

Opinion No. 82-18

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OPINION OF: Jeff Bingaman, Attorney General

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PUBLIC OFFICER AND EMPLOYEES; ELECTED OFFICIALS

Although an appointive office is not technically "vacant" upon the expiration of the incumbent's term, a recess appointment to the board of finance would be valid until the "next session of the senate" at which time the governor "shall appoint by and with the advice and consent of the senate" a person to fill the remainder of the two-year term.

QUESTIONS

May a person appointed by the governor prior to the 1983 legislative session, to fill a position on the state board of finance upon the expiration of the previous term, serve in that position before being confirmed by the senate?

CONCLUSIONS

Yes.

ANALYSIS

Membership on the state board of finance is defined by Section 6-1-1 NMSA 1978 which provides, in part, that:

"A. The state board of finance shall consist of five members:

(1) the governor;

(2) the lieutenant governor; and

(3) three members appointed by the governor with the advice and consent of the senate, no more than two such members to be from the same political party.

B. The terms of office for members appointed by the governor shall be two years. The term of each remaining member shall be coextensive with his term of office. If the office of lieutenant governor becomes vacant, his position on the board shall remain vacant until the election and qualification of a new lieutenant governor."

OPINION

An appointed member of the state board of finance is a public "officer" as that term is commonly used. That is, his position is created by law, his duties are defined by law, and his authority involves the exercise of some portion of the sovereign power of the state. See, **Pollack v. Montoya**, 55 N.M. 390, 234 P.2d 336 (1951). As a public officer, an incumbent member of the board of finance would hold over, unless removed, until his successor has been duly qualified. Article XX, Section 2, N.M. Const.

The qualification of the successor to an officer appointed by the governor with the advice and consent of the senate depends on whether the senate is in session when the successor is appointed.

If the appointment is made **during** the legislative session, the prospective "office holder can neither assume the duties or exercise the powers of the office until the consent of the senate is given." Opinion of the Attorney General No. 61-17, dated February 8, 1961. Thus, {312} in that case, the incumbent would hold over until the new appointee is confirmed by the senate.

However, if the appointment is made prior to the legislative session, the appointee would qualify without senate approval as a recess appointment. Article XX, Section 5, N.M. Const., provides:

"If, while the senate is not in session, a vacancy occurs in any office the incumbent of which was appointed by the governor by and with the advice and consent of the senate, the governor shall appoint some qualified person to fill the same until the next session of the senate; and shall then appoint by and with the advice and consent of the senate some qualified person to fill said office for the period of the unexpired term."

Although an appointive office is not technically "vacant" upon the expiration of the incumbent's term, **see, e.g., Territory ex rel. Klock v. Mann**, 16 N.M. 744, 120 P.#313 (1911), the provisions of Article XX, Section 5 are applicable to recess appointments. Under that section, a recess appointment to the board of finance would be valid until the "next session of the senate" at which time the governor "shall appoint by and with the advice and consent of the senate" a person to fill the remainder of the two-year term.

It may be noted that if a recess appointee is rejected by the senate, and no other person is confirmed while the senate is in session, the rejected appointee may not continue to hold the office under recess appointment. Section 10-1-1 NMSA 1978.

ATTORNEY GENERAL

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