

## **Opinion No. 78-05**

March 30, 1978

**OPINION OF:** Toney Anaya, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** Richard H. Folmar, Assistant Director, New Mexico Legislative Council, 334 State Capitol, Santa Fe, New Mexico 87503

**STATE SENATOR; VACANCY IN OFFICE; NOMINATIONS**

When a vacancy occurs in an office after the primary election, the party committee shall choose the nominees to be placed on the general election ballot.

### **QUESTIONS**

A state senator's term of office expires in 1981. If he should resign his seat following the 1978 primary election, the following questions would be presented:

1. Who would appoint his successor?
2. Even though the Governor's proclamation to the 1978 election did not include a senate seat, would that position appear on the 1978 general election ballot?
3. If the answer to question 2 is yes, how would the nominees of the political parties be placed on the general election ballot?

### **CONCLUSIONS**

See Analysis.

### **ANALYSIS**

If a state senator should resign his office prior to the end of his term, the vacancy which thereby occurs is governed by Section 2-9-129, N.M.S.A. 1953 Comp. which provides, in part, that it be filled

". . . (1) in any senatorial district situated wholly within the exterior boundaries of a single county, by appointment by the board of county commissioners of that county;

(2) in any senatorial district situated within the area composed of two [2] or more counties by the following method:

(a) the board of county commissioners of each county is the senatorial district shall each submit one name to the governor; and

(b) the governor shall appoint the senator to fill the vacancy from the list of names submitted; . . ."

### OPINION

Section 2-9-129(B)(3), **supra**, also provides that such appointment shall be for a term

". . . ending on December 31 subsequent to the next succeeding general election at which general election a person shall be elected to fill the remainder of the unexpired term."

Article IV, Section 4, of the New Mexico Constitution had governed the question of filling vacancies in the office of state senator, but the first paragraph of the section has been held invalid under the Fourteenth Amendment to the United States Constitution insofar as it refers to or pertains to the senate or senators. **Beauchamp v. Campbell**, Civil No. 5778, D.N.M. 1966 (unreported). The second paragraph, however, provides:

"Such legislative appointments as provided in this section shall be for a term ending on December 31, subsequent to the next succeeding general election."

Although the applicability of the second paragraph of Article IV, Section 4 may be somewhat uncertain now, Section 2-9-129(B)(3), **supra**, expresses essentially the same intent and is unquestionably valid. In any event, it would appear that in the situation as presented in your question, the office shall be filled by appointment until December 31, 1978 and thereafter by a person elected at the 1978 general election until the expiration of the term in 1981.

Ordinarily, offices for which parties are to nominate candidates are listed in the governor's proclamation issued pursuant to Section 3-8-12, N.M.S.A. 1953 Comp. If the vacancy does not occur until after the deadline for issuing the proclamation or, indeed, until after the deadline for amending it, Section 3-8-15, N.M.S.A. 1953 Comp., then there is no statutory method by which the office may be listed on the proclamation.

Not being listed on the proclamation, however, does not preclude the office from appearing on the general election ballot in 1978. In **State ex rel. Noble v. Fiorina**, 67 N.M. 366, 355 P.2d 497 (1960), the Court considered a question quite similar to the one presented here. A mandamus proceeding was brought against the Secretary of State to require her to place on the general election ballot the name of a candidate certified by the state central committee on a major political party to fill the unexpired term of a justice who retired after the primary election but before the next succeeding general election. The Court referred to Article XX, Section 4, N.M. Const., which provides that:

"If a vacancy occurs in the office of . . . judge of the Supreme or district court, . . . the Governor shall fill such vacancy by appointment, and such appointee shall hold office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term."

The Attorney General argued on behalf of the Secretary of State that the "next general election" meant the next general election for which a candidate could be properly nominated for the office; that there being no statutory method to provide for the office on the ballot, it could not be voted upon at the upcoming general election. The Court, however, ruled otherwise and ordered the Secretary of State to place the petitioner's name on the general election ballot even though he was not nominated in the primary process. The Court noted that the case law was divided on that point but stated that any ambiguity in the law "must be resolved in favor of accomplishing the clear purpose of the Constitution, viz., to have the voters vote to fill the vacancy at the next general election." 67 N.M. at 370.

The determination that the phrase "next general election" or "next succeeding general election" means the first one in point of time or, at least, the first one at which the office in question may be voted upon, is generally supported by the view that:

". . . democratic principles require that elective offices shall, so far as possible, be filled at all times by incumbents chosen by the electors and that it is the general policy of the law that they conceive an elective office should be filled at an election as soon as practicable after the vacancy occurs and appointment to fill vacancies should be effective only until the people may elect." 132 A.L.R. 576.

We would advise, therefore, that the phrase "next succeeding general election" as used in Section 2-9-129, **supra**, and Article IV, Section 4, means the next election in time at which the office may be voted upon; in this case, 1978 general election.

Although a state senate vacancy created by resignation after the 1978 primary must be voted upon at the 1978 general election, there exists no statute which would expressly provide for the nomination of the party candidates for that position. Nevertheless, in order to give effect to Section 2-9-129, **supra**, and Article IV, Section 4, some method must be found to select the party candidates when the primary procedure can no longer be used.

In **State ex rel. Noble v. Fiorina, supra**, the Court faced this problem and, under the then current election laws, applied the statute governing vacancies which occur on the general election ballot after the primary election has been held. While the court recognized that that statute was not intended to apply to the situation in which the office was not even voted upon at the primary, it noted that ". . . it does not require a straining of the language to apply it to this immediate problem." 67 N.M. at 370. **State ex rel. Noble v. Fiorina, supra**, would suggest, therefore, that in this situation the current law governing vacancies on the general election ballot occurring after the primary could be applied. That law, Section 3-8-8, N.M.S.A. 1953 Comp. provides that:

"A. If after a primary election a vacancy occurs, for any cause, in the list of nominees of a qualified political party for any public office to be filled in the general election, the central committee of the political party, state or county as the case may be may fill the vacancy by filing the name of its nominee for the office with the proper filing officer.

B. Appointments to fill vacancies in the list of a party's nominees shall be made and filed at least fifty-six days prior to the general election. If the vacancy is caused by the death of a nominee, the central committee may in like manner file the name of its nominee to fill the vacancy up until five days prior to the general election.

C. When the name of a nominee is filed as provided in this section, such name shall be placed on the general election ballot as the party's candidate for that office. In the case of a nominee appointed after the general election ballots are printed, such name shall be placed on the ballot by pasting the printed name of the nominee over the name of the candidate whose vacancy he fills on the general election ballot."

To apply Section 3-8-8, **supra**, in this case, as a similar statute was applied in **State ex rel Noble v. Fiorina, supra**, is essentially to recognize that when the vacancy occurs in a position that could not have been subject to the primary procedure, the responsibility for selecting the nominees falls to the political parties. This recognition is also consistent with **State ex rel. Speer v. Secretary of State, et al.**, No. 9952, decided March 19, 1974, as amended on August 22, 1974, in which the Court held that two district judgeships which were not created until after the primary and which were therefore not voted upon at the primary must in any event be voted upon at the general election and the nominees for these offices were to be designated by the political parties.

Nevertheless, we also recognize that the application of Section 3-8-8, **supra**, beyond its obvious intent, has been, in some cases, limited by the Court. In **State ex rel. Van Schoyck v. Board of County Commissioners of Lincoln County**, 46 N.M. 472, 131 P.2d 278 (1942), the Court did not permit a statute providing for filling vacancies by party designation of nominees to be applied in a situation where the nomination could have been made by proper primary procedure. In that case, the vacancy was created by the candidate's failure to qualify for the primary and the Court explained that if the party designation statute were to be applied in that case, a "political party whose leaders were so disposed might easily discourage the filing of candidacies in the primary" and "[h]aving thus occasioned a "vacancy," the appropriate party committee, following the primary could meet and select candidates" who would have the best chance of success against those selected by the other party in the primary. 46 N.M. at 483. The harm the Court sought to prevent by declining to apply the "vacancy" statute in that case, is not, however, involved in the case presented by your question. Thus, we do not find the limitation imposed by the Court in **State ex rel. Van Schoyck, supra**, to be controlling here. See also **Granito v. Grace**, 56 N.M. 652, 248 P.2d 210 (1952).

In **State ex rel. Robinson v. King**, 86 N.M. 231, 522 P.2d 83 (1974), the Court held that so long as the positions to be voted upon at the general election were created prior to the primary election, although after the primary filing date, the candidates must be

nominated by primary election and Section 3-8-8, **supra**, did not apply. The court did not, however, rule out the application of Section 3-8-8, **supra**, in the case, as here, in which the position to be voted upon in the general election does not become "vacant" until **after** the primary.

Thus, we conclude that, given the clear intent in Section 2-9-129, **supra**, that the office of state senator described by your question be voted upon in the 1978 general election and given the holdings in **State ex rel. Noble v. Fiorina, supra**, and the other relevant case law, the nominees for such office shall be selected in accordance with Section 3-8-8, **supra**, as it may reasonably be applied to the situation at hand.

**ATTORNEY GENERAL**

Toney Anaya, Attorney General