

Opinion No. 17-1949

March 17, 1917

BY: Attorney General.,

TO: W. C. Heacock, Esq., Albuquerque, N.M.

Councilmen. After Resignation, May Participate in Council Meetings Until Successors Qualify.

OPINION

I have your request for an opinion from this office as to whether or not the two members of the city council of the city of Albuquerque who have tendered their resignations are qualified to act and participate in meetings of the council before their successors are chosen and qualified. You go still further and ask whether or not they will be qualified to act in such capacity in selecting their successors. In reply I shall content myself with citing you to two decisions of our Supreme Court which I think are pertinent to the question involved.

In the case of Bowman Bank & Trust Company vs. The First National Bank of Albuquerque, 18 N.M. 589, the question involved the authority of the secretary and treasurer of the board of regents of the New Mexico Agricultural College to act after his successor had been appointed and before the qualification of his successor. In that case the court said:

"But as we view the matter, it is immaterial as to the time of the qualification of the new board, for, in view of the provisions of section 3574, C. L. 1897, the treasurer of the board would still continue as such until the election and qualification of his successor, notwithstanding the fact that he had ceased to be a member of the board. This section provides for the election of a secretary and treasurer, and other officials, and continues, 'all officers so elected shall hold their offices until their successors are duly elected and qualified,' thus clearly providing against a vacancy in office. It is true, the secretary and treasurer under the statute, must be, when elected, a member of the board of regents, but that his right to hold until the appointment and qualification of his successor is not dependent upon his continuing to be a member of the board is clear, otherwise the legislature would not have provided for his continuance in office until his successor was elected and qualified. The purpose of this provision was to guard against a vacancy in the office. Even without the statutory provision he would be continued in office by virtue of section two, Art. XX, of the Constitution, which provides: 'Every officer, unless removed, shall hold his office until his successor has duly qualified.' Under this provision there can be no doubt as to his right to hold the office until his successor has qualified. In this case the newly elected treasurer did not qualify until some time in August; consequently May was the treasurer of the board of regents on July 5th, when he transferred the certificate of deposit in question."

In the case of Haymaker vs. State, the opinion of which was rendered by our Supreme Court on February 12, 1917, but not yet reported, the question involved the right of Mrs. Haymaker to hold the office of a member of the Board of Education of the city of Roswell and to act as clerk of said board. It was contended by relator that the two offices were incompatible, and that under our statute the acceptance of a later office vacated first. The court in determining whether or not the first office was vacated said:

"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 Art. 20 of the State Constitution, every officer holds until his successor qualifies, except when he is removed. That section was construed in Bowman Bank & Trust Co., the Bank, 18 N.M. 589, 137 Pac. 143, wherein the court declared that all officers held office until their successors qualified. Nothing was said therein with reference to removals, because that question was not involved. In State vs. Brinkerhoff, 86 Tex. 45, cited by the defendant in error, the court held that the qualification of the person to the second incompatible office operated, ipso facto, as a resignation of the first office, and that the appointment by the proper power to the second office constituted an acceptance of the resignation of the person to the first office. Under the provisions of the Texas Constitution at that time all officers continued to perform the duties of their offices until their successors duly qualified. The constitution made no exception as to officers removed. Our search has not disclosed any constitutional provision in any state on this proposition identical with ours. If the view be taken that the acceptance of the clerkship by plaintiff in error constituted the tender of her resignation of the office of member of the city board of education and that the appointment thereof by the said board constituted an acceptance of the resignation of plaintiff in error to the first office the defendant in error obtains no benefit thereby. 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."

The court further in its opinion cites and quotes from a number of authorities sustaining the position that an office does not become vacant until the successor qualifies.

While I must admit that a ruling that a member of the council who has resigned has a right to participate as such member of the council until his successor has qualified and has the right to vote in the selection of his successor is carrying the doctrine to the extreme, but it would seem in the light of the opinions of our supreme court, as above cited, that a member of the council would have such authority.