

Opinion No. 42-4142

August 24, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Marshall Fuller County Clerk, Hidalgo County Lordsburg, New Mexico

{*235} In your letter of July 30, 1942 you relate that you are the duly elected and qualified County Clerk of Hidalgo County, New Mexico, and that you expect to be drafted on or about October 1, 1942.

In the light of these premises, you request our opinion upon the following questions:

1. Does a vacancy exist when a county clerk is inducted into the Army when there are deputies who can perform the duties of the elected official?
2. Should the county clerk be elected in the general election, may he qualify for the office and then leave whenever he desires in office as deputies, paying them his salary and the regular deputy's salary?

For your convenience I quote several provisions of the law applicable to vacancies. Section 96-105, New Mexico Statutes Annotated, 1929 Compilation, provides:

"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."

Section 96-107, New Mexico {*236} Statutes Annotated, 1929 Compilation, provides:

"Any office belonging to the class mentioned in section 3954 (96-105) becomes vacant under any of the following circumstances:

1. By death of the party in office;
2. Removal of the officer as provided by this chapter;
3. Failure of the officer to qualify as provided by law;
4. Expiration of the term of office when no successor has been chosen as provided by law;
5. When the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected;

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;

7. By resignation of the officer;

8. By an officer accepting and undertaking to discharge the duties of another incompatible office."

It is obvious that the first four and seventh circumstance set forth under Section 96-107, supra, cannot apply in the instant case for the reasons:

1. The county clerk is alive; (2) removal proceedings have not been instituted nor has a county clerk been removed from office; (3) the county clerk has qualified; (4) the term of office has not expired; and (7) he has not resigned.

In determining whether circumstance 5 applies, it is necessary for us to determine whether the word "remove," as therein used, means a change of legal residence or means the mere physical removal of one's person from the county. If the former interpretation is placed on the word "remove", no vacancy will exist in the absence of an express desire by the county clerk to the contrary. If the latter construction be placed upon the word "remove", a vacancy will, at this time, exist. Our Supreme Court has never defined nor interpreted this portion of Section 96-107, but we find that the courts of other states, in construing and interpreting similar provisions where the word "remove" was used, have held that a change of legal residence was contemplated. See *Prather v. Hart*, 24 N. W. 282, 283, 17 Neb. 598; *Davis v. Brandon*, 75 So. 908, 909, 200 Ala. 160; *Barstow v. Stone*, 52 P. 48, 51, 10 Colo. App. 396; *Stone v. Granite State Fire Ins. Co.*, 45 A. 235, 236, 69 N. H. 438; *Ware v. Schintz*, 60 N. E. 67, 69, 190 Ill. 189; *P. R. Smith Motor Sales v. Loy*, 3 S. E. (2d) 190, 191, 194, 173 Va. 117.

Circumstances 6 of Section 96-107, supra, specifically cannot apply in this case, for the reason that the law provides that a county clerk's duties may be performed by deputies, and for the further reason that your absence is for an unavoidable cause.

As to circumstance 8, I am of the opinion that it does not apply. Our Supreme Court, in the case of *Haymaker v. State*, 22 N.M. 400, 163 P. 248, referred with approval to the following rule:

"The incompatibility between two offices, which upon {*237} the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one persons to faithfully and impartially discharge the duties of both."

Also, to the same effect, see *People v. Green*, 58 N. Y. 295; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *State v. Brown*, 5 R. I. 1; 46 C. J., Sec. 46, p. 951; 22 R. C. L., Sec. 55, p. 413.

In view of the foregoing authorities, I conclude that the county clerk herein involved has not accepted or undertaken to discharge duties of another incompatible office.

In view of the foregoing, it is therefore my opinion that under the facts submitted, a vacancy has not occurred and will not occur in the office of county clerk upon your induction into the Armed Forces of the United States.

In answer to your second question, I will say that in my opinion, in absence of a federal directive upon the matter, that you are a legally qualified candidate for election in both the primary and general elections for the office of county clerk. The matter of the disposition of your salary is left up to you.

Trusting that the foregoing sufficiently answers your inquiries, I am

By GEO. H. HUNKER, Jr.

Asst. Atty. General