

Opinion No. 50-5297

May 19, 1950

BY: Joe L. Martinez, Attorney General

TO: Honorable Alicia Romero Secretary of State Santa Fe, New Mexico

{*151} I have your letter of May 19, 1950, regarding your power to remove the name of Theodore (Ted) Stevens from the primary election ballot. You state that, acting on verbal advice from this office you certified to the county clerks that Mr. Stevens is ineligible to run for the office of State Treasurer and that his name should not be placed on the ballot. You advise that a question has arisen as to your right to take this action and wish confirmation of the verbal advice previously given you.

It appears from the birth certificate and application for driver's license of this individual that he was born on December 22, 1925. Article 5, § 3 of the constitution of this state provides that no person shall be eligible to the office of State Treasurer unless he is at least 30 years of age. Simple mathematical calculation proves that Mr. Stevens will not reach the age of eligibility for more than 5 years. Thus it is plain that Mr. Stevens is not eligible for this office and could not serve if elected. The sole question is whether you, having knowledge of these facts, may cause his name to be withheld from the primary election ballot. Section 56-810 of the 1941 Compilation, insofar as material, provides as follows:

"The county clerk and the secretary of the state upon receipt of the declaration and petition required hereunder accompanied by the required filing fee, shall if such declarant is eligible to hold the office for which he seeks nomination under the Constitution and laws of the state of New Mexico receive and file such declaration and petition."

Speaking of this section, the Supreme Court of New Mexico, in *State v. Board of County Commissioners of Lincoln County*, 46 N.M. 472, 131 P.2d 278, stated:

"Furthermore, this section imposes a duty on the proper officials to receive and file the declaration and nominating petitions only in the event 'such declarant is eligible to hold office for which he seeks nomination under the constitution and laws of the state of New Mexico'. This provision undoubtedly is to avoid the confusion and complications arising where ineligible candidates appear on the ballot. If, for instance, in the case at bar the relator were herself not a qualified elector, were a nonresident, or should be seeking a third successive term to the office of county clerk, a result prohibited by the constitution, the county clerk or secretary of state upon ascertaining these facts should and would decline to {*152} receive and file the declaration." * * *

Thus the Secretary of State is, in certain instances at least, given the power to determine whether or not a person filing a declaration of candidacy is eligible to hold the

office for which he seeks nomination. It would not seem that the Secretary of State should have the power to make this determination only at the time the petitions are filed. If the candidate is at that time ineligible for the office he will be no more eligible the next day. The reason for the giving of this power to the Secretary of State and the various county clerks was recited in *State v. Board of County Commissioners*, supra, as follows:

"It is no answer to say that, if so nominated, the name of the nominee could be kept off the official ballot in the general election or denied the office, if elected. It is to avoid just such complications and to assure a majority selection of nominees that the conditions of filing declarations is imposed."

These reasons equally apply in a situation such as the one now facing you. It is to prevent the misleading of voters and the possible election of one who is unqualified and ineligible for the office. It would appear that since you have determined that Mr. Stevens is ineligible to the office for which he has filed, it is your duty to the electorate of the state to cause his name to be withheld from the official ballot to be used at the coming primary election.

I have examined also the nominating petitions filed in support of Mr. Stevens' declaration of candidacy. The first petition is in the statutory form. The remaining 22 petitions contain nothing but signatures of various citizens, the statutory heading of these petitions having been cut off. In this connection, I call your attention to § 56-809 of the 1941 Compilation, as amended by § 3 of chapter 86 of the Laws of 1943, which sets out the form of nominating petition and then provides:

"More than one nominating petition may be filed, but each shall be in the form provided and the aggregate number of signatures shall be not less than the number above required."

It would seem that the petitions filed by Mr. Stevens would, by virtue of the section above quoted, be subject to considerable question. However, since you have determined that Mr. Stevens is not eligible to hold the office to which he seeks nomination and have advised the county clerks to withhold his name from the ballot there is no necessity for deciding this latter question.

It is my opinion that you acted within the scope of your authority in advising county clerks as you did and there is no necessity of your rescinding your action in this case. It is to be regretted that Mr. Stevens did not first ascertain his eligibility to the office of State Treasurer before he filed his declaration of candidacy and nominating petitions.