

Opinion No. 65-47

March 19, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: Alexander F. Sceresse, District Attorney, Second Judicial District, Albuquerque, New Mexico

QUESTION

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In view of the 1963 Reapportionment Acts, may a vacancy in the office of State Representative from a district in Bernalillo County be filled by the County Commission prior to January 1, 1965?

CONCLUSION

Yes, but see Analysis.

OPINION

{*80} ANALYSIS

Chapter 2, Laws of 1963 Special Session, provided for the reapportionment of the State House of Representatives. Among other things, it provided for legislative districts within a county from which more than one member of the House was to be elected and that each member of the House shall reside in the district from which elected. Bernalillo County was to elect eighteen (18) members, and it is further provided in Section 14:

"EFFECTIVE DATE. -- Until January 1, 1965, the provisions of the 1963 Reapportionment Act shall be effective for the limited purpose of electing the members of the twenty-seventh legislature. After January 1, 1965, all provisions shall be fully effective."

Chapter 3, Laws of 1963, Special Session, set the boundaries of legislative districts within the various counties, including Bernalillo County, from which a representative must be elected and within which he must reside. It contained a similar provision as to its effective dates.

Article IV, Section 4 of the New Mexico Constitution, provides for the filling of a vacancy in the office of member of the House of Representatives by the county commissioners of the county wherein such vacancy occurs.

Under the facts furnished, a member of the House of Representatives for Bernalillo County was elected in November 1964 from one of the districts established by Chapter 3, supra. He resigned in December 1964, and the Bernalillo County Commissioners subsequently appointed another resident of the same legislative district to fill such position in the House of Representatives for the term commencing January 1, 1965. Such legislator so appointed was accepted by and sworn in as a member of the House of Representatives.

The first question that arises is whether a vacancy occurred in the position of member of the House of Representatives for the district, for which the appointment was made, before January 1, 1965. If so, the position could be filled by the Board of County Commissioners prior to January 1, 1965. An answer to this proposition requires a construction of the language, providing in substance, that the Act was effective for the purpose of electing members before January 1, 1965, and effective for all purposes on January 1, 1965.

The Acts in question were both passed by the same legislative session and reflect the concern of the Legislature that its method of apportionment might not comply with fairly recent decisions of the United States Supreme Court on the subject. In accord with its concern, additional House seats were created, as well as legislative districts within counties from which the legislators {**81*} would be elected and within which they must reside.

It is a well known rule of statutory construction that so long as the meaning of the statute is clear, and there is no ambiguity, there is no necessity for construction. **Southerland Statutory Construction** (3d Ed.), Vol. 2, p. 317, § 4502; **George v. Miller & Smith**, 54 N.M. 210; **Hendricks v. Hendricks**, 55 N.M. 51, 226 P.2d 464.

Unless the language that the Act was effective for the limited purpose of electing members of the Twenty-seventh Legislature created an ambiguity in the terms of the statute, no construction is warranted, and a vacancy existed which could be filled as soon as the vacancy occurred.

There would appear to be no ambiguity here. The entire legislative purpose concerns itself with the apportionment of the House of Representatives after January 1, 1965, and the method of electing the members of the House of the Twenty-seventh Legislature and subsequent legislatures. It did not, and did not purport to, concern itself with apportionment of the House prior thereto, or the method by which one might become entitled to a seat in any legislature prior to the Twenty-seventh Legislature. The provision that the Acts should be effective only insofar as election to that legislature was concerned, would appear to have been superfluous. The language seems clear that the Twenty-seventh and subsequent legislatures were reapportioned, and that the members of the House of the Twenty-seventh Legislature were elected in November 1964, to embark upon their duties upon the convening of such legislature, and not before. Even without the language concerning the effective date of the Act, it would be clear that vacancies occurring in the Twenty-sixth Legislature would necessarily be filled in the

manner then provided by law and for such legislative terms only. Opinion No. 64-139, Report of the Attorney General, 1963-64 (as yet unpublished), dated November 12, 1964.

Under the facts related, no vacancy had occurred in the office of Representative for Bernalillo County in the Twenty-sixth Legislature. The vacancy that occurred, if any, was in the Twenty-seventh Legislature.

Even if the language concerning the date or dates, upon which the Acts became effective, create an ambiguity, the same result is reached. The primary objective of construction is then to determine the intent of the Legislature. To this end we look to several rules to aid us in determining such intent. One such rule is that the meaning of a statute as a whole is determined in order to find the meaning of the language of the portion being construed. If possible, all parts of the statute must be construed so as to produce one harmonious whole. **Southerland Statutory Construction** (3d Ed.) Vol. 2 pp. 336-340, §§ 4703-4706. **State v. So. Pac. Co.**, 34 N.M. 306, 281 P.29; **Janney v. Fullroe**, 47 N.M. 423, 144 P.2d 145.

Following this rule of interpretation, we are again inescapably led to the conclusion that the Acts in question were concerned only with the Twenty-seventh and subsequent Legislatures, and that the recital to the effect that the Acts became effective to a limited extent only did affect and were intended to affect any question that might arise as to members of the House of Representatives of legislatures prior to the Twenty-seventh Legislature.

The vacancy in question concerned only the Twenty-seventh Legislature. Its number, apportionment, and method of election was set by the Acts here considered. The offices of member of the House of Representatives of the Twenty-seventh Legislature were created by the Acts and were, accordingly, filled by the election held in November. Insofar as the position in question is concerned, it was filled upon the election and qualification of the member of {*82} the House of Representatives who resigned. He filled a position in the Twenty-seventh Legislature by reason thereof, **although he would not embark upon his duties until January 1, 1965.**

The case of **State v. Herring**, 57 N.M. 600, 261 P.2d 442, involved a similar question. The newly elected county clerk resigned and, prior to January 1, another was appointed. After January 1 a new appointment was attempted. The court held that a vacancy occurred upon the resignation of the clerk, which was filled by the appointment. The appointee then held over until her successor was duly qualified. New Mexico Constitution, Article XX, Section 2. In that case, the newly elected clerk was also the incumbent clerk. However, this fact would not appear to be distinguishing under the facts now presented. Although not embarking upon his duties until January 1, 1965, the elected and qualified person was a member of the house of representatives of the Twenty-seventh Legislature, subject to being seated by it. Upon his resignation, a vacancy did exist which could be filled, and once filled, his successor continues in office

until his successor is duly qualified by election and qualification at the next regular election for such office. Opinion No. 64-139, supra.

Finally, it is noted that the person appointed was seated by the Twenty-seventh Legislature. Article IV, Section 7, New Mexico Constitution, provides in part:

"Each house shall be the judge of the election and qualifications of its own members. . . ."

Since the House of Representatives is the sole judge of the qualifications of its members and has, by seating him, determined that the appointee is qualified, he is the incumbent member of the House of Representatives, from that district, of Bernalillo County. The House of Representatives in so determining the qualifications of its members also determined whether or not a vacancy did indeed exist, which was filled by the appointment. **Covington v. Buffett**, 90 Md. 364, 45 A. 204, 47 L.R.A. 622. Opinion No. 61-119, Report of the Attorney General 1961-62, dated November 27, 1961, is to the same effect.

It is our opinion that after the election and qualification of a member of the Twenty-seventh Legislature and his subsequent resignation, a vacancy did occur which was filled by appointment of the appropriate county commission, although such vacancy was so filled prior to January 1, 1965. It is our further opinion that the appointee would be entitled to hold such office until his successor was duly elected and qualified. Additionally, such vacancy having been deemed to exist, and such appointment having been determined valid by the House of Representatives of the Twenty-seventh Legislature, the appointee is the incumbent holder of such position.