



NOTICE OF SPECIAL MEETING

The Doña Ana County Board of County Commissioners will convene a Special Meeting on **Monday, December 5, 2016** at 9:00 a.m. in the Doña Ana County Commission Chambers, 1st Floor, Doña Ana County Government Center, 845 North Motel Boulevard, Las Cruces:

- **Pledge of Allegiance**
- **Roll Call of Commission Members Present and Determination of Quorum.**

THE DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS CONVENES AS THE BOARD OF COUNTY COMMISSIONERS IN OPEN SESSION.

1. Approve an appointment to fill the vacant County Treasurer position.

THE DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS ADJOURNS AS THE BOARD OF COUNTY COMMISSIONERS.

THIS AGENDA IS SUBJECT TO CHANGE

NOTE: Doña Ana County will ensure effective communication with individuals with disabilities and will, upon request, provide auxiliary communication aids and services to afford those individuals equal opportunity for participation in Doña Ana County sponsored meetings, events, or activities. Any request should be made to the Americans with Disabilities Act Coordinator, in writing, or by phone, **at least two business days** prior to the event at which accommodation is needed. If you have any questions regarding examples of reasonable accommodations, please contact the ADA Coordinator, at 525-5884 (voice) or 525-2951 (TTY), 845 N. Motel Blvd., Las Cruces, NM 88007.

Spanish language interpretation services are now available upon request for participation in Doña Ana County sponsored meetings, events, or activities. Please contact the Community & Constituent Services Office at 525-6163, **at least two business days** prior to the event. **Por favor en contacto la Oficina de Servicio a la Comunidad y Constituyentes 525-6163 por lo menos dos días hábiles por adelantado para pedir este servicio.**

**DOÑA ANA COUNTY
BOARD OF COUNTY COMMISSIONERS**

Doña Ana County Government Center
845 North Motel Boulevard
Las Cruces, New Mexico 88007
Telephone: (575) 647-7200
Toll-Free: (877) 827-7200

Legal
Initiating Department

Nelson J. Goodin
Contact Person

December 5, 2017
Meeting Date

1
Agenda Item Number

TITLE OF AGENDA ITEM TO BE CONSIDERED

APPROVE AN APPOINTMENT TO FILL THE VACANT COUNTY TREASURER POSITION

SUMMARY OF ITEM TO BE CONSIDERED

On November 30, 2015, the office of Doña Ana County Treasurer became vacant due to the removal of David Gutierrez. An Order Removing David Gutierrez was filed in the Third Judicial District Court on December 1, 2016. Pursuant to section 10-4-28 (NMSA 1978), upon removal of a public officer "his successor shall be appointed in the manner provided by law for filling vacancies in such office." Section 10-3-3 provides that whenever a vacancy occurs in a county office (other than a county commissioner) the board of county commissioners shall fill the vacancy by appointment.

DESCRIPTION OF SUPPORTING DOCUMENTATION ATTACHED

Section 10-4-28 (NMSA 1978)
Section 10-3-3 (NMSA 1978)
Order Removing David Gutierrez filed December 1, 2016
Proposed Resolution Approving an Appointment to fill the Vacant County Treasurer Position

SUMMARY OF FINANCIAL IMPACT

None

ADMINISTRATIVE REVIEW AND APPROVAL

___ Finance

126 Legal

 County Manager/
Agenda Review

___ Purchasing

___ Human Resources

___ Assistant County Manager

___ Planning

___ Other

DOCUMENT CONTROL

Original/s for signature?: Yes No For Recording?: Yes No

Return original/s to: Name: _____ Dept.: Legal

Send copy of recorded original/s (resolution and ordinances only) to: Name: N/A Dept.: N/A

Deadline for return of document/s?: Yes, return by: _____ No

10-4-28. [Officer appointed for suspension period; oath and bond; filling vacancy after final removal.]STATUTE

When any officer is suspended as provided in this act [chapter], the judge of said court shall appoint some qualified person to discharge the duties of such officer during the period of his suspension, which person shall take the oath and give the bond required of incumbents of such office, and in case the final judgment be for the removal of such accused officer before the expiration of his term, his successor shall be appointed in the manner provided by law for filling vacancies in such office.

HISTORY

History: Laws 1909, ch. 36, § 29; Code 1915, § 3982; Laws 1915, ch. 21, § 1; C.S. 1929, § 96-133; 1941 Comp., § 10-330; 1953 Comp., § 5-3-30.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to conform to the substitutions of "this chapter" for "this act" made by the 1915 Code compilers throughout this article. The bracketed insertion is not a part of the law.

Compiler's notes. — The 1915 Code compilers replaced "chapter 36 of the Session Laws of 1909," compiled as 10-3-1, 10-4-1 to 10-4-29 NMSA 1978, with "this chapter," referring to Chapter 80 of the 1915 Code, §§ 3950 to 3985, compiled as 10-1-2 to 10-1-4, 10-3-1, 10-4-1 to 10-4-29 and 10-17-5 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Officers and Public Employees §§ 74 to 79, 108.

10-3-3. [Vacancy in county or precinct office; appointment.]

Statutes

Whenever any vacancy in any county or precinct office in any of the counties of this state other than a vacancy in the office of county commissioner, shall occur by reason of death, resignation or otherwise it shall be the duty of the board of county commissioners of the county where such vacancy has occurred to fill said vacancy by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law.

History

History: Laws 1907, ch. 6, § 2; Code 1915, § 1219; C.S. 1929, § 33-4233; 1941 Comp., § 10-302; 1953 Comp., § 5-3-2.

Annotations

Cross references. — For appointment of successor, see 10-4-28 NMSA 1978.

For tenure of office of state officers, see N.M. Const. art. XX, § 2.

ANNOTATIONS

Interim appointment. — There is no provision in this statute for an interim appointment. Having made the appointment which filled the vacancy, the jurisdiction of the board was exhausted until another vacancy occurred. It is irrelevant that the plaintiff was designated as "acting county clerk" or that she filed her oath of office and bond as an "acting county clerk"; the appointment is for the full legal term, notwithstanding the appointing body's attempt to give it a different duration. State ex rel. Walker v. Dilley, 1974-NMSC-090, 86 N.M. 796, 528 P.2d 209.

Serial appointments. — Where power has been given to appoint to an office and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant, and an office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it. State ex rel. Walker v. Dilley, 1974-NMSC-090, 86 N.M. 796, 528 P.2d 209.

Effect of hold-over authority after term expiration. — During the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment. State ex rel. Rives v. Herring, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

Appointee incumbent cannot be displaced by another appointee. State ex rel. Rives v. Herring, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

Reelected clerk's resignation prior to beginning of term. — Where a reelected county clerk resigned prior to the beginning of her new term, a vacancy in office was thereby created pursuant to Section 10-3-1 NMSA 1978 and the person properly appointed on the same day as the resignation was entitled to hold the office until her successor was duly elected and qualified; therefore, there was no vacancy in the office for the new term. State ex rel. Rives v. Herring, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

Last line of section not repealed. — Section 10-3-1 NMSA 1978, creating a vacancy for "failure of the officer to qualify as provided by law" does not repeal by implication the last line of this section, providing that an appointive officer shall hold office until "his successor shall be duly elected and qualified according to law." State ex rel. Rives v. Herring, 1953-NMSC-086, 57 N.M. 600, 261 P.2d 442.

No power to appoint when no power to elect. — Where people had no legal right to elect an assessor for a county, board of county commissioners had no legal right to appoint, and where such appointment was made, there being no vacancy, such appointment was of no legal effect. Territory ex rel. Sandoval v. Albright, 1904-NMSC-021, 12 N.M. 293, 78 P. 204, appeal dismissed, 200 U.S. 9, 26 S. Ct. 210, 50 L. Ed. 346 (1906).

Probate judge vacancy appointments. — A probate judge, who is appointed to replace a probate judge who died in the first year of a four-year term, must participate in the first primary and general elections after the appointment and if elected, the appointee must run again two years later when the original term expires. 2012 Op. Att'y Gen. No. 12-04.

Incumbent ineligible for reappointment. — A vacancy in a county office may occur where a successor in an office fails to qualify. The board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

Appointment within a reasonable time. — No mention is made of the time in which the appointment must be made, thus, in the absence of any directives, the appointment must be made within a reasonable time. 1970 Op. Att'y Gen. No. 70-50.

Incumbent may hold over. — Where person elected to office of probate judge dies before taking office, and incumbent of the office is appointed by county commissioners a year before that time upon resignation of the probate

1.2

judge, the incumbent holds over until a successor is appointed by board of county commissioners. 1937-38 Op. Att'y Gen. No. 36-1480.

Duration of appointee's term. — A county officer appointed by the board of county commissioners serves until the next succeeding general election. 1923-24 Op. Att'y Gen. No. 24-3788.

Second appointee authorized. — Where one has been appointed county clerk and his bond has not been approved in 13 days, the commissioners are authorized to appoint another. 1914 Op. Att'y Gen. No. 14-1236.

Scope of powers. — The board of county commissioners has the power to fill vacancies in any county offices, except vacancies occurring in the board itself. 1909-12 Op. Att'y Gen. No. 12-944.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 103.

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT

FILED

2016 DEC -1 AM 9:03

DISTRICT COURT
DONA ANA COUNTY

STATE OF NEW MEXICO

Plaintiff,

vs.

DAVID GUTIERREZ,

D-307-CR-2016-0321

JUDGE ANGIE K. SCHNEIDER

Defendant.

**ORDER REMOVING DAVID GUTIERREZ FROM THE OFFICE OF DONA
ANA COUNTY TREASURER - JUDGEMENT OF REMOVAL**

THIS MATTER came before the Court for a Jury Trial regarding the removal of David Gutierrez from the office of Dona Ana County Treasurer. The defendant appeared out of custody and was represented by Jose R. Coronado. The State of New Mexico was represented by Deputy District Attorney Daniel H. Sewell and Senior Trial Prosecutor Heather Chavez.

THE COURT HEREBY FINDS:

1. The jury found the defendant guilty of Corruption in Office, or Gross Immorality, under 10-4-2(F).
2. The verdict of the jury should be accepted.
3. The Defendant David Gutierrez should be removed from office according to 10-4-14.

IT IS HEREBY ORDERED THAT the Defendant, David Gutierrez, be removed from the office of Dona Ana County Treasurer, effective immediately.

Judgement of Removal
State v. David Gutierrez, D-307-CR-2016-0321
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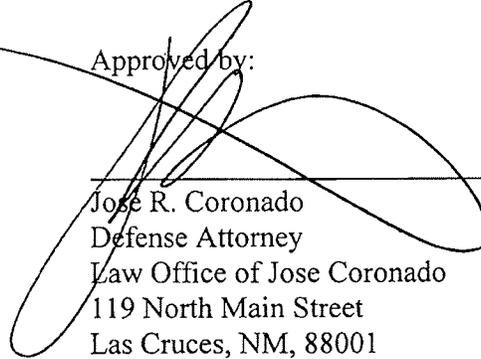
JUDGE ANGIE K. SCHNEIDER

Prepared and Submitted by:



Daniel H. Sewell
Deputy District Attorney
District Attorney's Office
845 N. Motel Blvd., 2nd Floor, Suite D
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Approved by:



Jose R. Coronado
Defense Attorney
Law Office of Jose Coronado
119 North Main Street
Las Cruces, NM, 88001
(575) 525-2517
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mca 2016-1253

RESOLUTION NO. 2016-____

**A RESOLUTION MAKING AN APPOINTMENT TO FILL THE
VACANT COUNTY TREASURER POSITION**

WHEREAS, on November 30, 2016 David Gutierrez was removed from office following a trial in the Third Judicial District Court in the matter of *State of New Mexico v. David Gutierrez*, cause number D-303-CR-2016-00321. On December 1, 2016 an Oder Removing David Gutierrez from the Office of Doña Ana County Treasurer – Judgment of Removal was filed in the Third Judicial District Court; and

WHEREAS, the removal of David Gutierrez created a vacancy in the office of County Treasurer; and

WHEREAS, section 10-4-28 (NMSA 1978) requires that upon removal of a public officer “his successor shall be appointed in the manner provided by law for filling vacancies in such office;” and

WHEREAS, section 10-3-3 provides that whenever a vacancy occurs in a county office (other than the office of county commissioner) the board of county commissioners shall appoint a qualified person to fill the vacancy; and

WHEREAS, the Board of County Commissioners of Doña Ana County has considered the matter of filling the vacancy of the office of County Treasurer;

NOW THEREFORE, BE IT HEREBY RESOLVED BY THE DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS that _____ is hereby appointed to fill the vacancy in the office of County Treasurer which term will expire on December 31, 2016.

ADOPTED this _____ day of March 2016.

**BOARD OF COUNTY COMMISSIONERS OF
DOÑA ANA COUNTY, NEW MEXICO**

Billy G. Garrett, District 1 For / Against

Dr. David J. Garcia, District 2 For / Against

Benjamin L. Rawson, District 3 For / Against

Wayne D. Hancock, Chair, District 4 For / Against

Leticia Duarte Benavidez, District 5 For / Against

ATTEST:

Lynn J. Ellins
County Clerk