

## **Opinion No. 89-13**

March 10, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Sarah E. Alley, Assistant Attorney General

**TO:** Honorable Anthony J. Williams, New Mexico State Senator, P.O. Box 306, Belen, New Mexico 87002

### **QUESTIONS**

Does a municipal council member, who is elected mayor pro tem for a particular meeting, have the right to vote at that meeting?

### **CONCLUSIONS**

Yes.

### **ANALYSIS**

It is our understanding that, at several council meetings of the Village of Los Lunas, the question has arisen whether a councilman, who is elected mayor pro tem for the council meeting, may vote on issues at that meeting.

Section 3-11-3, NMSA 1978 provides: "The mayor of a municipality is the presiding officer of the governing body. In all municipalities the mayor shall vote only when there is a tie vote." Section 3-12-3 NMSA 1978 provides: "A. The governing body of a municipality having a mayor-council form of government shall: (1) elect one its members to act as mayor pro tem in the absence of the mayor."

Section 3-12-3 is silent on the question whether the mayor pro tem can vote. However, under the rules of statutory construction, a statute will be constructed so that its application will be neither absurd nor unreasonable. *Midwest Video v. Campbell*, 80 N.M. 116, 452 P.2d 185 (1969). We believe that to interpret the silence in the statute as a prohibition on voting would, in effect, prevent an elected official from exercising the powers of his own office merely because his fellow members had elected him to preside over a meeting. This would lead to an absurd and unreasonable result.

The majority of states that have looked at this question have held that a councilman does not lose his right to vote even though elected mayor pro tem. See *Michael v. State*, 163 Ala. 425, 50 So. 929 (1909); *Harris v. People ex rel. Squires*, 18 Colo. App. 160, 70 P. 699, 18 (1902); *Shugars v. Hamilton*, 122 Ky. 606, 92 S.W. 564 (1906); *Sharkey v. LaGuardia*, 19 N.Y.S.2d 965, 259 App. Div. 557 aff'd 28 N.E.2d 726 (1940). The majority rule is supported by P. Mason, *Manual of Legislative Proceedings*, Section

577, at 419 (1979) which states: "A member of the Council who is chosen to preside Pro Tempore does not lose his right to vote as a member while serving as such presiding officer, but cannot also vote as mayor, though serving as mayor pro tem."

In *Michael v. State*, 163 Ala. at 426, 50 So. at 930, the court of appeals overturned the lower court's finding that the mayor pro tem could not vote. The council consisted of six members and the mayor. The passage of a city ordinance required the majority vote of the members elected to the council. Only four members attended a meeting at which an ordinance was passed. One of the members was elected to preside over the meeting in the absence of the mayor. The district court reasoned that if the mayor had been present, he could only have cast a tie vote, and thus the ordinance received only three legal votes. The court of appeals, in overturning the lower court's decision, pointed out that the councilman appointed pro tem was a member of the council and entitled to vote in his own right. The court of appeals concluded that he was not stripped of this right as the result of his selection as mayor pro tem.

The only case that we could find that holds against allowing the mayor pro tem to vote is *Klein v. Seattle*, 43 P. 367 (1896). In this case the mayor pro tem declined to vote on an ordinance passing a tax assessment. A taxpayer challenged the validity of the ordinance on the grounds that the mayor pro tem's failure to vote violated the statutory requirement of a unanimous vote. The appellate court held that the mayor pro tem had acted properly because the municipal charter vested the mayor pro tem with all of the powers and duties of the mayor. In New Mexico, the statutes are silent on whether the mayor pro tem is given all of the authority of the mayor. Thus, we do not believe that the *Klein* case would be followed.

In conclusion, it is our opinion that a councilman who is elected to preside over a meeting as mayor pro tem may vote, not as the mayor, who can only vote to break ties, but pursuant to his right to vote as a councilman.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General