Opinion No. 52-5532

April 28, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Thomas E. Foy District Attorney Silver City, New Mexico

*{*243}* This is written in response to your request of April 23rd asking that a re-examination be made of the question of the legal authority of a candidate for nomination for public office to withdraw his name prior to a primary election but after the acceptance by the Secretary of State or the proper county official of such candidate's nominating petitions filing fees and declaration of candidacy.

This question was considered at length in Opinion No. 5294, rendered on May 12 1950, in response to inquiry by another District Attorney. That 1950 opinion stated definitely that the candidate for office under the direct primary system has a right to withdraw his candidacy providing that he does so before the official ballots have been printed.

On April 9th, 1952, this office rendered Opinion No. 5525 in reply to an inquiry concerning the same question and stated that in the absence of any statutory authority to permit candidates to withdraw that it was believed that they had no such right.

In this latter opinion the reasoning relied upon to reach a conclusion was mainly that from the failure of the Legislature to provide any means to withdraw it should be presumed to have intended that no such withdrawal be allowed.

A re-examination of this question revealed that it is not a new one in this country and that it has been a question of consideration in other states. Our Legislature, in 1929, and again in 1951, changed our primary election laws somewhat. However, with regard to the mechanics of placing a candidate's name on the ballot by nominating petitions and declaration of candidacy the Legislature made little change.

The laws of the State of California with regard to the filing of candidacy for office are much the same as those of New Mexico and for this reason I think we would be bound to accept as persuasive the actions of the California courts in this regard. The case of Bordwell v. Williams County Clerk, Supreme Court of California, 159 P. 869, covers this precise question. The case there was a mandamus proceeding by a candidate for the office of United States Senator against the county clerk to compel that clerk to leave his name off the ballots being prepared at that time for use in the primary election. The California courts found there was nothing in the California statutes which prohibited such a withdrawal and that situation likewise exists as to our New Mexico statutes. The California court stated:

"A citizen is however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provisions

to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate if he sees fit so to do."

The court in discussing the question of the candidate's application for withdrawal of his name from the ballot stated:

"It need hardly be said that an application of this kind must be made sufficiently early to enable the officials to have the necessary alterations put into effect."

Upon a reconsideration it is my opinion that no presumption should be indulged in as to the intention of the Legislature for failure to provide any particular means of withdrawing one's candidacy, and it is my opinion that the California *{*244}* precedents being based on statutes similar to ours should be taken as persuasive.

While it is not the purpose of this opinion to go into the question of the right of a candidate who is designated by a pre-primary convention to withdraw after having accepted such designation it is necessary that it be mentioned. The statutes in regard to such withdrawal and to vacancies and the filling of them in such cases are much more specific than those regarding the mechanics of placing the names upon the ballots or withdrawal therefrom of candidates by nominating petition.

In view of the foregoing statements it is my opinion that the state of the law is expressed in the opinion of this office numbered 5294 of May 12th, 1950 is still applicable in the case of those candidates who sought nomination by the nominating petition method and now seek to withdraw. That opinion is herewith confirmed and the conflicting portions of the opinion of this office of April 9th, 1952, numbered 5525 are herewith overruled.