

Opinion No. 88-52

August 15, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Carol A. Baca, Assistant Attorney General

TO: The Honorable Rebecca Vigil-Giron, Secretary of State, Executive Legislative Bldg., 4th Floor, Santa Fe, NM 87503

QUESTIONS

1. If a supreme court justice, district court judge, metropolitan court judge, or court of appeals judge resigns his office after the primary election and his office did not appear on the primary proclamation, is his office "required by law" to be placed on the ballot for the 1988 general election?
2. If it is appropriate to place the resigned offices on the general election ballot, must the appointments of nominees to fill the offices be made by the fifty-sixth day prior to the general election----i.e., by September 13, 1988?
3. Is there a "vacancy" for the purposes of selecting a nominee under Section 1-8-8 NMSA 1978 if the effective date of the officeholder's resignation is prior to the general election but after September 13, 1988?

CONCLUSIONS

1. New Mexico law requires that the office of any supreme court justice, district court judge, or metropolitan court judge who resigns before the 1988 general election be placed on the 1988 general election ballot in accordance with the requirements of Section 1-8-8 NMSA 1978. The office of any court of appeals judge who resigns after the 1988 primary election is not subject to the central committee nomination procedures in Section 1-8-8; the governor must appoint someone to fill the unexpired term.
2. Yes.
3. Yes, but see analysis.

ANALYSIS

1. Subsection 1-8-8(A) NMSA 1978 provides as follows:

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, or a vacancy occurs because of the resignation or death of a person holding a public office

not included in the governor's proclamation and which office is required by law to be filled at the next succeeding general election, the vacancy on the general election ballot may be filled by:

(1) the central committee of the state political party filing the name of its nominee for the office with the proper filing officer when such office is a federal, state, district or multi-county legislative district office; and

(2) the central committee of the county political party filing the name of its nominee for the office with the proper filing officer when such office is a magistrate, county or a legislative district office where the district is entirely within the boundaries of a single county.

(Emphasis added.)

The first question thus requires us to determine whether other law requires that the offices of supreme court justice, court of appeals judge, district court judge and metropolitan court judge be filled at the "next succeeding general election," which falls on November 8, 1988.

Article XX, Section 4 of the New Mexico Constitution governs vacancies in the office of supreme court justice or district court judge:

If a vacancy occur ... 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 the expiration of the original term.

(Emphasis added.)

In *State v. Fiorina*, 67 N.M. 366, 355 P.2d 497 (1960), the New Mexico Supreme Court considered whether the secretary of state could place on the ballot for the next general election the name of a nominee seeking to replace a supreme court justice who resigned after the primary election. The court found that Article XX, Section 4's purpose is to preserve the voters' rights to fill vacancies in supreme court and district court positions at the earliest possible time, i.e., at the next succeeding general election. *Id.* at 370, 355 P.2d at 500. However, the court also determined that, while the first sentence of the constitutional provision is self-executing, the second sentence is not, because it does not provide the "manner of nomination and conduct of the election." *Id.* at 367-68, 355 P.2d at 498. Accordingly, the court addressed whether the election statutes provided a means by which the nominee could obtain a position on the general election ballot.

Section 3-11-54 NMSA 1953, the predecessor statute to Section 1-8-8, allowed political party committees to select a replacement "[i]f for any cause a vacancy shall occur on the list of candidates of a political party entitled to be placed on the general election ballot." (Emphasis added.) The secretary of state apparently argued in *Fiorina* that

Section 3-11-54 only applied to vacancies in the list of nominees selected in a primary election. The court concluded, however, that the election statutes must be read in conjunction with constitutional requirements.¹ It held that Section 3-11-54 implemented the second sentence of Article XX, Section 4, and that the vacancy that resulted from the resignation was "entitled to be placed on the [next] official general election ballot." *Id.* at 370, 355 P.2d at 499.

In view of the holding in *Fiorina* and the fact that Section 1-8-8 specifically addresses state offices that are not listed on a primary proclamation, we believe that Article XX, Section 4 and Section 1-8-8 require that the offices of supreme court justices and district court judges who resign after the June, 1988 primary election, but before the November, 1988 general election, be placed on the general election ballot.

Subsection 34-8A-4(A) NMSA 1978 governs vacancies in the office of metropolitan court judge: "The Governor shall fill vacancies ... by appointment of persons who possess the personal qualifications established by law until the next general election." We are not aware of any case that interprets what the phrase "next general election" means within the meaning of Subsection 34-8A-4(A). *Fiorina*, however, interpreted the same phrase in Article XX, Section 4 of the New Mexico Constitution to mean the next general election in point of time.² 67 N.M. at 370, 355 P.2d at 498. We therefore believe that Subsection 34-8A-4(A) and Section 1-8-8 require that the office of a metropolitan court judge who resigns after the June, 1988 primary election but before the general election be placed on the general election ballot.³

Article VI, Section 28 of the New Mexico Constitution provides that a "vacancy in the office of judge of the court of appeals shall be filled by appointment of the governor for a period provided by law." Section 35-5-4 NMSA 1978 states:

If a vacancy in the membership of the court of appeals other than by expiration of a term shall occur, the governor shall fill the vacancy by appointment of a qualified person to serve until December 31 following the next general election, or for the remainder of the unexpired term, whichever is the longer period.

For the reasons stated above, we interpret the phrase "next general election" to mean the next general election in point of time, in this case, the November 8, 1988 general election. Because your question assumes that the resigning court of appeals judge's position did not appear on the primary proclamation, his term of office must extend at least to December 31, 1990. Thus, under Section 35-5-4, the governor must appoint a successor for the remainder of his unexpired term, and no law requires that his office be placed on the November, 1988 general election ballot.

2. Subsection 1-8-8(B) sets forth the time limits in which the appropriate party central committees must make appointments to fill vacancies in nominations:

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.

The statute clearly prescribes that in cases of vacancies created by resignation the fifty-six-day deadline will apply. To fully answer your question, however, we must consider this requirement in light of *Thompson v. Robinson*, 101 N.M. 703, 688 P.2d 21 (1984).

In *Thompson*, the New Mexico Supreme Court held that the declared winner of a primary election for state senator was ineligible for nomination and ordered the party central committee to fill the judicially-created vacancy in accordance with the procedures in Section 1-8-8. As a result of the time spent hearing the election contest, the fifty-six-day time limitation had expired before the supreme court rendered its decision. The supreme court stated:

The reality of the 56-day limitation, in this case, is to allow a total of only 70 days from the date of filing the contest complaint in district court to decision by this Court on appeal.

We therefore hold that the 56-day restriction placed upon political central committees by Section 1-8-8 is inconsistent with the panoply of contest rights provided in Article 14 of the Election Code; and because its enforcement would result in unjust, absurd or unreasonable consequences, it cannot stand.

Id. at 706-07, 688 P.2d at 24-25.

We believe the *Thompson* holding must be read as limited to vacancies in nominations arising as the result of election contests. While the fifty-six-day limit is "impossible of performance" or "impractical" in the case of vacancies in nominations created by successful election contests, we know of no reasons why it would be unreasonable, unjust or absurd to require the appropriate central committees to fill vacancies created by resignations after the June, 1988 primary election by September 13, 1988. Furthermore, one of the stated purposes of the Election Code, Chapter 1, NMSA 1978, is to provide for efficient administration of and conduct of elections. Section 1-1-1.1. The fifty-six-day deadline is consistent with administrative convenience, because it facilitates compliance with the requirement in Section 1-6-7 NMSA 1978 that absentee ballots be printed at least forty-nine days prior to the general election.

3. The final question requires us to determine whether a "vacancy on the general election ballot" or vacancy in "the list of a party's nominees" occurs under Section 1-8-8 if an office holder tenders a resignation after the primary election that is worded to become effective after the September 13, 1988 deadline but before the general election. We assume for purposes of this question that the officeholder tenders the resignation in writing, the resignation is unconditional, and the Governor accepts it.

Section 1-8-8 provides little guidance. It merely states that the appropriate party central committee may fill a vacancy on the ballot that "occurs because of the resignation or

death of a person holding a public office." No New Mexico statute or constitutional provision prescribes the particular mode by which a public official may resign.⁴ No New Mexico case law discusses the legal effect of a prospective resignation.

The general rule in other states is that, absent contrary constitutional or statutory provisions, a resignation may be in writing or implied by conduct, but it must demonstrate an intention to relinquish a part of the term of office. See generally 63A Am. Jur. 2d Public Officers and Employees § 171 (1984). The greater number of cases also hold that the resignation of a public officer cannot take effect until it is accepted, either in terms or by appointing a successor. Annot., 82 A.L.R. 2d 751 (1962). The New Mexico Supreme Court recited the majority position in *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 406-07, 163 P. 248, 250-51 (1917).

Other jurisdictions recognize a public officer's ability, absent a statutory proscription, to tender a resignation that is effective at a future date. Annot., 82 A.L.R.2d 750-751 (1962). Most states that require acceptance of a resignation hold that a prospective resignation cannot be withdrawn after it is accepted, unless the accepting authority consents to withdrawal and no other rights have intervened. See, e.g., *Rogers v. Carleton*, 110 P.2d 908, 188 Okla. 470 (1941); see also 63A Am. Jur. 2d Public Officers & Employees § 175 (1984); Annot., 82 A.L.R.2d 751-752 (1962).

The facts of *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1975), most closely resemble the hypothetical situation that forms the basis for the third question. In *Spector*, the governor accepted an incumbent justice's prospective resignation. The court held that the resignation created a present vacancy for persons who wished to file papers to qualify as candidates for the position, even though the resignation was to become effective on the day that the elected successor would take office.⁵ The court's ruling rested on three factors. First, the court believed the controlling statutory provision was a general one that "a vacancy 'shall occur' upon 'resignation.'" *Id.* at 779. Second, the court did not believe the resignation could be withdrawn before its effective date and thus disrupt the elective process that had been initiated. Acknowledging the division of authority on the question, the court focused on the wording of the resignation. Although prospective, the resignation was explicitly unconditional: "[T]he resigning Justice by his letter left no doubt whatever as to finality and left no way out for any withdrawal of the tendered resignation, stating explicitly that his resignation was unconditional (a clear estoppel)." *Id.* at 780. Third, the court relied on the general policy that interpretations, "absent a clear provision to the contrary, should always be resolved in favor of the people's power and opportunity to select officials of the people's choice, and that vacancies in elective offices shall be filled by the people at the earliest practical date."

Id. at 781.

The reasoning in *Spector* persuades us that a prospective, unconditional⁶ resignation that takes effect after September 13, 1988, but before the general election, creates a present vacancy in the ballot that the appropriate party central committee may fill in accordance with Section 1-8-8. First, Section 1-8-8, like the statute considered in

Spector, does not distinguish between immediate and prospective resignations. Second, Haymaker suggests that New Mexico would join those jurisdictions that would prohibit a judge from withdrawing his resignation where the governor has accepted it. Third, New Mexico has a similar policy, reflected in Article XX, Section 4, of preserving voters' rights to fill supreme court and district court vacancies at the earliest possible time. *State v. Fiorina*, 67 N.M. at 370, 355 P.2d at 500.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) In discussing the related issue of nominations by minor political parties the court also stated that "any slight ambiguity [in the statutes] which may be urged, although we disavow it," must be resolved in favor of carrying out the purposes of Article XX, Section 4. 67 N.M. at 37; 355 P.2d at 500.

[n2](#) There are certain similarities in the various states' constitutional or statutory provisions governing the timing of elections to fill vacancies in public offices. These provisions, however, have been construed in a number of different ways. See Annot., 132 A.L.R. 574-599 (1941).

[n3](#) Metropolitan courts are established within county boundaries and are deemed to constitute state magistrate courts for the purposes of N.M. Const. art. 6, §§ 1 and 26. See Sections 34-8A-1 and 34-8A-2 NMSA 1978. Inasmuch as Subsection 1-8-8(A)(2) expressly permits the central committee of the county political party to fill vacancies in magistrate offices, we believe the county central committee, rather than the state central committee, may fill vacancies in metropolitan court nominations.

[n4](#) Under N.M. Const. art. 20, § 2, every public officer, unless removed, is deemed to hold his office until his successor qualifies. In a constitutional sense, therefore, a resignation does not create a "corporeal vacancy" in an office, but it does create the right in the appointing or electing power, as appropriate, to appoint or elect a new officer. *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 407, 163 P. 248, 251 (1917).

[n5](#) Spector is, therefore, distinguishable from a situation in which a New Mexico district court judge would resign effective December 31, 1988. N.M. Const. art. XX, § 4, which contemplates that an elected successor will take office directly after the general election, would prohibit the secretary of state from placing that position on the November, 1988 general election ballot. See also *Blount v. Anderson*, 1 Ky. Op. 62 (1867).

[n6](#) Where the Governor receives a prospective resignation that is not clearly unconditional, he should seek clarification.