

Opinion No. 56-6397

February 20, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mrs. Natalie Smith Buck, Secretary of State, State Capitol Building, Santa Fe, New Mexico

You have asked the opinion of this office on the questions:

1. May the Secretary of State and County Clerks demand payment of filing fees of Primary Election candidates in cash or by cashier's check?

And in connection with this question you ask further:

2. Would the Secretary of State or County Clerks be liable to the State should a personal check be taken in payment of a filing fee, and such check subsequently prove worthless or payment is stopped thereon?

Section 3-11-45, N.M.S.A., 1953, Pocket Supplement, relating to filing fees required of candidates in Primary Elections, provides in part:

"Such declarations to be entitled to be filed shall be accompanied by a fee of five per centum (5%) of the first year's salary for state and district office, and three per cent (3%) for county office . . ."

It is noted that the statute does not specifically point to the medium which may be employed in order that the declaration of candidacy be considered, "accompanied by a fee."

At the outset this may be said. If the "fee" must be tendered in cash, then the Secretary of State and County Clerks, have no authority to accept cashier's or personal checks. And conversely if the statute is broad enough to permit tender of the "fee" by personal check then the Secretary of State and County Clerks have no authority to demand that the tender be in cash or even by cashier's check. This seems apparent to us from the following considerations: Firstly, the Legislature has provided that the filing must be accomplished in one day between the hours of 9:00 A.M. and 5:00 P.M., Section 3-11-43, N.M.S.A., 1953, Pocket Supplement. It is common knowledge that many candidates wait until the last moments of filing day to file their declarations and fees. Past experience proves this. Now, if any discretion is vested in the Secretary of State and County Clerks as to the manner in which they may accept tender of the "fee", the following may easily happen: A candidate not favored by the Secretary of State or a County Clerk immediately before the close of filing presents his declaration and personal check to cover the fee. The check is refused and cash is demanded, and, although, the candidate may have sufficient moneys in the bank to cover the check he

cannot secure it because of time limitations. That candidate's filing, for whatever reasons the Secretary of State or County Clerks may have, has been effectively blocked. Thus the Secretary of State or County Clerks could demand cash of those not favored and, on the other hand, accept personal checks from those favored. It is apparent that such a discretionary power would carry with it obvious opportunities for arbitrariness and favoritism. This office cannot conceive that the Legislature intended to vest the Secretary of State or County Clerks with such a power.

It has been suggested that instructions could be given to prospective candidates beforehand that, say only cash, or only cashier's checks, would be accepted and that this would remedy whatever evil is inherent in permitting discretion on the matter. This is no answer. If such officials have the power to formulate such an instruction, what is there to prevent them from changing it in favor of a favored candidate or against one unfavored? Consideration of fairness may not be enough.

What then may be considered the tender of "fee" within the meaning of Section 3-11-45? This office is not unaware that ordinarily and strictly speaking the tender of a personal check is not "payment" of a debt at the time it is given. *Groomer vs. McMillen*, 143 Mo. App. 612, 125 S.W. 285; *Morrisson vs. Chapman*, 140 N.Y.S. 700.

And neither is the tender and acceptance of a cashier's check absolute payment. *Lloyd Mortgage Company vs. Davis*, 199 N.W. 869, 36 A.L.R. 465. The tender and acceptance of personal and cashier's checks is merely conditional payment. It is payment when in due course it is actually paid. *Hunter vs. Wetsell*, 84 N.Y. 549; *Morrisson vs. Chapman*, supra.

Does Section 3-11-45, supra, allow conditional payment by cashier's or personal check? This office is of the opinion that it does. Support for this conclusion is derived from statutes other than the above regarding, generally, the handling of public moneys in this State. For example, Section 11-2-3, N.M.S.A., 1953, provides in part:

"It shall be the duty of every official, or person in charge of any state agency, **receiving any moneys, in cash or by check, draft or otherwise**, for or on behalf of the state or any agency thereof from any source, . . ." (Emphasis supplied.)

It is apparent that the Legislature contemplated that moneys may be received by check or draft or otherwise, and that the receipt of moneys by a State official may not always necessarily be in cash.

You indicate to us, and we are aware from personal experience, that in the past personal checks have been accepted as tender of filing fees. No one has ever questioned the propriety of this, and we know of no instances where the acceptance of these has worked any real prejudice to the State of New Mexico. Further, such a practice naturally makes it more convenient for candidates. The 1955 Legislature in passing Section 3-11-45, supra, must have been aware of this practice and refrained

from providing specifically that such a fee must be in cash. This may be of some significance.

From the above, it is our conclusion that your first question must be answered in the negative, and, further that the Secretary of State and County Clerks must accept the tender of the fee in cash or personal check as the candidate chooses.

We are not unmindful of Opinion No. 6191 rendered by this office on June 16, 1955, wherein it was held that Justices of the Peace had no authority to receive payment of a fine by personal check. We do not believe that the reasoning and authorities cited there extend to the situation which you present here.

Regarding your second question, it is the opinion of this office that the Secretary of State or County Clerks would not be liable should a personal check be taken as a filing fee and such check subsequently proves worthless. These officials are in no different position than, for example, a County Treasurer who accepts payment of taxes by check, or, as another example, the Bureau of Revenue which accepts payment of the School Tax by check.

It may be noticed that the matter of worthless checks or checks upon which payment has been stopped can be effectively taken care of. Section 3-11-46, N.M.S.A., 1953, gives the County Clerks and the Secretary of State ten days in which to process the declarations of candidacy. This would seem to be sufficient time within which worthless checks or checks upon which payment has been stopped to be uncovered and if such proves to be the case, of course, no filing would have been accomplished. Further, civil and criminal liability would seem to be sufficient deterrents to the giving of worthless checks or stopping payment in connection with filing.

I trust the above answers your inquiries.

By: Santiago E. Campos

Assistant Attorney General