

Opinion No. 23-3687

March 29, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. J. F. Hinkle, Governor of the State of New Mexico, Santa Fe, New Mexico.

The Failure of a Duly Elected State Officer to Qualify Creates a Vacancy Which May be Filled by Appointment by the Governor.

The Constitutional Provision Extending the Term of Office Until a Successor Qualifies is Merely for Convenience and is Not Designed to Give the Incumbent an Additional Term of Office.

The Phrase "Hold His Office Until a Successor has Duly Qualified" Defined.

OPINION

{*33} This inquiry arises on the following statement of facts: John W. Corbin was elected to the office of State Treasurer on last November for the term beginning January 1st, 1923 but thus far has failed to fully qualify for the office by filing the requisite bond. The former Treasurer, O. A. Matson is now occupying the office and performing its duties as a hold over under the provisions of the State Constitution in Article 20, Section 2, that "every officer unless removed shall hold his office until his successor has duly qualified."

The question is asked now whether a vacancy exists in the office of the State Treasurer which can be lawfully filled by the appointment of another person by the Governor.

{*34} In this state no time limit within which an officer must qualify is prescribed by either the constitution or the statutes. It is true that in the schedule portion of the Constitution there is a thirty day limitation mentioned, but this applies only to the officers elected at the first state election. After a diligent search I have found little authority discussing the period in which an officer must qualify and I imagine this lack of discussion is due largely to the fact that most states have specified by statute a time limit for qualification. These periods usually vary from ten to sixty days from the commencement of the term. The Supreme Court of Minnesota in the case of State ex rel., Forrer v. McIntosh, 109 Minn. 18, said that new officers should have reasonable opportunity to qualify and assume the duties of the office after the opening of business hours on the first day of the term. In the absence of statutory or constitutional direction I think that an officer is entitled to a reasonable time in which to qualify. In the instant case the delay has now reached almost three months or one-eighth of the entire term and I think that under the circumstances this period is more than a reasonable time and that the Governor of the State may properly declare, as a matter of fact and of law, that a failure to qualify has occurred.

Although there are some exceptions, the law appears to be settled that when an officer fails to qualify, a vacancy occurs. The following language, which is directly applicable to the situation here, occurs in 22 R. C. L., Page 440.

"There is a conflict of authority as to whether a vacancy exists where an elected candidate fails to qualify for the office to which he has been elected. One opinion is that the failure of a newly elected officer to qualify creates a vacancy which may be filled by appointment although under the provisions of the constitution the present incumbent may be entitled to hold over until his successor is elected and qualified. The reason supporting the soundness of this view is found in the danger of a wilful refusal of an appointee to qualify and assume the duties of the office. Since it is to the public interest that the office should be filled the power should exist to fill a vacancy by appointment when the person primarily entitled to occupy it fails or refuses to qualify."

A careful examination of Adjudicated Cases on the subject convinces me that the conflict of authority mentioned in the foregoing citation is more apparent than real and that the above statement in Ruling Case Law states the great weight of authority. For instance, the case of *State v. Boucher*, 3 N. D. 389, which is cited in the same work as holding a contrary view, is one in which the appointment had to be made by the Governor with the consent of the Senate, and the Court held that when the Senate adjourned without confirming the Governor's appointee, the incumbent held over and there was no vacancy permitting the Governor to make a new appointment without the consent of the Senate. This is a familiar and well settled principle which has no application whatever to the situation here. In fact, I think that many of the so-called contrary authorities will be found to be the cases where an appointment should be made with the consent of the Senate.

{*35} I find that many Courts have held that the failure of a newly elected officer to qualify creates a vacancy which may be filled by appointment and that the hold over officer has no vested right to continue after such appointee has qualified. Some of these cases are *Childrey v. Rady*, 77 Va. 518; *Owens v. O'Brien*, 78 Va. 116; *Smith v. Beppard*, 69 W. Va. 211. In the case of *State ex rel., Finch v. Washburn*, 17 Wis. 658, it was held that where a person newly elected refuses to qualify the office for the term becomes vacant and an appointment may be made, although to prevent an interregnum the old incumbent is authorized for the time to perform its functions so that under such circumstances there may be a lawful holding of the office by the old incumbent as of the new term, while a vacancy actually exists, as to the new term.

It has been frequently held that the general purpose of the same constitutional provision extending the term of office until a successor qualifies, is merely to provide against any inconvenience that otherwise might arise from a vacancy in an office occurring after the expiration of a term and before the qualification of a successor. In *Cline v. McKelvey*, 57 W. Va., 29, it was held that on the failure of a newly chosen officer to qualify, a successor should be appointed even though the old incumbent held over. The Court said that the incumbency of the hold-over would not preclude the existence of a vacancy as a basis for the exercise of the appointive power and that for the purposes of

appointment there was a vacancy notwithstanding the occupancy of the hold-over incumbent. The same thing was decided in *Campbell vs. Dotson*, 111 Ky. 125. The Court reviewed all of the Kentucky constitutional provisions that incumbents should hold over until the successors are qualified and said:

"All of these sections mean the same thing. None of them were designed to give the incumbent two terms in case his successor died before qualifying. The aim was simply to prevent a hiatus in the office in case the new officer for any reason failed to qualify."

To the same effect is the advisory opinion to the Governor by the Supreme Court of Florida in 62 Southern 363, where a new officer had failed to qualify and the Governor sought to appoint another one.

It is true there are a number of authorities to the effect that upon the expiration of a term there is not a vacancy to be filled by the general appointing power where the prior incumbent was entitled to hold "until his successor was elected and qualified," but our Constitution simply says that every officer shall hold office until his successor has qualified and such successor does not have to be an elected successor. Moreover, in this case, there has been an election and the vacancy is caused by the failure of the elected successor to qualify and not by reason of there having been no election.

Some cases which appeared to hold a contrary view and are based upon the proposition that a "vacancy" must be an actual physical vacancy or absolute lack of any person functioning in the office as an officer, but the Supreme Court of New Mexico has disposed of this theory in this state. In the case of *Haymaker v. State*, 22 N. Mex. 400, Justice Hanna speaking for the Court, said:

{*36} "It was also said in that case that the statute providing that officers should hold office until their successors are elected and qualified was significant as denoting the policy of the state, and that the "public convenience shall not suffer from a vacancy in such 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." Assuming that the resignation of the plaintiff in error of the first office had been accepted, a vacancy, as defined in section 3955, Code 1915, did occur in the office of member of the board of education of the city. But in view of the constitutional provision cited supra, 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 in the place and stead of the plaintiff in error."

The Court held that a "vacancy" which gives the appointive power the right to fill the office need not be a corporeal vacancy. The legal meaning of the term vacancy in such case is that the office has no occupant who holds by good title in law and that the appointing power may at once be exercised to fill it.

There can be no doubt that the Governor of New Mexico, is empowered to fill any vacancy in a state office by appointment; Constitution, Art. 5, Sec. 5. It is not necessary

to have a judicial determination of the existence of such vacancy before the appointive power can act.

"Where it appears, prima facie, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect according to the forms of law, a person, to fill such office." Page 208, Ind. State, ex rel. Schumacher v. Gosman, 19 Ind. 356.

The question involved in this opinion is a difficult one but after careful search among the authorities I am convinced that the great weight of authority in this country is in harmony with the facts I have expressed. From all the foregoing I conclude that the Governor may declare that Mr. Corbin has failed to qualify, that such failure has created a vacancy in the office of State Treasurer, that the Governor has the right to fill the vacancy by appointing another person, that Mr. Matson is at present holding over with no certain tenure of office and that his title to the office will cease on the qualifications of a new treasurer appointed by the Governor.