

Opinion No. 89-08

February 27, 1989

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: John A. Malley, Chairman, Board of Nursing Home Administrators, P.O. Drawer 1388, Santa Fe, New Mexico 87504-1388

QUESTIONS

1. What constitutes a quorum of a six-member board?
2. Does board member Ernest Romero's continued service on the Board of Nursing Home Administrators after his term expired affect the validity of board action taken after Mr. Romero's term expired?
3. Do vacancies on the Board of Nursing Home Administrators alter quorum requirements?

CONCLUSIONS

1. Four members.
2. No.
3. No.

ANALYSIS

1. Subsection 61-13-4(A) of the Nursing Home Administrators Act ("NHAA"), Sections 61-13-1 to 61-13-17 NMSA 1978 (Repl. 1986), provides: "There is created a state board of nursing home administrators, consisting of five members appointed by the governor...." Section 61-13-4.1 provides: "In addition to the members of the state board of nursing home administrators appointed pursuant to 61-13-4 the governor shall appoint one lay member to the state board of nursing home administrators...." Section 61-13-5 provides: "A majority of the board shall constitute a quorum...." The Board of Nursing Home Administrators ("Board") consists of six members; a majority of the Board consists of four members. Thus, four members of the Board is a quorum.
2. We are informed that Board member Ernest Romero continued to serve on the Board after his term expired on June 30, 1986. Mr. Romero was not reappointed after his term expired, and his successor was not appointed until September 14, 1988. Mr. Romero's service on the Board and his voting on Board matters after his term expired do not

affect the validity of Board action. Even though not reappointed, Mr. Romero could continue to serve as a Board member until his successor was appointed and qualified.

Article XX, Section 2 of the New Mexico Constitution provides: "Every officer, unless removed, shall hold his office until his successor has duly qualified." In **Haymaker v. State, ex rel. McCain**, 22 N.M. 400, 406, 163 P. 248, 250 (1917), the New Mexico Supreme Court stated: "Since the adoption of the Constitution, no public office becomes vacant, in the sense that there is no incumbent to fill it, except in the case of death, perhaps, because under section 2 of article 20 of the state constitution, every officer holds until his successor qualifies, except when he is removed." Article XX, Section 2 denotes New Mexico's policy that the "public convenience shall not suffer from a vacancy in ... public offices, but that the office shall ever be full, so that there will always be some one competent to perform the duty belonging to the office." *Id.* at 407, 163 P. at 250 (quoting **People v. Supervisor**, 100 Ill. 332). Article XX, Section 2 "can be said to continue the incumbent in office." **State ex. rel. Rives v. Herring**, 57 N.M. 600, 606, 261 P.2d 442, 446 (1953). See also **Bowan Bank and Trust Co. v. The First National Bank**, 18 N.M. 589, 139 P. 148 (1914) (Under art. XX, § 2, an officer holds office until his successor qualifies).

In Att'y Gen. Op. 71-9 (1971), the Attorney General concluded that a Public Service Commissioner, whose term had expired, could continue in office and could perform his duties as a commissioner until his successor was appointed. The Attorney General stated: "A Public Service Commissioner is an officer within the constitution definition contained in Article XX, Section 2 of the New Mexico Constitution, and a holdover officer is a de-jure officer with full and complete powers until his successor is duly qualified...." See also Att'y Gen. Op. 58-233 (1958) (a vacancy is not created by expiration of the term of office, and the present incumbent continues in office by virtue of art. XX, § 2). Therefore, under the holdover provision of New Mexico's Constitution, Article XX, Section 2, Mr. Romero continued to serve as a member of the Board after his term expired and before his successor was duly appointed and qualified for that office.¹

3. As used in the third question, "vacancy" means those positions whose incumbents have resigned or for which no appointment has been made following the incumbents' expiration of term. In **Territory ex rel. Klock v. Mann**, 16 N.M. 744, 748, 120 P. 313, 315 (1911), the New Mexico Supreme Court stated:

"The word vacancy as applied to an office has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution, or law, with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it...." (quoting **State ex. rel Carson v. Harrison**, 113 Ind. 434, 489, 16 N.E. 384, 386 (1887)).

It is also well settled that the right to hold-over continues until a qualified successor has been elected or appointed by the body electorate; or the appointing power, which by law is entitled to elect or appoint such successor.

See also **State ex rel. Rives v. Herring**, supra, at 608, 261 P.2d at 448 (approving **Mann** and holding that an appointee incumbent of an elective office cannot be displaced by another appointee).

In **Haymaker v. State ex rel. McCain**, supra, the New Mexico Supreme Court stated:

Current authority firmly establishes the proposition that an officer holds until his successor qualifies, even though he has tendered his resignation and the same has been accepted.

...

[I]n view of the constitutional provision cited supra [art. XX, § 2], the vacancy so called, was not a corporeal vacancy; a condition simply arose thereby which gave the right to the appointing or electing power to appoint or elect some person to the said office.... [B]ut such right had no effect whatever upon the status of the plaintiff in error with respect to that office until the successor qualified for the office.

Id. at 407-408, 163 P. at 250-51. See also **State v. Blancett**, 24 N.M. 433, 447, 174 P. 207, 208 (1918) (citing **Haymaker** and stating that under the constitution, no public office becomes vacant in the sense of a corporeal vacancy, but rather a condition results conferring a right to appoint or elect some person to the office in the place of the occupant).

Based on this authority, the expiration of a Board member's term of office or a member's resignation does not create a corporeal "vacancy." The Board's composition remains as six Board members, although the power to appoint successors does arise.² Until successors are appointed who duly qualify for office, the current six members continue to serve in office. Accordingly, the quorum requirement remains at four.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

ⁿ¹ The facts do not reflect any constitutional impediment to Mr. Romero's continued service beyond the term for which appointed. Cf. Att'y Gen. Op. 79-19 (1979) (board of county commissioners under a duty to appoint a county treasurer where the newly elected treasurer failed to qualify for that office; board could not allow the incumbent treasurer to hold over for that term of office under art XX, § 2, because the incumbent was ineligible under art. X, § 2 of the new Mexico Constitution to serve more than two consecutive terms as treasurer).

ⁿ² Subsection 61-13-4(B) imposes a duty on the governor to fill vacancies: "In the case of a vacancy on the board, the governor shall, within ninety days of the occurrence of

such vacancy, appoint a member to fill the unexpired portion of the term." Those occurrences giving rise to the exercise of the appointment power would include term expirations, voluntary resignations that are accepted, or resignations by operation of Section 61-13-5: "Any board member failing to attend three consecutive meetings of the board, at least two of which were regular meetings, shall automatically be dropped as a member of the board."