

Opinion No. 57-47

March 8, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Senator W. C. Wheatley, New Mexico State Senate, Santa Fe, New Mexico

QUESTIONS

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When the Governor submits a second list of names, which purports to be appointees to the highway commission, to the Senate at a time later than the fifth day of the regular session of the Legislature after having complied with the 5-day provision, is the second list of purported appointees eligible for consideration by the Senate?

CONCLUSION

No, the only valid appointments are those made within the limits prescribed by constitutional provision.

OPINION

ANALYSIS

This question arises by reason of the submission by the Governor to the Senate of two names within the 5-day period prescribed by Art. V, § 14 of the New Mexico Constitution. The Senate refused to confirm those two names and upon such decision, the Governor submitted two more names. But such submission was after the 5-day period had elapsed.

Art. V, § 14 was approved by the people as a constitutional amendment in 1949 and became effective on January 1, 1950. This was a limitation purposely made by the Legislature and the people and was in direct derogation of Art. V, § 5 of the Constitution, which was the appointive provision of such Constitution. The people were submitted this on the proposition that the Governor at the time was exercising undue control over the highway department and the section was drawn to limit, almost to the point of abolition, the Governor's power over the highway commission. Thus Art. V, § 5, so far as this section of the constitution is concerned, must be considered inoperative.

The provision, however, leaves many shadowy areas and a great number of possibilities, the answers to which are not self-contained in the section. Any view taken of some of the possibilities available in Art. V, § 14, when such are extended to the extreme, lead to very strange conclusions. For instance, if the Governor can comply

with the 5-day provision by submitting two names known by him to be unacceptable to the Senate, and upon objection submits other names also known by the Governor to be unacceptable to the Senate, the Governor would be empowered to unduly burden the State Senate with appointments and cause embarrassment of a great number of people, if his list were selective enough. Admittedly, this is an extreme situation and we are not suggesting that this Governor has done any such thing. It is our view that the Legislature, when this Art. V, § 14, was adopted for submission to the people and the people voted to adopt it, were attempting to limit the Governor's power over the highway department in an extremely drastic fashion.

A provision similar to the 5-day provision has been held to be a cut-off provision which terminates the Governor's right to act after such time regardless of what action he has taken during that period. **See In re Opinions of the Justices**, 42 So. 2d 27 (Ala.); **Tanzilli vs. Cassassa**, 85 N.W. 2d 220 (Mass.).

Our Supreme Court recently held, in the case of **State ex rel Wilson v. County Commissioners of Quay County**, 61 N.M. --, 306 P. 2d 259, that a date for action is a termination date and the action must be concluded before that date and substantial compliance was not sufficient. See 67 CJS. (Officers) Section 114b, p. 404; 43 Am. Jur. (Public Officers) Section 259, p. 77; and 3 Sutherland, Statutory Construction, 102. It should be noted that the phraseology used in the Constitution is couched in mandatory terms. (The Governor **shall submit** the appointment of commissioners to the State Senate for confirmation **not later than the fifth day** of each regular session of the Legislature.) See also the case of **City of Hutchison vs. Ryan**, 121 P. 2d 179 (Kan.); and **Schlafly vs. Baumann**, 108 S.W. 2d 353, wherein the Missouri Court held that the time limit in a provision was mandatory and must be construed as a termination date, thus limiting the power of the officer to action within that period. See also the case of **Sanford Realty Co. vs. City of Knoxville**, 110 S.W. 2d 325.

This office feels compelled to depart from the usual function of an opinion and suggest to the members of the Senate that the situation contained in this constitutional provision creates certain vague aspects and that an amendment should be submitted to clarify the true intention of this section. For example, whether the creation of a vacancy during a session but after the 5-day period would give right to the other commissioners to appoint or whether the Governor, or the Senate, could appoint. Of course this office has previously held, in Opinion No. 57-30 dated February 15, 1957, that the termination of the term did not create a vacancy in the office. See **Terr. ex rel Klock vs. Mann**, 16 N.M. 744.