

Opinion No. 16-1835

June 22, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

Filling of vacancies in boards of state institutions by governor. Expiration of a term does not create a vacancy.

OPINION

{*398} I have received your letter of yesterday asking my opinion concerning the power of the governor to appoint members of boards of state institutions, etc., when the term of the present incumbent has expired, and the legislature is not in session.

I assume that your question relates to those boards, the members of which are to be appointed by and with the advice and consent of the senate. By Section 5 of Article XX of the Constitution the governor is authorized to fill a vacancy occurring while the senate is not in session, in any office the incumbent of which was appointed by the governor, by and with the advice and consent of the senate, the person filling such vacancy to hold until the next session of the senate. Section 2 of the same article provides that every officer, unless removed, shall hold his office until his successor has duly qualified.

It will be obvious that your question is to be answered by considering whether or not a vacancy has occurred in the office of a member of a board because the term for which he was appointed has expired while the legislature is not in session.

It is clearly the intent of the Constitution that no office shall remain vacant, no matter how or when the vacancy occurs, and that if it does occur when the senate is not in session, the vacancy must be filled by the governor. The provision that every officer shall hold his office until his successor has duly qualified does not create any new term of office, but is a mere extension of the term for which the officer may have been either elected or appointed. He continues in office, lawfully discharging its duties, and it cannot be said that there is any vacancy in the office which the governor is authorized to fill by appointment. The governor should appoint only when there is no person authorized by law to discharge the duties of the office. The vacancies which the governor is authorized to fill by appointment when the senate is not in session, are those which occur by death, resignation or removal from office, or something equivalent thereto.

These views are amply supported by authorities in states where cases have arisen under similar constitutional or statutory provisions as to officers holding until successors should be qualified, and as to the power of the governor to fill vacancies. I will not attempt to state the facts of particular cases, or to quote from them, but will cite the following, which set out the same views as I have above expressed:

People v. Tilton, 37 Cal. 614.

People v. Bissell, 49 Cal. 407, 411.

People v. Tyrell, 87 Cal. 475, 478.

{*399} People v. Edwards, 93 Cal. 153.

State v. Harrison, 113 Ind. 434, 440, et seq.

Koerner v. State, 148 Ind. 158.

Commonwealth v. Hanley, 9 Penn. 513, 517, 519.

State v. Lusk, 18 Mo. 333, 340-1.

Boyett v. Cowling, 78 Ark. 494.

State v. Smith, 94 Ia. 616, 620.

State v. Howe, 25 O. St. 586.

State v. Compson, 34 Oreg. 25, 30-1.

Soucy v. People, 21 Ill. App. 370.

State v. Meilike, 81 Wis. 574, 577-8.

I have found but one case opposed to the opinion which I have formed, and that is in West Virginia, but the decision is unsatisfactory, makes no argument and gives no reasoning upon which to found a bald statement that an appointment might be made to fill a vacancy upon the expiration of the term of office.

Kline v. McKelvey, 57 W. Va. 29, 33.

I am, therefore, compelled to say that in my opinion the governor has no power to appoint members of boards of state institutions, for the reason that the term of a present incumbent has expired, as the governor can only appoint to fill vacancies, and I cannot avoid the conclusion that the expiration of a term does not create any vacancy.