

Opinion No. 26-3909

August 16, 1926

BY: ROBERT C. DOW, Assistant Attorney General

TO: Hon. Ray C. Haner, Chairman, Democratic Central Committee, Raton, New Mexico.

This Office is in receipt of your request for an opinion, such request being substantially as follows: In case a state senator has been absent from his senatorial district continuously for more than six months does his office automatically become vacant, and should another senator be elected to fill the unexpired term. You also state that at their recent convention the Republicans nominated a candidate for state senator, and no doubt this was done upon the theory that the office is now vacant, or in anticipation of the office being later declared vacant.

§ 3954 of the New Mexico Code is as follows:

"Any county, precinct, district, city, town or village officer elected by the people, and any officer appointed to fill out the unexpired term of any such officer, may be removed from office on any of the grounds mentioned in this chapter and according to the provisions hereof."

And § 3956 is in part as follows:

"OFFICE -- WHEN BECOMES VACANT.

Sec. 7. Any office belonging to the class mentioned in Section 3954 becomes vacant under any of the following circumstances:

* * * *

6. Absence from the county for six consecutive months, and in cases of municipal officers, absence for such length of time from the village, town or city for which he is elected; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause."

There is no doubt but that the above statute is applicable to all county, precinct, district, city, town or village officers elected by the people, and the question here for decision is whether or not a state senator is a district or county officer within the purview of this Statute. The general rule seems to be that an officer whose general authority and who is authorized to exercise his official function throughout the entire state is a state officer. See Words and Phrases, Vol. 7, 6365. It has also been held in the case of Rockingham, 2 N. H. 249, that a representative in the state legislature is a state officer. Much

depends, however, upon the particular provisions from the different state constitutions and statutes, and the general rule is that such provisions must be read together in order to arrive at a correct conclusion. A person might be held to be a state officer for one purpose and yet a district or county officer for another purpose. For instance, in the case of *Ward v. Romero*, 17 N.M. 88, our Supreme Court has held that a district attorney is a state officer within the meaning of the New Mexico Constitution relating to salaries of officers. However, it might be held that such district attorney is a district officer in contemplation of the above law relative to vacating his office, and likewise the above statute might be construed to apply to a state senator in case such state senator is absent from his county or district for more than six consecutive months.

§ 3 of Article 4 of our Constitution provides that the senate shall consist of twenty-four members who shall be qualified electors of their respective districts and residents of New Mexico. This at least requires that a state senator be a qualified elector of his district at the time of his election. Under another provision of our Constitution, all officers hold office until their successors are duly appointed and qualified. In the case of a county officer vacating his office under the terms of our Statute the Governor of New Mexico could appoint another person to fill the office, but in the case of members of the legislature, § 7 of Article 4 of our Constitution provides that "each house shall be the judge of the election and qualifications of its own members."

This question will necessarily have to be determined by the state senate when it convenes at its next regular session, and inasmuch as they are the sole judges of the election and qualifications of their own members their acts or their decisions cannot be questioned by any judicial authority, and while arriving at its conclusion the state senate should look to the decisions of the court for its guidance, yet the members of such a body are necessarily partisan and such decisions are often misconstrued or held in abeyance.

Therefore, in summing up my conclusions, I am of the following opinion: The senators from each senatorial district should be chosen by a majority of the people and, as I understand from your letter, the Republicans have already nominated a man for this office, it seems to me that your party should also nominate a man for the office thereby allowing the majority of the people to elect a senator, and when the state senate convenes in January it can then determine the question of who is entitled to the office, and if we are to judge of the future by the past, it will no doubt do so.