

Opinion No. 62-52

March 28, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General William E Snead, Assistant Attorney General

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

QUESTION

QUESTIONS

1. Should the occupation and county of residence be placed on the ballot immediately under the names of Joseph M. Montoya and Joseph E. Montoya, pursuant to Section 3-11-53, N.M.S.A., 1953 Comp. (PS)?
2. If the answer to question No. 1 is yes, what should the occupation and the county of residence be?

CONCLUSIONS

1. Yes.
2. See analysis.

OPINION

ANALYSIS

The above two questions were formulated from correspondence with your office as well as copies of correspondence between you and the interested candidates forwarded to us.

The two questions presented require an interpretation of Sec. 3-11-53, N.M.S.A., 1953 Comp. (PS). Therefore, this section is quoted in full:

" Candidates with Similar Names -- Occupation and Address Included on Ballot and Ballot Labels. -- In the preparation of the primary ballots herein provided for, and in the preparation of ballot labels for voting machines, if the name of two [2] or more candidates whether for the same or different offices, to be voted upon at said primary are determined by the secretary of state in his or her discretion to be the same or to be so similar as to confuse the voters as to their identity, the occupation and county of residence of each such candidates shall be printed immediately under such candidate's name on said primary or ballot label. Nicknames, other parenthetical names and titles

shall not be included on the ballot or ballot label **as a part of the candidate's name.** (Emphasis added).

The obvious purpose of the above quoted statute is to prevent confusion in the minds of the voters in order to allow them to vote for the candidate of their choice. The confusion which would result in the situation presented here where the only difference between the names of the two candidates is the middle initial need hardly be pointed out. The statute was specifically designed to take care of the present situation. It is submitted that few voters are able to recall the first name of a candidate in most elections where many candidates for different offices are on the ballot. The recollection of the middle initial is relegated to only the most careful followers of a campaign.

Although the statute above quoted provides that the change should be made in the discretion of the Secretary of State, the similarity of names leaves no doubt that the occupation as well as the county of residence should be placed on the primary ballot immediately under the names of Joseph M. Montoya and Joseph E. Montoya. **Larson v. Marsh**, 144 Neb. 644, 14 N.W. 2d 189 (1944); **In re Sullivan**, 307 Pa. 221, 160 A. 853 (1932); **Dougherty v. Holm**, 243 Minn. 38, 44 N.W. 2d 483 (1950); **Peterson v. Holm**, 243 Minn. 38, 66 N.W. 2d 15 (1954).

The second question will be answered separately for each candidate.

Immediately under the name of Joseph M. Montoya should be placed the following:

U.S. Representative Sandoval County

It has long been established that "'occupation' has reference to the principal or regular business of a man's life, or that to which he devotes his time and attention, such as trade, profession or other vocation or calling, **or that which principally takes up one's time, thought, and energy . . .**" (Emphasis added). **Trails Motors v. The First National Bank of Laramie**, 76 Wvo. 152, 301 P. 2d 775 (1956). See also, **Bowen v. Merchant's Mut. Cas. Co.**, 99 N.H. 107 A. 2d 379 (1954); **Showcraft v. Standard Acc. Ins. Co. of Detroit**. 177 Wash. 106 30 P. 2d 987 (1934); **Sovereign Comp., W.O.W. v. Craft**, 208 Ala. 467, 94 So. 831 (1922).

There can be doubt that for all practical purposes the entire time and energies of a Congressman are occupied with the position for which he was elected. This was the intention of the electorate as is shown by the provision for a \$ 22.500 annual salary for each Congressman.

It has long been established that Representatives in Congress are public officers. **Mechem on Public Officers**, Sec. 54 (1890). This proposition was first established in **People ex rel. Kelly v. Common Council** 77 N.Y. 503, 33 Am. Rep. 659 (1879), in a long discussion in which the term was said to embrace every charge or employment in which the public are interested. The Supreme Court of the United States has also

determined that a United States Senator is a public officer. **Lamar v. United States**, 241 U.S. 103 (1916).

The question of whether public officers are employees has been questioned only once and has been answered in the affirmative. **Schuchardt v. The People**, 99 Ill. 501, 39 Am. Rep. 34 (1881), in which the Court said;

"'Occupation' is a generic term, and includes every species of that **genus**, and holding or discharging the duties of a public office is one species of occupation, just as carpentering, tailoring, farming, etc., are other species of occupation."

The statute under consideration is remedial and should be liberally construed. It has been held in **Dougherty v. Holm**, supra., where the Court construed a statute providing that where the surnames are the same, the occupation and residence shall be added, that the election laws should be liberally construed so as to secure to the people their right freely to express their choice; that a technical construction would be objectionable on general principles and would tend to subvert the purposes for which the legislation was enacted. The Court further held that the statute is remedial and that therefore the Court can carry the statute even beyond the natural import of its words when essential to answer the purpose of the Legislature. The construction has been supported by **Minnesota Farmer's Mutual Ins. Co. v. Smart**, 204 Minn. 101, 282 N.W. 658 (1938); **Peterson v. Holm**, 243 Minn. 38, 66 N.W. 2d 15 (1954).

If any doubt is left as to whether a candidate's occupation as an elected officer should be listed, all doubt has been resolved by **Dougherty v. Holm**, supra., where the Court held that a former State Supreme Court Justice could list his occupation as "Former Supreme Court Justice" since he had only recently resigned that public office to run for governor. It should be noted that Joseph M. Montoya is presently in attendance at the present session of Congress.

No real problem is presented as far as Joseph E. Montoya is concerned.

Immediately under his name should be placed:

Salesman Bernalillo County

Correspondence with Joseph E. Montoya, a check of state records, and investigation by this office has disclosed that Joseph E. Montoya is presently engaged in the occupation of salesman. Therefore, his occupation should be so listed on the ballot.

No question is raised regarding the second sentence of the statute. No candidate has requested that any nickname, other parenthetical name or title be added to his name. The underlined clause of the statute provides that nicknames, etc., cannot be a **part of a name**. We are here concerned only with meeting the requirements of the first sentence, that is, placing the occupation and county of residence immediately **below the name**.