Opinion No. 91-04

March 28, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Mr. Paul L. Hunter, Regent, Western New Mexico University, P.O. Box 1410, Silver City, New Mexico 88062

QUESTIONS

1. Does the failure of the legislature to act on the nomination of a regent submitted to it during the session operate either to confirm or reject the governor's nomination?

2. Can a person appointed during a legislative recess to fill a regent's unexpired term be replaced through a new nomination before the end of the regent's term, or is removal pursuant to Article XII, Section 13 of the New Mexico Constitution the exclusive means to remove before the end of the regent's term?

3. What is the status of an unconfirmed nominee who serves as regent after adjournment of the legislature and are his actions valid?

4. If the senate has not acted on a governor's prior nomination may the governor lawfully submit another nomination?

5. If the senate confirms the new nominee without having acted on the prior nomination, can the new nominee lawfully assume the duties as regent?

CONCLUSIONS

1. The failure of the legislature to act upon the governor's nomination operates neither as "constructive consent" to, nor as rejection of, the nomination.

2. A regent appointed by recess appointment may be replaced through a new gubernatorial nomination made during the next session of the legislature.

3. A nominee who is neither confirmed nor rejected by the senate cannot serve as regent unless, following adjournment of both houses of the legislature, the governor makes a recess appointment of the person, in which case, that person may serve as a full-fledged regent until the next session of the legislature. As either a de jure or de facto officer, the regent's actions are valid as to the public.

4. The governor is not obliged to re-submit the former nominee to the next session of the legislature and may make a new nomination.

5. The new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment by the governor if the senate fails to take any action.

FACTS

In 1990 during the regular legislative session, Governor Garrey Carruthers nominated Paul Hunter as regent of Western New Mexico University to fill the remainder of the term (three years) of a position vacated by the incumbent regent's resignation. The regular session of the legislature adjourned on February 15, 1990 without taking action on the nomination.

By letter dated March 16, 1990, Governor Carruthers appointed Mr. Hunter to fill the unexpired term of the regent position, commencing February 16, 1990 and expiring January 1, 1993. That letter advised Mr. Hunter that his appointment must be confirmed by the senate. The legislature again convened in its first special session at noon on March 16, 1990 and adjourned on March 20, 1990. The legislature did not act upon Mr. Hunter's nomination during the first special session, nor during a second special session convened later in 1990. During the 1991 legislative session Governor Bruce King nominated Dianne Hamilton to serve as regent in the position occupied by Mr. Hunter.

ANALYSIS

Article XII, Section 13 of the New Mexico Constitution provides, with respect to appointments to boards of regents of state educational institutions including Western New Mexico University: "The governor shall nominate and by and with the consent of the senate shall appoint the members of each board of regents for each of said institutions." Article XII, Section 13 requires cause to remove "members of the board" and establishes jurisdiction in the New Mexico Supreme Court to hear removal proceedings. Thus, under Article XII, Section 13, the governor must nominate persons to regent positions but consent of the senate is indispensable to valid appointments to those positions. Absent confirmation, an appointment is not complete under that section.

However, Article XX, Section 5 of the New Mexico Constitution states an exception to senate confirmation, i.e. consent to a nomination, applicable only to "recess" appointments. Section 5 provides:

If, while the senate is not in session, a vacancy occur 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.

Thus, for reasons of public necessity Article XX, Section 5 allows the governor to fill vacancies in appointive offices temporarily "while the senate is not in session." Prior New Mexico Attorneys General have concluded that "appointments" made before the

legislature adjourns are not appointments at all, but nominations needing senate confirmation before the nominee can assume office. AG Op. No. 61-17 (1961); AG Op. No. 82-18 (1982).[1]

Finally, the constitutional provision explicitly states that a recess appointee may exercise the powers of the office only until the next session of the senate. See AG Advisory Letter No. 84-34 (1984) (advising that if a university regent resigns while the senate is not in session, the governor may appoint someone "to act as regent in all respects until the next session of the Senate at which time the constitution provides that the Governor shall appoint with the consent of the Senate a person to fill the unexpired term of office"); AG Op. No. 82-18 (1982) (recess appointment valid until the next session of the senate at which time the governor appoints, with the senate's consent, a person to fill the remainder of the term).

Addressing the first question, the senate's inaction in 1990 upon the governor's nomination does not constitute consent. In State ex rel. Oberly v. Troise, 526 A.2d 898, 902 (Del. 1987), the Supreme Court of Delaware held that the senate's prolonged failure to act on gubernatorial nominations was not to be deemed constructive consent to those nominations, and, therefore, the governor could not constitutionally issue to the nominees valid full-term commissions. Concluding that Article III, Section 9 of Delaware's Constitution did not provide a judicial remedy for prolonged senatorial inaction on nominations, the court discussed the impediments to a "constructive consent" remedy:

Courts would be forced to determine at what point senatorial inaction became sufficiently "prolonged" to be deemed consent. This would require an examination of ... the amount of work before the Senate and the priorities placed on different projects, and even whether the Senate and the Governor have attempted a good faith resolution of their differences. Such an inquiry would put courts in the position of determining and passing upon the Senate's choices and motives, entangle the judiciary in a political thicket, and might ultimately indicate a "lack of the respect due coordinate branches of government."

Id. at 905 (citation omitted). Other courts have ruled similarly. See Passaic County Bar Ass'n. v. Hughes, 260 A.2d 261 (N.J. App. 1969) (holding that the court had no power to remedy an abuse of the confirmation power, described as "senatorial courtesy," under which the senate would refuse to confirm a nominee to a judicial office in a particular county if that nominee displeased one or more senators from that county); State ex rel. McCarthy v. Watson, 45 A.2d 716, 724 (Conn. 1946) (agreeing that the senate was obliged to act on nominations, but ruling that "there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment"). While senate inaction is not consent, neither is it rejection. See AG Advisory Letter No. 83-2 (1983) (advising that the senate's failure to act on a nominee is not a rejection for purposes of NMSA 1978, § 10-1-1 (Repl. Pamp. 1990), and that the governor could thereafter appoint such nominee under Article XX, Section 5's recess appointment provisions).

Addressing the third question, because of the special session of the legislature, the March 16, 1990 appointment may not qualify as a recess appointment. However, it is unnecessary to determine whether the regent was a de jure officer as a valid recess appointee or a de facto appointee[2] whose appointment was not a valid recess appointee. In either case, the actions taken during 1990 were valid as to the public. In Arellano v. Lopez, 81 N.M. 389, 467 P.2d 715 (1970), the New Mexico Supreme Court held that the question was moot whether a member of the council had been validly appointed. The court saw no purpose to be served by any pronouncement about the original appointment and the efforts to have that appointment declared invalid, stating:

At least during the period he served under the appointment, whether legal or not, he was a de facto member of the Council, if not a de jure one.... He was clothed with all the powers of a de jure councilman if, indeed, he was not one.

Id. at 393, 467 P.2d at 719. "The law validates the acts of 'de facto' officers as to the public and third persons on the ground, though not officers de jure, they are in fact officers whose acts, public policy requires, should be considered valid." Country Clubs, Inc. v. City of Knoxville, 395 S.W.2d 789, 793 (Tenn. 1965). See also State ex rel. Huntington v. McNulty, 199 A.2d 5, 6 (Conn. 1964) (when an appointing authority lacks power to make an appointment, the appointment is illegal and appointee at best becomes a de facto officer); Freeman v. State, 322 S.E.2d 289, 296 (Ga. App. 1984) (while de facto in office, the officer is competent to act); Jackson v. Maypearl Independent School Dist., 392 S.W.2d 892, 895-96 (Tex. Civ. App. 1965) (reciting general rule that when an official person or body has apparent authority to appoint a public officer and exercises that authority, and the person so appointed enters such office and performs its duties, that person will be an officer de facto, notwithstanding a want of power to appoint in the body or person who professed to do so).[3]

Addressing the second, fourth and fifth questions, Article XII, Section 13 requires the governor to nominate and to appoint, with the senate's consent, regents of Western New Mexico University. But that section does not require the governor to nominate again, at a subsequent legislative session, the same person whose nomination was not acted upon at the previous session. Even a valid recess appointment permits the governor to nominate a different person at the next legislative session. AG Op. No. 71-2 (1971). The same is true with respect to an invalid appointment. Therefore, the governor's new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment if the senate fails to take action.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Frame v. Sutherland, 327 A.2d 623 (Pa. 1974) illustrates the limited application of this authority to periods of recess. In Frame, the Supreme Court of Pennsylvania ousted

from office certain appointees in a quo warranto proceeding brought by state senators. Those appointees were among 680 appointments the governor had made several hours after the senate adjourned but before the house adjourned. The court held that the attempted "recess" appointments were invalid because the legislature had not yet adjourned and accordingly ousted the defendants from the offices they occupied.

n2 To constitute an "officer de facto," (1) the office must have a de jure existence, or at least one recognized by law; (2) the officer must be in actual possession of it; and (3) the officer's holding must be under color of title or authority. State v. Blancett, 24 N.M. 433, 446, 174 P. 207, 208 (1918) (concluding that a judge, even though not an officer de jure, was an officer de facto and, therefore, his authority was not subject to collateral attack). Id. at 449, 174 P. at 209.

n3 Similarly, the invalidity of the appointments considered by the court in the Frame case (discussed previously) did not affect the validity of actions taken by those appointees. In In re Falone, 346 A.2d 9 (Pa. 1975), a witness adjudged in contempt for refusing to testify argued that a petition granting immunity was invalid because signed by an attorney general whose appointment was defective under Frame. The court disagreed, because his appointment was not before the Frame court, and, even if his appointment suffered from the same defect as the Frame defendants, the attorney general "was at least a de facto officer...and thus his public acts possess the same validity as if he had been validly appointed." Id. at 15.