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ARIZONA ATTORNEY GENERAL

June 18, 1954
Opinion No. 54-87

TO: The Honorable Norman H. Whiting
Apache County Attorney
Courthouse
St. Johns, Arizona

RE: Justice Precincts

QUESTION: "Can the Board of Supervisors establish a new precinct out of part of the territory of an old precinct during the term of office of the justice of the old precinct, and can the Board of Supervisors appoint a new Justice of the Peace for the new precinct until the next time precinct officers are elected?"

The answer to the foregoing question lies in an analysis and application of several Arizona statutes. Section 17-504, A.C.A. 1939, as amended, dealing with precinct officers reads as follows:

"17-504. Precinct officers.--The officers of justice precincts shall be a justice of the peace and a constable, who shall be elected by the qualified electors of the precinct at the general election for state and county officers for terms of four (4) years each. The board of supervisors shall divide the county into justice precincts and name or number the same, and may change or abolish any such precinct, or re-district the county, but no abolishment of a precinct shall take effect until the expiration of the term of office of the then justice and constable of the abolished precinct."

The foregoing statute, before its amendment in 1945, read as follows:

"17-504. Precinct officers---Changing precinct.---The officers of justice precincts are one (1) justice of the peace and one (1) constable. The board of supervisors shall divide the county into justice precincts and name or number the same, and may change or abolish any such precinct, or redistrict the county, when a precinct is abolished or changed the justice whose precinct includes the territory of the precinct abolished or changed, or some portion thereof, shall be deemed the successor of the justice whose precinct has been abolished, or changed, provided, that no precinct shall be abolished during the term of office of a justice elected or appointed therein, and the order of the board abolishing such precinct, or including the territory therein contained in another precinct shall not take effect until the expiration of the term of office of the then justice of such abolished precinct."

A comparison of this statute before and after amendment reveals that the Legislature, by the 1945 amendment, took away most of the restrictions against changing or abolishing Justice Precincts and requires only that "no abolishment of the precinct shall take effect until the expiration of the term of office of the then Justice and Constable of the abolished precinct."

It will also be noted that in the amended version of Section 17-504, supra, the legislature gives the Board of Supervisors power to change or abolish a Justice Precinct or to redistrict the County but restricts the Board of Supervisors only in so far as abolishment of a precinct is concerned.

It is the opinion of this office, therefore, that the Board of Supervisors may change a Justice Precinct when convenience requires even though such change will affect an existing precinct. It is patently clear that the Board of Supervisors may not, however, abolish a Justice Precinct during the term of office of the Justice or Constable of the abolished precinct. This opinion finds further support in Section 17-309 (a) 2. A.C.A. 1939, as amended, which provides:

"17-309. Powers of board.---(a) The board of supervisors, under such limitations and restrictions as are prescribed by law, may:

* * * * *

2. Divide the counties into such districts or precincts as required by law, change the same and create others as convenience requires."

* * * * *

The next question which arises is, presuming a Justice Precinct is changed and a new precinct created, who shall be the precinct officers in the newly created precinct and how shall such officers be selected.

Section 17-309 (a) 16. A.C.A. 1939, as amended, deals with the power of the Board of Supervisors to fill vacancies and reads as follows:

"17-309. Powers of board.--(a) The board of supervisors, under such limitations and restrictions as are prescribed by law, may:

* * * * *

16. Fill by appointment all vacancies occurring in county or precinct offices."

The foregoing Section can be of no effect unless there is a vacancy, so it will be necessary to determine whether there is, in fact, a vacancy in the offices of the newly established precinct.

Section 12-404, A.C.A. 1939, defines vacancies by law, but was construed by the Arizona Supreme Court in ROGERS v. FROMMILLER, 59 Ariz. 513, 130 P.2d 271 to have application only where there is first an incumbent of an office and the vacancy occurs during the term for which he has assumed the office. There has never been an incumbent in the Justice Precinct in our hypothetical case so it is apparent that Section 12-404, A.C.A. 1939, has no application.

The precise question now under consideration is discussed in 67 C.J.S., Officers, Section 50 (b), page 210; the rule therein set forth is:

"§50. -- Occurrence and Existence of Vacancy

b. Newly Created Office

A newly created office is vacant on its creation where the act creating it does not otherwise provide.

A newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act for filling it, becomes vacant on the instant of its creation, and remains so until it is filled by an incumbent;
* * *"

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This proposition finds strong support in the cases gathered in 43 Words & Phrases Perm., Vacancy--Vacant--Vacate--of-Office under the subdivision, "Creation of Office", page 611 et. seq.

It is our opinion, based on the foregoing authorities, that the offices in a precinct newly created by the Board of Supervisors are vacant on the instant of their creation.

Section 17-309, supra, having given the Board of Supervisors power to fill all vacancies in county or precinct offices, it is the opinion of this office that the Board of Supervisors may:

1. Create a new precinct when convenience so requires even though such creation may change an existing precinct, and
2. Fill by appointment all vacancies in the offices of the newly created precinct which officers shall hold until the next general election.

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