

Opinion No. 16-1728

January 29, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Hon. A. W. Hockenull, Clovis, New Mexico.

As to when officers, elected at the first city election, take office.

OPINION

{*299} I have just received your letter of January 27th enclosing carbon copy of a previous letter which you wrote to this office on the 15th. I return the carbon copy as you may need it for your files, and have to say that the original thereof was duly received here and by pure accident has been neglected and overlooked until your last letter arrived. We regret this very much but I feel certain that you know we would not have intentionally neglected any letter from you as I believe that we have always promptly responded to everything that you have written to us.

You say that Melrose incorporated last year under the village act, which appears as Section 3764 of the codification and the sections following, and held an election for village officers under Section 3766, while Section 3767 provides that the officers elected shall qualify and enter upon the duties of their respective offices on the first Monday of May succeeding their election, and you desire our opinion as to whether this provision applies to the officers elected at the first election or only to officers elected at the regular village elections held thereafter, which, by Section 3746, are to be held on the first Tuesday of April of each even numbered year.

The legislation, by the changes made by that Section 3746, which was part of an act of 1913, and by the codification, is left in a very unsatisfactory condition. The codification repeals all acts of a general and permanent nature not included therein, and on the face of the new legislation there seems to be no provision about when officers elected shall qualify, except the one in Section 3767, which fixes the time as the first Monday of May succeeding the election.

If we revert to Chapter 117 of the Laws of 1909, which is the village incorporation act, we find that by Section 4 careful and satisfactory provisions were made as to the first and subsequent elections, and as to when the officers elected should qualify and enter upon their duties, or rather those elected at the first election were to hold their offices until the first Monday in May succeeding such election in part, and two of the trustees were to hold their offices for an additional year. The view appears to have been taken that the act of 1913 repealed this section as to these provisions, which probably was a mistaken idea and the codifiers must have taken the view that the act of 1913, reappearing as Sections 3745 and 3746 covered the whole subject.

If we adopt a literal view of the legislation as it appears in the codification, we might have the extraordinary condition of officers elected in May, 1915, who could not qualify and take office until the first Monday of May, 1916, and yet by Section 3766, the county commissioners, upon the filing of the report of a survey and a census, are to declare the people of the territory embraced in {*300} such survey, to be an incorporated village, and then to order an election. If the officers who were then elected cannot take office, can it be said that there is any incorporation when there are no officers to administer the corporate affairs?

Section 3591 of the codification requires the trustees or council of each municipal corporation to appoint the judges and clerks of municipal elections and direct the places for holding such elections, but if the officers elected for your village cannot qualify and take office until the first Monday of next May, it is obvious that they would be in no position to perform the duties imposed upon them by Section 3591, and as a result there could be no election next April and the officers elected sometime last year would qualify on the first Monday of May and hold office for two years thereafter. This result is so manifestly contrary to the general legislative intent as to the government of these municipalities, that I am of opinion, as a matter of necessity, that the officers elected at the first election should immediately qualify as soon as the result of the election is known, and that they should direct the holding of an election at the regular time in April next.

I will not say with great confidence that the courts would take this view if the matter were presented to them, but I advise that the officers of Melrose qualify at once if they have not already done so, and then in April next proceed to hold the regular biennial election. If this is wrong it will have to be righted judicially.