

The Employment Security Department should establish a procedure whereby information is to be provided the Nevada Equal Rights Commission upon request. The specific method by which such information is provided, whether in typewritten transcript form or by tape, is left to the respective agencies to handle in the most efficient manner.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: PAMELA M. BUGGE, *Deputy Attorney General*

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**OPINION NO. 84-16 County Officers; Elections: A vacancy occurring in a partisan county office after the date specified in NRS 293.165(3) and (4) is to be filled by appointment rather than the procedure contained in NRS 293.165.**

CARSON CITY, September 12, 1984

THE HONORABLE HY FORGERON, *District Attorney of Lander County*, P.O. Box 1179, Battle Mountain, Nevada 89820

DEAR MR. FORGERON:

You have requested clarification of Op. Att'y Gen. No. 84-4 (February 6, 1984).

QUESTION

What procedure for filling a vacancy in a county office is to be used if the office becomes vacant after the date specified in NRS 293.165(3) and (4)?

ANALYSIS

In Op. Att'y Gen. No. 84-4 (February 6, 1984), we concluded that if an elected county officer resigned after July 3, 1984, that office must appear on the ballot of the 1984 general election to fill the unexpired two-year portion of the term. We went on to state that candidates for that office that are to appear on the ballot are to be designated in accord with the procedures contained in NRS 293.165. That statute provides that a vacancy occurring in a party nomination for office may be filled by a candidate designated by the party's central committee of the county or the state, as the case may be. However, no change may be made on the ballot after the third Tuesday in September of the year in which the general election is held. The statute goes on to provide that all designations made pursuant to that section must be filed before 5:00 p.m. on the third Tuesday in September. In each case, the statutory filing fee must be paid and an acceptance of the designation must be filed before 5:00 p.m. on that date.

You relate that a county commissioner in Lander County whose office is not up for election in the 1984 general election has indicated that, because of a job transfer by his employer, it is his intention to resign his office effective October 1, 1984. Under these circumstances, you ask whether the office should be filled by appointment pursuant to NRS 244.040 for the entire unexpired portion of the commissioner's term, or should the procedures outlined in Op. Att'y Gen. No. 84-4 (February 6, 1984) be followed?

In resolving your inquiry, we must address the effect of the commissioner's prospective resignation. The legal effect of this type of resignation has been analyzed in at least three

separate Nevada Supreme Court opinions. In *State ex rel. Nourse v. Clarke*, [3 Nev. 566](#) (1867), our Supreme Court concluded that a civil officer has the absolute right of resignation at will. In *State ex rel. Williams v. Beck*, [24 Nev. 92](#), 49 P. 1035 (1897), our court found that the resignation involved in that case was to become effective at a future date and upon the happening of certain specified contingencies. Citing *State ex rel. Nourse v. Clarke*, *supra*, the court held that, the resignation of the office holder being conditional in nature and not to take effect except upon certain contingencies at a future date, there was no vacancy in the office until the happening of the contingencies and the arrival of the specified day. The court found that in the meantime the resignation was within the control of the office holder and could be withdrawn at his pleasure.

In *State ex rel. Ryan v. Murphy*, [30 Nev. 409](#), 97 P.391 (1908), the court considered the resignation of a county officer which was tendered at one date but was not to take effect until a date in the future. Unlike the resignation involved in *State ex rel. Williams v. Beck*, *supra*, the resignation in this case had no conditions attached to it, except that it was to take effect at a specified date in the future. In *State ex rel. Ryan v. Murphy*, *supra*, the office holder purportedly withdrew his resignation prior to the date that it was to take effect. The court determined that to constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of office accompanied by the act of relinquishment. A prospective resignation amounts to a notice of intention to resign at a future date, and if that proposed resignation is not accompanied by the giving up of the office, possession of the office is still retained. Therefore, the court held that prior to the effective date of the resignation, a public officer may withdraw his proposed resignation.

Applying the rules found in these three cases to the facts which you have related leads us to conclude that the county commissioner has only given notice of his intention to resign at a future date. This means that the county commissioner in question could revoke his intended resignation at any time prior to the effective date of that resignation, which is October 1, 1984. If the commissioner revokes his resignation, no vacancy will be created in that office and the commissioner will be permitted to serve out the unexpired portion of his term. If the commissioner allows his resignation to become effective on October 1, 1984, a vacancy will occur in the office of county commissioner.

However, the procedures contained in [NRS 293.165](#) for placing that vacant office on the ballot of the 1984 general election are inapplicable because the vacancy will not have occurred until after the third Tuesday in September, which is the last date on which the procedures contained in that section may be used. Therefore, we must conclude that should a vacancy occur on October 1, 1984 under the circumstances described in this opinion, the appropriate means to fill that vacancy is through the appointment procedure contained in [NRS 244.040](#) which is the only other means authorized by law. The appointment made pursuant to that section will extend for the entire unexpired portion of the term of the commissioner resigning.

## CONCLUSION

If an elected county officer resigns after the third Tuesday in September of the year in which a general election is held, the vacancy created by that resignation may not be filled at the ensuing general election pursuant to the procedures set forth in [NRS 293.165](#). That vacancy must be filled pursuant to the appointment procedures contained in [NRS 244.040](#), and the appointment extends through the balance of the unexpired term of the officer who resigned.

Sincerely,

BRIAN MCKAY, *Attorney General*

By: SCOTT W. DOYLE, *Deputy Attorney General*