

## **Opinion No. 75-79**

December 30, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Senator I. M. Smalley 501 West Pine Street Deming, New Mexico 88030

### **QUESTIONS**

#### **FACTS**

The Municipal Judge in Deming, New Mexico was elected in 1974 for a term of four years. The elected judge resigned in 1975 and an appointment was made to fill the vacancy created by the resignation.

#### **QUESTIONS**

1. Is the appointed judge to serve until the next municipal election, or is the appointment for the remainder of the four-year term to which the original judge was elected?
2. If the appointed judge is to serve until the next municipal election, is the judge then elected to complete the original term, or for a new four-year term?

#### **CONCLUSIONS**

1. The appointed judge is to serve until the next regular municipal election.
2. The judge is elected to a new four-year term.

### **OPINION**

#### **{\*212} ANALYSIS**

Subsection C of Section 37-1-4, NMSA, 1953 Comp. provides that "the governing body of any municipality may fill vacancies by appointment of a municipal judge to serve until the next regular municipal election."

It is the clear intent of this provision that an appointed municipal judge must stand for election at the next regular municipal election rather than serve the remainder of the four-year term vacated by the resigning judge. The question of the length of the term to which the municipal judge is elected at the subsequent regular municipal election requires more extensive analysis.

It was the theory of the common law that the king was the source of all power and of all offices. A corollary to this general proposition was that nothing of the term of office

survived when an officer vacated office. The office reverted back to the sovereign to be filled for a new term. Under modern law, the office again is considered to revert back to the source of power for the office i.e. to the authority for the office as established under the Constitution and the statutes of the state. **Clark v. State ex rel. Graves**, 177 Ala. 188, 59 So. 259 (1912). The term of office for municipal judges is established under state law and {213} this law must be consulted to determine the term specified. **State ex rel. Swope et. al. v. Mecham**, 58 N.M. 1, 265 P.2d 336 (1954).

Article VI, Section 1 of the New Mexico Constitution vests judicial power in courts inferior to the district courts as they are established by law within a municipality. Section 37-1-4A, **supra**, provides that "municipal judges shall be elected for terms of four [4] years, at a regular municipal election." Unless it is otherwise shown to be the intent of the statutes or constitution, Section 37-1-4(A), **supra**, grants to candidates elected as municipal judges a term of four years and does not limit the term of such judges to the unexpired terms of their predecessors.

**State ex rel. Swope et. al. v. Mecham, supra**, discusses the term of office for district court judges. It is the manifest intent of the Constitution to limit the term of district court judges to the unexpired term of the judge he or she is elected to replace. Although Article VI, Section 12 of the New Mexico Constitution establishes an unqualified term of six years for district court judges, the Supreme Court of New Mexico in **Mecham** found it to be the intent of the Constitution that all district judges of the State stand for election simultaneously. The Court cited New Mexico Constitution, Article XX, Section 4 stating:

"Vacancies. If a vacancy occur in the office of district attorney, judges of the Supreme or district court, or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and **shall hold his office until expiration of the original term.**" (Emphasis added.)

No similar statutory or constitutional authority exists to create statewide concurrent term for all municipal judges.

In some municipalities two or more municipal judges are authorized by statute. Section 37-1-4B, **supra**, provides that municipalities with a population of 50,000 persons or more may elect more than one municipal judge. Section 3 of Chapter 215, Laws of 1967 provided that where a municipality elects more than one municipal judge, the municipality was by ordinance to provide for the election of judges to staggered terms. Deming elects only one municipal judge. Therefore, there can be said to be no legislative intent that the municipal judge in question be elected for less than four years in order to preserve the statutorily mandated staggered terms.

Section 37-1-4, **supra**, creates a four-year term for elected municipal judges. No intent to limit this term, when the election is a result of an unexpected vacancy in the office, exists in the statutes or constitution. Therefore, it must be taken to be the intent of the

statute to create a four-year term for the individual elected municipal judge in municipalities having only one municipal judge.

By: Charles E. Roybal

Assistant Attorney General