

## **Opinion No. 62-148**

December 26, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

**TO:** Judge William U. Tate, Jr., 800 Canyon Road, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. When no candidate from either party ran for election as justice of the peace in a particular precinct, does the incumbent justice who was elected for a term expiring December 31, 1962, hold over until his successor qualifies?
2. Will there be a vacancy in this office at 12:01 a.m., January 1, 1963, which the Board of County Commissioners can fill by appointment?

#### CONCLUSIONS

1. Yes.
2. Yes.

### **OPINION**

#### ANALYSIS

The somewhat unusual fact situation giving rise to your questions is as follows: You are the incumbent justice of the peace in precinct 28 with a term which expires at 12:01 a.m., January 1, 1963. Neither party had a candidate for justice of the peace in this precinct at the last general election. You ran in the last general election as a candidate for justice of the peace in precinct 3 and were defeated. The matter that concerns you is your status as justice of the peace in precinct 28 after December 31, 1962.

For purposes of this opinion we have assumed that you still meet the necessary residence requirements to hold office in Precinct 28. See Section 36-2-8, N.M.S.A., 1953 Compilation.

There are a number of statutory and constitutional provisions which must be considered, each of which, we believe, can be given full force and effect.

Article 20, Section 2 of the New Mexico Constitution provides that "Every officer, unless removed, shall hold his office until his successor qualifies."

Section 36-1-1, N.M.S.A., 1953 Compilation, provides in pertinent part as follows:

"At each general election there shall be elected in each precinct one (1) justice of the peace . . . in the manner now provided by law for the election of state and county officers . . . and shall hold office for two (2) years thereafter, or until their successors shall qualify according to law, or unless sooner removed for cause."

No one having run for justice of the peace in Precinct 28 at the last general election, and since your term of office expires on December 31, 1962, you will hold over until your successor qualifies.

However, this does not mean that a vacancy will not exist on January 1, 1963. Section 5-3-1, N.M.S.A., 1953 Compilation, provides that certain offices (including precinct offices) become vacant by "Expiration of the term of office when no successor has been chosen as provided by law."

That is the situation we will have in Precinct 28, insofar as a justice of the peace is concerned, at 12:01 a.m., January 1, 1963. When such a vacancy occurs in a county or precinct office "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." (Emphasis added)

When the Board of County Commissioners subsequently fills the vacancy which will occur on December 31, 1962, the appointee will hold the office until his successor is **both** elected and qualified. See Opinion No. 57-63; **State v. Herring**, 57 N.M. 600, 261 P. 2d 442.