

## **Opinion No. 89-11**

February 28, 1989

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

**BY:** Carol A. Baca, Assistant Attorney General

**TO:** Les Williams, District Attorney, State of New Mexico, Ninth Judicial District, Curry County Courthouse, Clovis, New Mexico 88101

### **QUESTIONS**

Does Section 3-12-1(A) NMSA 1978, which provides that appointees who fill vacancies on governing bodies of mayor-council municipalities "shall serve until the next regular municipal election," mean that an appointee serves until the next immediate regular municipal election or until the next regular municipal election for the office that the appointee has assumed?

### **CONCLUSIONS**

Under Section 3-12-1(A), if no special election is held, an appointee's term lasts until the next regular municipal election in point of time after his appointment. The person elected at such election serves out the remainder of the unexpired term of the vacated office, if any.

### **ANALYSIS**

Section 31-12-1(A) NMSA 1978 provides:

Except as provided in Subsection B of this section, any vacancy on the governing body of a mayor-council 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 apt as provided in Subsection B of this section, any vacancy on the governing body of a mayor-council 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.

(Emphasis added).

Section 3-12-1(A) addresses special elections held to fill vacancies on the governing body. The question asked of us assumes that no special election will be held for this purpose.

While the meaning of the phrase "next regular municipal election" has not been addressed in the context of Section 3-12-1(A), the New Mexico Supreme decided a similar issue in *State v. Fiorina*, 67 N.M. 366, 355 P.2d 497 (1960). At the time *Fiorina* was decided, N.M. Const. art. XX, § 4 provided:

If a vacancy occurs in the office of district attorney, judge of the supreme or district court, or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term.

(Emphasis added).

The *Fiorina* court stated without a great deal of explanation that the phrase "next general election" refers to next general election in point of time.<sup>1</sup> The court merely stated that an alternate construction would do serious violence to the Constitution. 67 N.M. at 368, 355 P.2d at 498.

Attorney General Opinion 60-151 (1960), which was issued immediately prior to the *Fiorina* decision, contains a fuller discussion of the meaning of the language "until the next general election" in Article XX, Section 4. The opinion acknowledged that the phrase had been construed in some jurisdictions as referring to the next election at which a successor to the incumbent of the office would have been elected if there had been no vacancy. However, the opinion concludes, in agreement with a second line of cases, that the phrase was intended to refer to the general election next in point of time after the appointment.

Opinion 60-151 gives two reasons for the conclusion reached. The first is that "the constitutional provision under consideration is an expression of the principle that the people should have the right not only to select their officers originally but to do so as soon as it can conveniently be done when any of the offices become vacant." This rationale is consistent with other authorities discussing elections to fill vacancies in offices temporarily held by appointment. See, e.g., *Valenti v. Rockefeller*, 292 F. Supp. 851, 883 (S.D.N.Y. 1968) (dissenting opinion), *aff'd without opinion*, 393 U.S. 405 (1969); *State v. Moore*, 49 Ariz. 51, 64 P.2d 809 (1937); *Barbieri v. Shapp*, 476 Pa. 513, 383 A.2d 218 (1978). See generally Annot., 132 A.L.R. 574, 576 (1941) and cases cited therein (it is the general policy of the law that vacancies in elective offices should be filled at an election as soon as practicable after the vacancy occurs and appointments to fill vacancies should be effective only until the people may elect). See also 67 C.J.S. Officers § 76 (1978).

The second reason proffered in Opinion 60-151 for concluding that "next general election" meant the next general election in point of time was based on the last sentence of Article XX, Section 4, which states that a person elected to fill a vacancy "shall hold his office until the expiration of the original term." According to the opinion, "[t]his last sentence could have no effect if the phrase 'until the next general election' were construed as meaning the next election for that particular office."

Fiorina's and Opinion 61-151's construction of the phrase "next general election" remains valid. Other opinions issued by New Mexico courts and this office have expressly or implicitly arrived at the same interpretation of the same or similar language. See *State v. Mechem*, 58 N.M. 1, 265 P.2d 336 (1954) (construing N.M. Const. art. XX, § 4 in the context of a vacancy resulting from creation of a new office); Att'y Gen. Op. 88-52 (1988) (construing Section 34-8A-4(A) NMSA 1978); Att'y Gen. Op. 64-139 (1964) (construing N.M. Const. art. XX, § 4); Att'y Gen. Op. 5612 (1952) (construing N.M. Const. art. V, § 5).

Applying the foregoing authorities, we construe the phrase "next regular municipal election" in Section 3-12-1(A) to refer to the next regular election immediately following the appointment. The reasoning in Opinion 60-151 is equally applicable to Section 3-12-1(A).

Moreover, where the words of a statute are plain and unambiguous, there is no room for construction. See, e.g., *Southern Union Gas Co. v. New Mexico Public Service Comm'n*, 82 N.M. 405, 482 P.2d 913 (1971). One of the letters attached to your opinion request argues that, in order to preserve staggered terms for city councilmen, Section 3-12-1(A) must be construed to mean that the appointee must serve until the next regular election at which the office would have been on the ballot but for the vacancy and appointment. Our reading of the statute is that, if no special election is held to fill a vacancy, the office must be filled at the next regular election in point of time. At such election, someone must be elected to fill the remainder, if any, of the former incumbent's term. The effect of this reading of the statute is that the length of the former incumbent's term, whether staggered or otherwise, is preserved. We find no compelling reason to read the statute otherwise, particularly when the statute is so clear on its face.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) The more substantial issue in the Fiorina case was whether the second sentence of N.M. Const. art. XX, § 4 was self-executing or a particular statute contained the legislative authorization to place a vacancy in nomination created by resignation on the general election ballot.