

Opinion No. 59-73

July 20, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Honorable R. C. "Ike" Morgan State Senator Roosevelt County 223 South Main Portales, New Mexico

The State Racing Commission may refuse to renew a racing license when it expires but it can only do so for reasons which would have permitted it to refuse to issue the license in the first instance.

The Lieutenant Governor is under a duty to cast his vote authorized under Art. V, Sec. 8, Constitution of New Mexico, when the Senate is evenly divided on a matter not a proposed constitutional amendment.

OPINION

{*116} This is written in reply to your recent request for an opinion on the following questions:

1. After the three year period expires for the license issued to the Fortuna Corporation for horseracing, may the racing commission refuse to renew the license?
2. Is the Lieutenant Governor under a duty to vote when the Senate is evenly divided on an issue not a constitutional amendment?

In answer to the above questions, it is my opinion that:

1. Yes, the Commission may refuse to renew the license but it can only do so for reasons which would have permitted it to refuse to issue the license in the first instance -- that is, it cannot do so arbitrarily or capriciously.
2. The Lieutenant Governor is under a duty to cast his vote authorized under Article V, Sec. 8, Constitution of New Mexico, when the Senate is evenly divided on a matter not a constitutional amendment.

The answer to your first question is found in part in the case of **D. F. Ross and J. S. Witt v. State Racing Commission**, 64 N.M. 478, 330 P. 2d 701, which dealt with a similar problem before the same Commission. The Court in that case made it very clear that while the Commission was given broad discretion in granting and revoking racing licenses in this State, it could not act unreasonably, arbitrarily or capriciously in refusing to grant a license. As you will recall, the Court in that case sent the case back to the Commission for further proceedings since the Commission denied the license on the

grounds that it would not be a successful enterprise and there was not sufficient evidence in the record of the proceedings to show financial ability or inability.

It is my view that this case and the language therein in part controls the answer to your question. Also bearing on this matter is an opinion of the Attorney General, No. 59-29, dated March 26, 1959, a copy of which I am enclosing. In that opinion, then Assistant Attorney General Fred M. Calkins, Jr., said:

"* * * it is my opinion that the present commission could revoke a license granted by a previous commission for reasons other than those particularly listed in the racing laws, **but only if it can be established as a matter of fact that reasons existed which would have justified a refusal in the first instance or if fraud or deceit existed in obtaining the license in the first instance.**" (Emphasis supplied)

It, therefore, becomes apparent that when the **Ross** case, supra, and the above cited Attorney General's opinion are looked at together, you have the following result: The Commission can refuse to renew a license only on the grounds *{*117}* which would have permitted it to refuse to issue it in the first instance; the Commission in refusing to grant a license in the first instance cannot act arbitrarily or capriciously; therefore, it is my view that the Commission can refuse to renew the Fortuna license when it expires but it cannot do so arbitrarily or capriciously and can do so only upon grounds which would have permitted them to refuse to issue it in the first instance.

In regard to your second question, it is my opinion that the Lieutenant Governor is under a duty to cast his vote authorized under Article V, Section 8, Constitution of New Mexico, when the Senate is evenly divided on a matter not a Constitutional amendment.

I arrive at this conclusion by virtue of the fact that the above cited section of the Constitution says:

"The lieutenant governor shall be president of the Senate, but **shall** vote only when the Senate is equally divided. (Emphasis supplied)

It is almost uniformly held by the Supreme Court of this State that the word "shall" is mandatory in nature. See **Boyd v. City of Wagon Mound**, 46 N.M. 262, 127 P. 2d 242; **In Re Armijo's Will**, 57 N.M. 649, 261 P. 2d 833.

This result seems correct in view of the fact that had the framers of the Constitution intended the Lieutenant Governor to have the discretion to cast his vote or abstain in the event that the Senate divided equally on a matter not a constitutional amendment, they would have written the section to say that the Lieutenant Governor **may** vote only when the Senate is equally divided. The word "may" is a word of permissive character and is normally so construed by the Courts.

It is therefore my opinion that the Lieutenant Governor is under a duty to cast his vote rather than abstain when the Senate is equally divided on an issue not a constitutional amendment.

It should be noted that I have qualified my remarks by referring to matters not constitutional amendments. This is so by virtue of Opinion of the Attorney General, No. 59-13, dated February 16, 1959, which states in effect that the Lieutenant Governor cannot break a tie when the Senate is equally divided upon a constitutional amendment.