

## **Opinion No. 79-19**

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**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

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### **COUNTIES**

A person having served two consecutive terms as county treasurer may not hold over for a third term or be appointed to serve.

A county treasurer was elected to serve two consecutive two-year terms from 1975 through 1978. Her successor was duly elected in 1978 but left the state without taking the oath of office or posting official bond. The incumbent has offered to continue to serve for the remainder of the term as a "hold over."

### **QUESTIONS**

May a person who has served two consecutive terms as a county treasurer remain in office for an additional term if her successor fails to qualify?

### **CONCLUSIONS**

No.

### **ANALYSIS**

The facts stated here appear to present a conflict between two constitutional provisions. First, Article XX, Section 28 N.M. Const., provides that "Every officer, unless removed, shall hold office until his successor has duly qualified." Second, Article X, Section 2, N.M. Const., provides that "All county officers shall be elected for a term of two years, and after having served two consecutive terms, shall be ineligible to hold any county office for two years thereafter." What must be determined is whether, absent a duly qualified successor, a county officer may continue in office for a third consecutive term.

In order to qualify for office, Article XX, Section 1, N.M. Const., requires an elected officer to take an oath before entering upon his duties. In addition, Section 10-1-13, NMSA 1978 requires all county officers to take an oath and post bond before assuming the duties of office. Having failed to take an oath or post bond, the person elected to the office of county treasurer in the 1978 election did not qualify for that office. The

incumbent treasurer thus continues to hold that position in accordance with Article XX, Section 2, **supra**.

The mere election of an officer, without his becoming qualified, does not oust the incumbent. **Bowman Bank & Trust Co. v. First Nat'l. Bank of Albuquerque**, 18 N.M. 589, 139 P. 148 (1914). Failure to qualify for office as provided by law creates a legal vacancy in office notwithstanding the fact there is no corporal vacancy so long as the incumbent holds over. **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 163 P. 248 (1917). Nevertheless, once a vacancy is defined, the appointing or electing power has a {\*47} duty to appoint or elect some person to the office in place of the occupant. **State v. Blancett**, 24 N.M. 433, 174 P. 207 (1918). Accordingly, upon the failure of the newly elected treasurer to qualify as provided by law, a vacancy occurred in that office which must be filled by the proper authority.

Section 10-3-3 NMSA 1978 provides that the Board of County Commissioners shall fill a vacancy in a county office "by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law." While the statute does not specify the time in which an appointment must be made, this section has been construed to require that the Board of County Commissioners act with reasonable promptness. See Opinion of the Attorney General No. 70-50, dated May 13, 1970.

From the foregoing, it would fairly follow, that under the facts presented here, there exists a vacancy in the office of the county treasurer which the commissioners must fill by official appointment. They may not simply allow the incumbent to hold over for the remainder of the term. Section 10-3-3, **supra**, obliges the commissioners to make an appointment and the question becomes whether the incumbent may be officially appointed.

Article X, Section 2 limits county officers to two consecutive terms by providing that they are "ineligible to hold any county office" after having been twice elected. A person appointed to fill a vacancy in accordance with Section 10-3-3, **supra**, is entitled to hold that office until his successor is duly elected and qualified. **State ex rel. Walker v. Dilley**, 86 N.M. 796, 528 P.2d 209 (1974); **State ex rel. Rives v. Herring**, 57 N.M. 600, 261 P.2d 442 (1953). However, a person who has served two consecutive terms in a county office is ineligible to hold that office for a third consecutive term and is thus ineligible for that appointment.

Although Opinion of the Attorney General 1921-22, p. 192, dated November 28, 1922, concluded that no vacancy in office occurs where the successor fails to qualify, that opinion recognized the limitations prescribed by Article X, Section 2, stating that:

"Complications, however, would arise if the present incumbent had held office for the maximum period prescribed by the constitution. In other words, if the present incumbent has filled the office for two terms he would not be qualified to hold for another term and

some cases hold that in such circumstances a vacancy does exist and the appointing power would then come into play."

In sum, the Board of County Commissioners must appoint a person to fill the vacancy in the office of county treasurer and the incumbent, having already served two consecutive terms, is ineligible for that appointment.

**ATTORNEY GENERAL**

Jeff Bingaman, Attorney General