Chapter 3

MUNICIPAL CLERK
APPOINTMENT, QUALIFICATION AND DISCHARGE

In New Mexico, there are three forms of municipal government: Mayor-Council; Commission-Manager; and, Charter. In the Mayor-Council and Commission-Manager forms, the basic structure and lines of authority are prescribed by state statutes. In the Charter form, the structure and lines of authority are defined by a written charter adopted by election by a majority of the people voting.

All municipalities are originally incorporated as Mayor-Council municipalities; to change to the Commission-Manager form of government or to adopt a municipal charter requires an election.

Combining the Offices of Clerk and Treasurer
The offices of Clerk and Treasurer may be combined, with one person appointed to perform both functions. In larger municipalities, the offices are usually separate; however, most smaller municipalities combine the office and appoint an individual to serve as "Clerk-Treasurer" (§ 3-12-4).


APPOINTMENT
Who appoints (employs) and supervises the Municipal Clerk depends upon what form of government the municipality has. If a Mayor-Council municipality has established the position of City Manager, that Manager has all the same authority as a Manager in a Commission-Manager municipality.

Mayor-Council Municipality Without City Manager
The Municipal Clerk is appointed (employed) by the Mayor - with the approval by vote of a majority of the governing body (Council or Board of Trustees) - at either the organizational meeting or a regular council meeting. If the appointment is made at the organizational meeting and the governing body fails to confirm the appointment, the Mayor submits the name of another person for approval at the next regular meeting of the governing body (§ 3-11-5 NMSA 1978). The Municipal Clerk acts under the supervision of the Mayor (§ 3-11-6).

Commission-Manager Municipality and
Mayor-Council Municipality with City Manager
The Municipal Clerk is employed and supervised by the City Manager, if the municipality has determined that the Municipal Clerk is engaged in the administrative service of the municipality (§§ 3-13-3, 3-14-14 NMSA 1978). If the municipality has made no such determination, the Municipal Clerk shall be employed and supervised as provided in the municipal ordinance creating the office of Municipal Clerk.

Charter Municipality
The Municipal Clerk is appointed (employed) and supervised by whomever is authorized to do so by the municipal charter.
Qualifications for Appointment

Each municipality establishes its own specific qualifications for the office of Clerk, based on the assigned duties and responsibilities. However, state law prohibits the employment of certain public officers, including Municipal Clerk, for certain reasons (See below). According to the statutes, elected municipal "public officers" are the mayor, governing body members and municipal judge; appointed municipal "public officers" are the municipal clerk, treasurer, police officer, attorney, manager and persons appointed as members of boards and commissions.

Residence
State law does not require that any municipal employee be a resident of the state or of the jurisdiction by which they are employed, but municipalities may require residence within the municipality within a reasonable time after employment. Check your local ordinances.

Nepotism
It is vital to the public image of a municipality to avoid the practice or appearance of nepotism, the hiring of relatives. Public officials with appointing authority are prohibited from employing a clerk, deputy, or assistant, compensated from public funds, who is related to the appointing official(s) by blood or marriage to the third degree of kinship, unless such employment is approved in advance by the officer, board, council, or commission whose duty it is to approve the bond of the official(s) (§ 10-1-10).

The third degree of kinship includes spouses and parents, children, brothers, sisters, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nieces and nephews of the official or spouse.

This section does not apply to clerks, deputies or assistants who receive less than $600 per year as compensation.

Persons convicted of a crime
No person convicted of a felonious or infamous crime shall be appointed or elected to any public office, unless such person has been pardoned or restored to political rights (§ 10-1-2).

Persons advocating sabotage, sedition or treason
A municipality shall not knowingly employ any person who either directly or indirectly carries on, advocates, teaches, justifies, aids or abets a program of sabotage, force and violence, sedition or treason against the government of the United States or of the State of New Mexico (§ 10-1-12).

Assuming Office after Appointment
Once a person has been selected and appointed to the office of Clerk or Clerk-Treasurer, that person must fulfill certain additional requirements in order to assume the office.

Oath and Bond
1. Since the Municipal Clerk is an appointed officer under state statute, before taking office the Clerk (and Deputy Clerk) must swear an oath (or make a public affirmation) to support the Constitution of the United States and the Constitution and laws of the State of New Mexico, and to faithfully perform the duties of the office (§ 3-10-2A).
2. To ensure the care and disposition of municipal funds in the employee's custody and the faithful discharge of the employee's duties, the governing body of the municipality shall require a corporate surety bond from the Clerk, Clerk-Treasurer, and any other employee it designates. Instead of individual corporate surety bonds, the governing body may secure a blanket corporate surety bond. In either case, the municipality shall pay the cost of the surety bond (§ 3-10-2B).

3. The governing body of the municipality may declare vacated the office of any person who fails, within the 10 days after he has been notified of appointment to office, to take the oath of office, or to give bond when required. If the person is not bondable because of past actions, he or she may not hold the office (§ 3-10-2C).

Incompatibility of Office
Sections 10-6-3 and 10-6-5, various Attorney General Opinions and New Mexico case law prohibit a person from holding two offices which are incompatible with each other. There are two kinds of incompatibility of office, functional and physical. Both must be considered when determining whether offices are incompatible.

1. Functional incompatibility refers to holding of offices whose duties have inherent conflicts, such as: one office sets the salary for the other; one office supervises the other; or one office may overturn the decisions of the other. Some examples are: the offices of Mayor and Clerk; the offices of Judge and Police Chief; and the offices of Judge and Councilor.

When functions of two positions do not conflict, the law does not prohibit a person from holding these positions simultaneously. For example, a 1968 Attorney General Opinion states that a person may serve as both Municipal Clerk and Municipal Judge because the functions are not inconsistent and therefore no functional incompatibility of office exists.

2. Physical incompatibility refers to the impossibility of a person being in two places at once. However, there is nothing to prevent a Clerk from holding another job during hours when the Clerk's presence is not required to carry out the normal duties of the office. In the case of a Clerk also holding the part-time office of Municipal Judge, the Attorney General ruled that when an individual is serving in the capacity of Municipal Judge outside the normal working hours in the position of Municipal Clerk, there is no physical incompatibility of office.

If a Municipal Clerk accepts another job or office and, because of this other employment, fails to devote time to the usual and normal extent during working hours required for performance of the Clerk's duties for a period of thirty days, then the Clerk shall be deemed to have resigned from the office of Clerk. (§ 10-6-3)

**SALARY, WORKING HOURS AND BENEFITS**
The governing body sets the salary, working hours and employment benefits of the Municipal Clerk. The wages of the Clerk shall be paid out of the general fund. However, if the Clerk is also required to handle the accounts of a utility, then the Clerk may be paid for this service from the utility fund.

**TERM OF OFFICE**
The Municipal Clerk is appointed for an indefinite term of office and serves until voluntary or involuntary termination.
DISCHARGE
Who may discharge the Municipal Clerk also depends on the municipality's form of government.

Mayor-Council Municipality without Manager
The governing body may discharge a Municipal Clerk by a majority vote of all the members of the governing body; or the Mayor may discharge the Municipal Clerk upon the approval by vote of a majority of all the members of the governing body (§ 3-11-6).

As discussed earlier in this chapter, a 1994 Court of Appeals case held that the office of municipal clerk cannot be covered under a merit system personnel ordinance. Please see [http://www.nmcompcomm.us/nmcases/NMCA/1994/1994-NMCA-026.pdf](http://www.nmcompcomm.us/nmcases/NMCA/1994/1994-NMCA-026.pdf). Therefore, the incumbent may also be replaced at the organizational meeting following the municipal election by simply appointing another person to the office (§ 3-11-5). The clerk may be discharged at any time, without cause.

Commission-Manager Municipality and
Mayor-Council Municipality with Manager
The Manager shall employ and discharge all persons engaged in the administrative service of the municipality. The Manager is the chief administrative officer of a city under the commission-manager form of government, and sole authority to hire and fire municipal personnel is vested in the Manager, without concurrence of the commission, but subject to any merit system ordinance (§ 3-14-14).

Charte Municipality
The Municipal Clerk is discharged by whoever is authorized to do so by the municipal charter.

DEPUTIES AND ASSISTANTS
You may have as many assistant clerks as your budget will allow and the governing body will authorize, but you should have at least one Deputy Clerk to perform your duties in your absence. Any Deputy Clerk must take the same oath of office that you did and must be bonded as you are. Try to choose the brightest, most capable and most experienced person you can for your deputy. Remember, the Deputy Clerk substitutes for you and that is an important and demanding responsibility.