

## **Opinion No. 57-63**

March 27, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilario Rubio, Assistant Attorney General

**TO:** Honorable E. M. Barber, District Attorney, Seventh Judicial District, Truth or Consequences, N.M.

### **QUESTIONS**

#### QUESTIONS

1. Is Precinct No. 9, Palma, New Mexico, a legal precinct?
2. Does a justice of the peace have to be reappointed by the County Commissioners of Torrance County, New Mexico, after his first two-year appointment has expired?

#### CONCLUSIONS

1. Yes.
2. No, but he may be appointed at this time.

### **OPINION**

#### ANALYSIS

To a letter dated March 18, 1957, is attached a letter to you by the Chairman of the County Commissioners of Torrance County wherein it is stated that the Minutes failed to show wherein Precinct No. 9 at Palma, New Mexico, was ever consolidated with Moriarty Precinct No. 8 or Encino Precinct No. 12; and that the minutes do show that the last election held in Precinct No. 9 was in November of 1950. Mr. Alva Halderman, the Acting Justice of the Peace, states that he is a resident of Precinct No. 9. I have checked this date the Secretary of State's Office to see if the County Clerk of Torrance County has complied with § 15-37-20, N.M.S.A., 1953 Compilation, in sending a certificate to the Secretary of State showing a change in any of the precincts of that County. Records of the Office of the Secretary of State fail to show that any such certificate was sent as by law provided.

The facts also disclose that at the first election for a justice of the peace, the man elected served for two years, but they do not show whether he ran for reelection or was appointed thereafter.

In regard to the first question, I call your attention to § 15-37-19 concerning change in precincts. That Section provides:

"Whenever any board of commissioners shall organize new precincts or demarcations, or alter the boundaries of any precinct or demarcation in their county they shall cause a map and record thereof to be made by the county clerk, specifying the name and boundaries of such precinct or demarcation, which map and record shall be kept in the office of said clerk, and a copy thereof, under the seal of said board, shall be made by said clerk and filed with the justice of the peace of such precinct or demarcation."

It appears that this has never been done by the County Commissioners, and I find that the County Clerk has not complied with § 15-37-20, entitled "Change in precincts -- Certificate to secretary of state." This statute reads as follows:

"The said clerk of each county shall, as often as a new precinct or demarcation shall be organized in his county or the boundaries of any precinct or demarcation shall be altered, and immediately there-after, make out and transmit to the secretary of state a certified statement of the names and boundaries of the precincts and demarcations so organized, and of the boundaries of any precinct or demarcation, the boundaries of which shall have been altered."

So long as Precinct No. 9, Palma, New Mexico, continues to be a legal precinct, the residents of that precinct must vote there at all elections. See *State v. Board of County Commissioners*, 59 N.M. 9. This was a contest case between the Board of County Commissioners of Harding County and the Board of County Commissioners of Quay County. The Supreme Court held that any vote cast by a voter outside of the precinct in which the voter resides is void, and that the State Constitution makes it mandatory that voting places be provided in each precinct. Article VII, § 1, New Mexico Constitution; § 3-1-1, N.M.S.A., 1953 Compilation. In the future, an election must be held in this precinct at all times -- any deviation would cast a doubt on such election.

Therefore, it is the opinion of this office that answer to the first question is that Precinct No. 9, Palma, New Mexico, is still a legal precinct because the County Commissioners' records do not show any official action of any kind in abolishing, organizing new precincts, demarcations, or altering the boundaries of any precinct or demarcation in their county and preparing a map of same as required in § 15-37-19, N.M.S.A., 1953 Compilation. Nor have they complied with the requirement of § 15-37-20, N.M.S.A., 1953 Compilation, which provides that a certified statement of the names and boundaries of the precincts and demarcations so organized and boundaries altered be filed with the Secretary of State's Office.

In regard to the second question, from your letter dated March 18, 1957, and the other two attached letters, the facts as to whether the justice of the peace was elected once and then continued to occupy the office, or was elected and then appointed, are not very clear, so I am writing an opinion on the second question on the alternative.

Assuming that Precinct No. 9 is in existence, and once they had an election for justice of the peace, that office is occupied by someone.

If there was an election and if there was a failure to elect after expiration of that term, and because of failure to elect there was an appointment by County Commissioners, then there is now no vacancy which can now be filled by appointment.

In support of the above assumed facts, I cite the case of State ex rel. Reeves v. Herring, 57 N.M. 600, 261 P. 2d 442. In this case, the County Clerk of Chaves County, who was elected in the November election, was the incumbent. During December, and before she qualified for the second time for office, she resigned and her successor, one Dorothy Herring, was appointed. The expiration of the term for which Miss Herring was appointed would be December 31, 1952 at midnight. However, the former incumbent, Miss Chandler, was not present to qualify, and did not qualify at any time prior to the hearing. The County Commissioners, however, took the view that the expiration of the term for which Miss Chandler was elected was midnight of December 31, 1953, that they were authorized to appoint a person to fill that office. They attempted to do so and this action was commenced.

After quoting extensively from the various cases in New Mexico, and particularly the case of Territory ex rel. Klock v. Mann, 16 N.M. 744, the Court held that the incumbent, Dorothy Herring, was the County Clerk for all purposes, a de jure officer, and entitled to hold that office against all assaults except a qualification by Miss Chandler. This problem is discussed at length in an annotation at 164 ALR 1248. Under this assumption of facts, it is the opinion of this office that there is now no vacancy and no appointment by the County Commissioners can be made.

However, if there was an election in the precinct, and no subsequent appointment was made by the County Commissioners after expiration of the term for which a justice of the peace was elected, then there is now a vacancy which can be filled by appointment as provided in § 5-3-1, N.M.S.A., 1953 Compilation, which provides as follows:

"CIRCUMSTANCES CAUSING VACANCY IN LOCAL OFFICE. -- Any office belonging to the class mentioned in section 3954 (includes justice of the peace) becomes vacant under any of the following circumstances: . . . .

4. Expiration of the term of office when no successor has been chosen as provided by law; . . . ."

Section 5-3-2, N.M.S.A., 1953 Compilation, provides the means by which the County Commissioners may fill any county or precinct office vacancy, and that vacancy can be filled by appointment, assuming that the facts are as above stated. And the procedure to be followed by the County Commissioners in making the appointment for the vacancy that exists is provided in § 5-3-2, N.M.S.A., 1953 Compilation, which reads as follows:

"VACANCY IN COUNTY OR PRECINCT OFFICE -- APPOINTMENT. -- Whenever any vacancy in any county or precinct office in any of the counties of this state other than a vacancy in the office of county commissioner, shall occur by reason of death, resignation or otherwise it shall be the duty of the board of county commissioners of the county where such vacancy has occurred to fill said vacancy by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law."

Therefore, it is the opinion of this office that under the above assumption of facts, and from the requirements of the above quoted statutes, that a vacancy in the justice of the peace office in Precinct No. 9 exists, and the County Commissioners can proceed to appoint the present justice of the peace, or any other person, to fill the vacated office.