

## Opinion No. 53-5867

December 10, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Beatrice B. Roach Secretary of State Santa Fe, New Mexico

{\*295} On December 9, 1953, you addressed an inquiry to this office concerning whether or not this office may prosecute an action for the collection of a Bond given by a candidate for the United States Senate for the purpose of recounting certain boxes in the November 4, 1952, election, and which recount was held on or about December 12, 1952, pursuant to § 56-615, N.M.S.A., 1941 Comp., which reads as follows:

"56-615. Recounts -- Cost of Proceedings. -- Any applicant for such recount upon applying therefor shall deposit with the state canvassing board fifty dollars (\$ 50.00) in cash, or a sufficient surety bond in an amount equal to fifty dollars (\$ 50.00), for each precinct or election district for which a recount is demanded as security for the payment of the costs and expenses of such recount in case the result of such recount is not sufficient to change the result of the election; if it shall appear that error or fraud sufficient to change paid result has been committed, then the costs and expenses of such recount shall be paid by the state upon warrant issued by the state auditor supported by voucher of the state canvassing board; but if no error or fraud shall appear sufficient to change the result then the cost and expenses for such recount shall be paid by the applicant. Said costs shall consist {\*296} of mileage of the sheriff in serving summons and fees and mileage of election officers, at the same rates allowed witnesses in civil actions, but if the recount shows that error or fraud has been committed by election officers in any precinct or election district they shall not be entitled to such mileage or fees. (Laws 1927, Ch. 41, § 615, p. 62; C.S. 1929, § 41-615)."

This point was before the Supreme Court of New Mexico in the case of **State vs. Barker**, 51 N.M. 51, 178 P. 2d 401, in which case the State brought an action for collection of the expenses due the Sheriff of Rio Arriba County, and certain election officials, who recounted the ballots, for the fees due them as the result of such recount. The result of the election was not changed and the unsuccessful candidate refused to pay the fee, mileage and election officials' fee. The State brought the action as the obligee on the Bond of the unsuccessful candidate. The Court held that the State was not the real party in interest and defined the test of who is the real party in interest, as follows:

"(1) Whether he is the owner of the right to be enforced; or (2) Whether he is in position to release and discharge the defendant from the liability upon which the action is grounded."

They further held that the State was not in the position of a Trustee and could not maintain an action for the collection under this Bond without legislative authority to do so. The Legislature has not yet provided such authority, so we must be bound by the decision of the aforementioned case.

You ask further how such an action for the collection of the fees due could be prosecuted. There are three methods which occur to this office, by which the action could possibly be maintained:

1. By suit brought by the individual obligee, be he sheriff or any election official who has a claim against the unsuccessful candidate;
2. By assigning the individual claim to another individual, and his bringing the action against the unsuccessful candidate. This would permit an individual to accumulate a sizeable number of claims, thus the cost would not be prohibitive.
3. By some individual bringing a class action in behalf of himself and those similarly situated for the enforcement of the claims.

There is some authority to the effect that a class action cannot be maintained for a money judgment, therefore this method may not be deemed practicable, if, in the judgment of the attorney bringing the action, the authority against a class action for money damages is convincing.

Therefore, it is the opinion of this office that the only methods by which collection against either the unsuccessful candidate where the results of the election are not changed, or against his bond can be maintained, are by individual suits under any of the three methods set out above. The State of New Mexico cannot maintain such an action by reason of its not being the real party in interest nor a Trustee as per the authority in the Barker case, *supra*.

We sincerely hope that this answers this inquiry.

By: Fred M. Standley

Assist. Attorney General