

## **Opinion No. 58-233**

December 16, 1958

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

**TO:** Honorable Fred H. Thompson, Member, House of Representatives, County of Mora, Wagon Mound, New Mexico

### **QUESTION**

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"Mr. Laudente Quintana, who was elected to the State House of Representatives from Mora County on November 4, was appointed Acting Postmaster of Wagon Mound on November 18 and has been working in that capacity since then. Will you please give me an opinion from your office on the following?

1. Does Mr. Quintana become the State Representative from Mora County on January 1, 1959 or is it necessary for him to take the oath of office?
2. Under Article IV, Section 3 of the State Constitution, can he legally take the oath of office of a State Representative while on the Federal pay roll?
3. If he can, and does, assume the office and then resigns how is his successor determined?
4. If he does not intend to be sworn in as State Representative, whom does he notify?
5. If he does not appear to take the oath of office, is a vacancy created?
6. If he does not assume the office of State Representative, who does?"

#### **CONCLUSIONS**

1. He must take the oath.
2. No, but this office cannot be the judge of qualifications of members of the House.
3. By the Board of County Commissioners.
4. The Secretary of State.
5. No.

6. The present incumbent.

## OPINION

### ANALYSIS

In regard to your first question, we are cognizant of Constitution of New Mexico, Art. XX, Sec. 3, providing:

"The term of office of every state, county or district officer, except those elected at the first election held under this Constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election."

Standing alone, and at first blush, this provision would seem to say that Mr. Quintana becomes a State Representative January 1, 1959. However, under rulings of our Supreme Court, we are not at liberty to restrict ourselves to the one provision, inasmuch as consideration must be given the various provisions of the Constitution in order to give effect to it in its entirety. **State ex rel. Ward v. Romero**, 17 N.M. 88, 125 P. 617. This is for the reason all constitutional provisions have equal dignity. **McCormick v. Board of Education**, 58 N.M. 648, 274 P. 2d 299.

We believe the answer to your question is contained in Constitution of New Mexico, Art. XX, Sec. 1, reading:

"Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the Constitution of the United States and the Constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability."

for as was held in the **Bowman Bank and Trust Co. v. The First National Bank**, 18 N.M. 589, 139 P. 148, citing the above constitutional provision, the election or appointment of an officer does not serve to oust his predecessor from office. The Court emphasized one must first qualify, i.e., take the oath and give bond where the latter is required. It follows that election alone is not enough. The constitutional oath must be taken.

Your second answer is contained in Constitution of New Mexico, Art. IV, Sec. 3, as amended. Subsection (a) thereof provides:

"Senators shall not be less than twenty-five (25) years of age and representatives not less than twenty-one (21) years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the county from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in section 4 of this article. **No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any**

**office of trust or profit with the state**, county or **national governments**, except notaries public and officers of the militia who receive no salary." (Emphasis supplied)

It is the opinion of this office that one who is an Acting Postmaster holds an office of trust or profit under the national government. However, we hasten to add that Mr. Quintana, **if he chooses**, could resign from his position as Acting Postmaster (thus removing the impediment) between now and the time the legislature convenes, take the oath, and assume his office as a member of the House of Representatives. Otherwise, he would not be eligible to serve according to our Constitution.

Assuming, however, that Mr. Quintana properly takes office, and then resigns, you ask how his successor is determined. Constitution of New Mexico, Art. IV, Sec. 4 states:

"Members of the legislature shall be elected as follows: Senators for the term of four years, and members of the house of representatives for the term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment; Provided, however, that if a vacancy occurs in a legislative district composed of more than one (1) county, then the county commissioners of each county in the legislative district shall submit one (1) name to the governor, who shall appoint the representative to fill such vacancy from the list of names so submitted by the respective county commissions."

Consequently, the successor would be determined by the Board of County Commissioners of Mora County. See Opinion of the Attorney General No. 58-175, rendered August 26, 1958.

Inasmuch as Constitution of New Mexico, Art. IV, Sec. 8, provides that the House of Representatives shall be called to order by the Secretary of State, notice that Mr. Quintana does not intend to be sworn (if that be the case), should be sent to the Secretary of State.

If Mr. Quintana doesn't appear to take the oath, a vacancy is not created. While this seems like an anomaly at first glance, regard must be had to Constitution of New Mexico, Art. XX, Sec. 2, reading:

"Every officer, unless removed, shall hold his office until his successor has duly qualified."

Expiration of the term of office does not work a vacancy. The case of **The Bowman Bank and Trust Co. v. The First National Bank**, *supra*, citing Art. XX, Sec. 2, held that an officer holds office until his successor qualifies. Consequently, a vacancy is not created by expiration of the term of office, and further, the present incumbent would

continue in office by virtue of Art. XX, Sec. 2. **State ex rel. Rives v. Herring**, 57 N.M. 600, 261 P. 2d 442.

In Opinion of the Attorney General No. 57-30, rendered Feb. 15, 1957, Mr. Standley reviewed at length a number of cases bearing upon these and similar problems. We shall be happy to send you a copy thereof if you desire.

While we have willingly given answers to all your questions, a serious doubt arises in our minds as to the binding effect of this opinion in all respects, due to the provisions of Constitution of New Mexico, Art. IV, Sec. 7, which reads:

**" Each house shall be the judge of the election and qualifications of its own members.** A majority of either house shall constitute a quorum to do business, but a less number may effect a temporary organization, adjourn from day to day, and compel the attendance of absent members." (Emphasis ours)