

February 24, 1947

Honorable Dan Angius,
State Senator,
Capitol building,
Phoenix, Arizona.

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Sir:

We are in receipt of your letter of February 15, 1947, requesting our opinion on the legality of Mr. Bernard McDonald's holding the office of highway commissioner at this time.

It appears from your letter and information received from the governor's office that Mr. McDonald, a resident of Mohave County, was appointed on February 4, 1946 to succeed Mr. Loren Cress of Coconino County, whose term as highway commissioner expired by law on January 31, 1946. We assume it was Mohave County's turn to furnish the commissioner from the Fifth District.

On January 23, 1947, the governor recommended to the State Senate Mr. McDonald as highway commissioner representing the Fifth District. The Senate, by its action, failed to confirm him on February 3, 1947.

The appointment in question was made under the provisions of Section 59-101, A.C.A. 1939, as amended, which provides for the appointment of five members of the Highway Commission, the term of each member to be five years, one term expiring on January 31st of each year. The appointment shall be by the Governor "with the advice and consent of the Senate". Section 59-102, A.C.A. 1939, then provides in subsection (c):

"No person shall serve as a commissioner, except as a recess appointee, until confirmed by the senate. A recess appointment shall be effective only until the senate has acted or failed by adjournment to act upon the nomination, and no nominee who has so failed of confirmation shall be eligible, following such session of the senate, for a recess appointment. In the event a vacancy occurs while the legislature is in session the governor shall make a nomination to fill the vacancy before the adjournment thereof".
(Underlining ours)

We are of the opinion that under this section there is a vacancy in the office of highway commissioner, and

Mr. McDonald is not now entitled to act in that capacity, even though his recess appointment on February 4, 1946, was valid; such recess appointment could extend only until the Senate acted, which was done on February 3, 1947, by the Senate's rejection of the appointment.

In arriving at this conclusion, we are aware of Section 12-104, A.C.A. 1939, which reads in part: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified". This latter provision is a general statute, whereas, Section 59-102, supra, is a special law relating to a single subject, and the two are apparently conflicting. Where a special and a general statute conflict, the special act constitutes an exception, and controls the terms of the general act. - *Industrial Commission v. Hartford A. & I. Co.*, 61 Ariz. 86, 144 P. (2d) 548, and cases cited.

Therefore, it is the opinion of this office that Mr. McDonald has no authority to act as highway commissioner at this time, since the State Senate has acted under the terms of Section 59-102, supra, by rejecting the appointment.

Very truly yours,

JOHN L. SULLIVAN,
Attorney General

BURR SUTTER,
Assistant Attorney General

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