

## Opinion No. 46-4882

March 15, 1946

**BY:** C. C. McCULLOH, Attorney General

**TO:** Colonel Rufus Sedillo State Director Selective Service Santa Fe, New Mexico

**Re:** Julian L. Pierce Tularosa, New Mexico

### OPINION

{\*209} We are in receipt of your letter of March 8, 1946 and the enclosed letter from Mr. Pierce. It appears that on July 26, 1943, Mr. Pierce was appointed county clerk to fill out the term which would expire January 1, 1945. On December 28, 1943, Mr. Pierce was inducted into the army and the county commissioners appointed Mrs. Grisak to fill the unexpired term. Mrs. Grisak ran for that office in the election held in November, 1944, and was elected to serve a two-year term, beginning January 1, 1945. Later Mrs. Grisak resigned and the county commissioners appointed another individual to the job of county clerk.

You ask our opinion as to whether Mr. Pierce, upon making proper application, is entitled to his old job as county clerk.

Your question involves the construction of two statutes. Chapter 123 of the Laws of 1943 provides that in the event any public officer of the State of New Mexico, or any county, shall enter the armed forces of the United States and for that reason fail to devote his time to the performance in person of the duties of such office, he shall be deemed to have abandoned such office until but only until he shall have been released from active duty.

Section 2 of the act authorizes the proper agency to fill the vacancy created by the incumbent entering the armed forces. The person so appointed is entitled to perform the duties and receive the salary until, but only until the former incumbent shall have been relieved from active duty.

It is my opinion that by this statute the Legislature intended only to provide for the filling of a temporary vacancy until the expiration of the term of office of the officer entering the armed services; further, that the Legislature only intended to permit the incumbent to resume his office for the balance of any unexpired term. Any other construction would probably be unconstitutional as the Constitution provides, first, that a term of office shall be two years and, second, for the election of officers every two years.

Chapter 10 of the Laws of 1941, as amended by Chapter 24 of the Laws of 1945, provides for the reemployment by the State of New Mexico and its subdivisions of all

persons who left a position other than a temporary position in the employment of the state or its subdivisions to enter the armed services.

It is my opinion that this section does not apply to officers of the state of New Mexico or any subdivision, but only employees, as it refers specifically to employment. An officer of the state or subdivision is not an employee, but is an officer. If this statute were so construed to restore a public officer to his former office after his term had expired, it appears that it also would be unconstitutional for the reasons noted above.

{\*210} In view of the foregoing, I am of the opinion that Mr. Pierce is not entitled to the office of county clerk held by him during a prior term of office.

By ROBERT W. WARD,

Asst. Atty. General