

Opinion No. 60-50

March 16, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mrs. Betty Fiorina Secretary of State Santa Fe, New Mexico

QUESTION

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May a person who has filed a declaration of candidacy under § 3-11-43, N.M.S.A., 1953 Comp. (PS), but who has withdrawn his candidacy validly, prior to certification of his name on the ballot, reinstate his candidacy by a withdrawal or revocation of his original withdrawal?

CONCLUSION

No.

OPINION

{*405} ANALYSIS

We have diligently searched the New Mexico Statutes and cases in an attempt to find New Mexico authority directly in point, but have found none. However, certain provisions of the Primary Election Code, §§ 3-11-36 through 3-11-68, N.M.S.A., 1953 Comp. (PS), must be considered.

Sec. 3-11-43 provides, as pertinent here, that any person desiring to become a candidate of any political party participating in the primary for any office shall, between 9:00 A.M. and 5:00 P.M. of the first Tuesday of March of each even numbered year (in this case, March 1, 1960) file in your office, as to candidates for offices filled by the State at large and districts comprising more than one county, a declaration of candidacy substantially in the form set forth therein. This form provides in part "That I desire to become a candidate for the office of {*406} (Name of Office) ___ at the primary to be held on the second Tuesday in May, A.D., 19__;".

Sec. 3-11-46 provides that you, in this case, shall determine within 10 days from the date of filing of such a declaration whether or not the statements made therein are true, in which event, and not otherwise, the candidate's name shall be placed on the primary ballot. The section further provides that within 15 days from filing date, a certified list of all candidates for congressional and state offices, including district offices, shall be mailed by you to each county clerk.

Sec. 3-11-66 provides that the name of any person certified for inclusion upon the official ballot shall not be withdrawn from such ballot unless he notifies you or the county clerk in writing by sworn statement signed by him that he is not a candidate. If this is done not later than 25 days before the primary, you certify the withdrawal to the county clerks. This section does not by its terms apply to withdrawals made before certification, but in Opinion No. 6407 we ruled that it applies to all withdrawals made at any time after the filing of declarations of candidacy.

There is no doubt that a candidate for party nomination at a primary election may withdraw from such candidacy. Not only is such right recognized by § 3-11-66, but also by our Opinion No. 5294, in which we quoted from 18 Am. Jur., Elections, § 127, to the effect that a citizen is under no obligation to seek office and may be a candidate or not at his option, even though he has filed for such office.. See also our Opinion No. 5532, in which we reaffirmed Opinion No. 5294.

The question then arises as to whether a valid withdrawal can in turn be withdrawn or revoked prior to the certification of candidacy. This problem can be approached in two ways, each resulting in a different conclusion. First, it can be argued that the declaration, being merely a statement of intent on the part of a person desiring to run for nomination for public office, does not bind the declarant to a candidacy until certification by you or the county clerk as the case may be. Thus, under this approach, a person is not a candidate until certification and may change and rechange his intention to become or not to become a candidate until that time. Under this approach, only a withdrawal not rescinded prior to certification or one made after certification can be considered as binding.

The other approach is to say that a declaration of candidacy is absolutely voided by a valid withdrawal; thus, it cannot ever be revived by a subsequent attempted revocation thereof. Our opinion is that this approach is correct, and we so hold. Therefore, once a valid withdrawal is received in your office, the original declaration of candidacy is voided and cannot be revived. Any attempted revocation of a withdrawal can at most only be considered as an attempted new declaration untimely filed.

Our position is supported by the only two cases we have been able to find nearly in point. These cases are **Brower et al. v. State ex rel. Ritz**, 13 Ohio App. 259 (1920) and **State ex rel. Moon v. Annear**, 253 Wis. 257, 33 N.W. 2d 634 (1948).

In the **Ritz** case, Ritz filed a declaration of candidacy and 45 days prior to the primary election withdrew such candidacy, which withdrawal was accepted by the election board. One day later, he withdrew his withdrawal and on the same day the Secretary of State approved the original withdrawal. The Ohio Court of Appeals held that while the right to a timely withdrawal was recognized by Ohio statute, no such recognition could be given to a withdrawal of a withdrawal unless also authorized by statute, of which there was none.

{*407} In the **Annear** case, the Wisconsin Supreme Court held that a candidate in a primary election had the right to "decline" to become such candidate even after he had, under Wisconsin law, accepted the filing of nomination papers, but could not later withdraw his declination (withdraw a withdrawal). Although this case was based on a set of facts more analogous to the New Mexico situation of a withdrawal after certification, we deem the holding therein to be persuasive. As the Wisconsin court said at 33 N.W. 2d page 634:

"The act of revocation was an act which destroyed a statutory right, the right of the realtor to have his name printed upon the primary ballot. That right having been destroyed, and the statute conferring no right upon the realtor to recreate it, he was wholly without power to do so . . ."

We see no significance in the fact that under § 3-11-46, a candidate is not certified for placement on the ballot until 10 days after the date for filing his declaration. Needless to say, this 10-day lapse of time is for the purpose of allowing you or the county clerk, as the case may be, to check the various declarants' qualifications to determine eligibility for office and not to allow candidates to vacillate between running or not running for office.

We conclude that a person who has filed a declaration of candidacy under § 3-11-43 and who later, but before certification, validly withdraws his candidacy, cannot reinstate such candidacy by a withdrawal or revocation of his original withdrawal.

By: Philip R. Ashby

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