, the Municipal Code states at Section 14-14-5 "that the charter shall not be inconsistent with the Constitution of New Mexico." The Constitution now contains, in Article X, Section 6, the requirement that:

"D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter . . ."

The language of the amendment excludes from the authority of a chartered municipality, even those not chartered under the Constitution, only what is expressly denied by law. Nothing in the Municipal Code expressly denies the right of a municipality to provide by charter that appointees to vacancies may serve out an unexpired term. Section 14-11-1(A), **supra**, provides otherwise but does not, in so providing, expressly preclude a municipality from adopting an alternative charter provision.

The New Mexico Supreme Court has recently ruled on the meaning of paragraph D of the Home Rule Amendment. The court stated:

"We need to determine what is meant by the clause 'not expressly denied by general law or charter.' In this contention, it may be stated that the term 'general law' can only be interpreted to mean a law that applies generally throughout the State, or is of state-wide concern as contrasted to 'local' or 'municipal' law. The words 'not expressly denied' must be given some meaning, and we take it to mean that some express statement of

the authority or power denied must be contained in such general law in order to be applicable, [example omitted] or otherwise no limitation exists." **Apodaca v. Wilson**, N.M. State Bar Bull., Vol. 13, No. 22 August 29, 1974, page 296.

There is no express statement of power denied in Section 14-11-1 (A), **supra**.

Furthermore, paragraph E of the Municipal Home Rule Amendment requires a construction of the amendment in favor of the authority of the municipality and, hence, deference to the charter, by providing

"E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities." Article X, Section 6.

We conclude, therefore, that with respect to the question of vacancies on the Gallup City Council, the Gallup City Charter provision at Article II, Section 8, **supra**, prevails over the provision in the Municipal Code at Section 14-11-1(A), **supra**, and the appointee need not run for reelection at the next regular election.

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