

Opinion No. 64-35

March 19, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General

TO: Mrs. Alberta Miller, Secretary of State, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Must the total number of signatures on nominating petitions filed pursuant to Section 3-11-7 be calculated on the basis of the total vote cast for the office, or is the number of signatures to be calculated on the basis of the vote for the particular political party for which petitioner has filed as a candidate?
2. In determining the required number of signatures, is the official canvass for the office to be the record that is used?
3. The office of United States Senator was not voted upon in the 1962 general election, but was voted upon in 1960 and 1958. In 1960 the Honorable Clinton Anderson was elected. In 1958 the late Honorable Dennis Chavez was elected. Which election should be the index for the number of signatures required?

CONCLUSIONS

1. Total vote cast for the office.
2. Yes.
3. 1960 election for United States Senator.

OPINION

ANALYSIS

At the outset it is important to note that a "pre-primary" law is not new to this State. Such a statute was enacted in 1949 by Laws 1949, Chapter 123, and was amended in certain important respects by Laws 1951, Chapter 180, and was repealed by Laws 1955, Chapter 218. While the present preprimary law, enacted by Laws 1963, Chapter 317, differs somewhat from the law which was formerly in effect, many of the provisions which appeared in the original law were incorporated into the new statute, some without any change at all.

Therefore, in answering your first question it is imperative that we examine what the 1949 law, as amended in 1951, provided in regard to the total number of signatures required in order to become a petition candidate. We find this provision in Laws 1951, Chapter 180, Section 8, appearing in the 1953 Compilation as Section 3-11-7. We deem it important to set out in full this Section as it appeared in the old law and then compare it with Section 3-11-7, as enacted by the 1963 legislature.

Section 3-11-7, as enacted in 1951, reads:

"Any person desiring to become a candidate of any political party participating in the primary election for any office, the candidates for which have been nominated by certificate of designation by convention, and who has not been so nominated by such convention, may during the period commencing at 9:00 A.M. of the first Tuesday in March of each even numbered year and ending at 5:00 P.M. on the third day thereafter, file a declaration of candidacy in substantially the form provided in section 4 hereof.

At the time of filing such declaration, such candidate shall file therewith a petition for nomination signed by qualified electors who are members of his political party, which nominating petition shall be in substantially the form provided for nominating petitions in section 4 hereof. Such nominating petition shall be signed in ink. If for offices elected from the state at large, **such petition shall be signed by a number of qualified electors resident in one-half of the counties of the state equal to at least two per cent (2%) of the votes cast by his political party for the office for which said petition is being circulated, at the last general election held for such office,** in each of the counties wherein such petition is circulated. If for offices elected from a district comprising more than one (1) county, such petition shall be signed by a number of electors in each county in the district equal to at least **two per cent (2%) of the votes cast by his political party for the office** for which such petition is circulated, at the last general election held for such office. If for offices elected from a single county, such petition shall be signed by a number of electors resident in such county equal to at least **two per cent (2%) of the votes cast by his political party for the office for which such petition is circulated, at the last general election held for such office.**

The electors signing such petition shall write opposite their names their respective post-office address and the county and precinct wherein they are registered as an elector.

Such nominating petition may consist of one or more sheets, to be fastened together in the form of one petition, but each sheet shall contain the same heading, which shall contain the name and address of the person seeking nomination, together with the designation of the office for which such person is seeking nomination. No elector shall be eligible to sign any such nominating petition unless such elector shall have been affiliated with the political party named in such petition for a period of at least six (6) months immediately preceding the signing of such petition, as shown by the registration books of the county clerk of the county wherein such elector resides, or in the office of the secretary of state.

No person shall be eligible for nomination as a candidate by petition for any office to which this act applies on any primary ballot, unless such person shall have been affiliated with the political party named in the nominating petition for not less than six (6) months prior to the signing of the declaration of candidacy, as shown by the registration books of the county clerk of the county wherein such person is registered, or in the office of the secretary of state.

Such declarations and nominating petitions shall in the case of offices elected from the state at large or from a district comprising more than one county, be filed in the office of the secretary of state. For county offices and legislative offices elected from one county, such declarations and nominating petitions shall be filed with the county clerk of the county wherein such candidate seeks election.

Upon the filing of any nominating petition as in this section provided, the name of the candidate nominated therein shall be placed on the primary ballot for the office designated in said petition following the names of the candidates nominated by convention and by lot if there be more than one such candidate nominated by nominating petitions.

Upon the filing of any such nominating petition, it shall be the duty of the secretary of state, as to such petitions filed in the office of the secretary of state, and of the county clerk, as to such petitions filed in the office of the county clerk, to forthwith investigate the qualification of the electors signing such petition as shown by the registration records, and the name of no candidate nominated by petition as herein provided shall be placed on a primary ballot unless signed by the number of qualified electors herein specified, as disclosed by the registration records." (Emphasis added)

Section 3-11-7, as enacted by Laws 1963, Chapter 317, Section 7, provides as follows:

"PETITIONS FOR CANDIDATES. -- Any person desiring to become a candidate of any political party participating in the primary election for any office, the candidates for which have been nominated by certificate of designation by convention, and who has not been so nominated by such convention, may during the period commencing at 9:00 A.M. of the first Tuesday in March of each even numbered year and ending at 5:00 P.M. on the third Tuesday of March thereafter, . . . file a declaration of candidacy in substantially the form as follows:

"DECLARATION OF CANDIDACY I, ____, a qualified elector of Precinct No. ____ (here insert the number) of the County of ____ (here insert the name of county) State of New Mexico, declare that I am a member of the ____ (here insert name of political party) Party and desire to become a candidate for nomination for the office of ____ (here insert office) at the primary to be held on the first Tuesday after the first Monday in May, A. D. 19__ and I hereby irrevocably authorize and direct the officials charged therewith to print on the official ballot the name of the candidate receiving the highest number of votes for the aforesaid office at said primary as the candidate of the said party for said office at the ensuing general election.

___ (Declarant)

___ (Post-Office Address")

At the time of filing such declaration, such candidate shall file therewith a petition for nomination signed by qualified electors who are members of his political party, which nominating petition shall be in substantially the following form:

"NOMINATING PETITION

We, the undersigned qualified electors of the State of New Mexico and members of the ___ (here insert name of party) Party in said State, do respectfully petition that the name of ___ (here insert name of declarant) be placed upon the official ballot of the said party as a candidate for nomination for the office of ___ (here insert name of the office) at the Primary to be held on the first Tuesday after the first Monday in May, A.D., 19__

SIGNATURE OF ELECTOR ___

POST-OFFICE ADDRESS ___

COUNTY AND PRECINCT NO. ___

Such nominating petition shall be signed in ink. **The petition shall be signed by a number of qualified electors resident in one-half of the counties in the state equal to at least three per cent of the votes cast for the office for which said petition is being circulated, at the last general election held for such office, in each of the counties wherein such petition is circulated.**

The electors signing such petition shall write opposite their names their respective post-office address and the county and precinct wherein they are registered as an elector.

Such nominating petition may consist of one or more sheets, to be fastened together in the form of one petition, but each sheet shall contain the same heading which shall contain the name and address of the person seeking nomination, together with the designation of the office for which such person is seeking nomination. No elector shall be eligible to sign any such nominating petition unless such elector shall have been affiliated with the political party named in such petition for a period of at least one year immediately preceding the signing of such petition, as shown by the registration books of the county clerk of the office wherein such resides, or in the office of the secretary of state.

No person shall be eligible for nomination as a candidate by petition for any office to which this act applies on any primary ballot, unless such person shall have been affiliated with the political party named in the nominating petition for not less than one year prior to the signing of the declaration of candidacy, as shown by the registration books of the county clerk of the county wherein such person is registered, or in the

office of the secretary of state. Such declarations and petitions shall be filed in the office of the secretary of state.

Upon the filing of any nominating petition as in this section provided, the name of the candidate nominated therein shall be placed on the primary ballot for the office designated in said petition following the names of the candidates nominated by convention and listed in order desired by lot if there be more than one such candidate nominated by nominating petitions for any office.

Upon the filing of any such nominating petition, it shall be the duty of the secretary of state to forthwith investigate the qualifications of the electors signing such petition as shown by the registration records, and the name of no candidate nominated by petition as herein provided shall be placed on a primary ballot unless the petition be signed by the number of qualified electors herein specified, as disclosed by the registration records." (Emphasis added)

When Section 3-11-7, as it was enacted in 1951, is compared with Section 3-11-7, as enacted in 1963, it becomes obvious, in fact irrefutable, that the 1951 "pre-primary" law was used as the take-off point for the drafting of the 1963 law.

Thus the legislature was fully aware of the provisions of the 1963 law which deviated from the 1951 pre-primary law. And the major change made in Section 3-11-7 was the number of signatures required in order to get on the ballot by petition. As the underlined portions of the two laws establish, the old law had required two percent of the votes cast by the petitioner's **political party** for the office at the last general election. The 1963 law raised the percentage to three and omitted the phrase "by his political party." Instead it simply says "three per cent of the votes cast **for the office** at the last general election."

There is further compelling proof that the legislature made the change just mentioned with full knowledge and after careful consideration. The so-called "pre-primary" law was introduced in the 1963 legislature as Senate Bill No. 43 and was referred to the Rules Committee. As introduced in the Senate, the particular section in question required that nominating petitions be signed by a number of qualified electors who belong to the same political party as the candidate in an amount equal to at least **two percent** of the votes cast **for the office** for which the petition is circulated at the last general election for that office in **each** of sixteen counties.

The Rules Committee recommended that Senate Bill 43 DO NOT PASS, but that Senate Rules Committee Substitute for Senate Bill No. 43 be reported WITHOUT RECOMMENDATION.

The very section here being considered, indeed the same sentence, was studied by the Rules Committee and certain changes were made therein. The most significant was the change from **two percent** as provided in the introduced bill to **three percent**.

Had the Committee desired to tie the figure to the vote for the **political party**, as the 1951 law had provided, it would have done so. Instead the phrase "by his political party" was omitted. That the Committee clearly had access to the old law is obvious when the language of the two acts is compared.

The committee substitute bill was further considered on the floor of the Senate and ten amendments were adopted. The bill passed the Senate and was referred to the House Committee on Privileges and Elections which reported it out with a DO PASS. The bill was further considered on the floor of the House where four amendments were proposed, three of which passed and one of which failed. After passage by the House, the bill went back to the Senate which concurred in the House amendments.

The express language of Section 3-11-7 as enacted in 1963, particularly when considered in the light of the way it read in 1951, leads us inescapably to the conclusion that the number of signatures required is based on the total vote cast for the office at the preceding general election for the office. No doubt there are those who feel that it is preferable to tie the number of signatures required for a petition candidate to the votes cast by his political party at the preceding general election for the office he seeks, as the 1951 law did provide. However, this is a matter that lies solely within the province of the legislative branch of government, and that body, in the 1963 enactment, chose to utilize a different percentage and a different base.

In your second question you ask whether the official canvass is to be used in determining whether a petition candidate has obtained the required number of signatures. The answer is in the affirmative.

Article V, Section 2 of the State constitution, provides for the membership and duties of the State Canvassing Board. Section 3-10-18, N.M.S.A., 1953 Compilation, provides as follows:

"CANVASS OF SENATORIAL VOTE. -- The vote for candidates for the office of United States Senator shall be cast, counted, returned, and canvassed as herein provided for other offices to be filled by the vote of the electors of the state at large. Immediately upon the completion of the canvass of said vote, the result of said election shall be declared and the person receiving the highest number of votes for such office shall be declared duly elected and a certificate of such election shall be issued and delivered to the candidate so declared elected by the state canvassing board. A certificate of the state canvassing board of the result of said election shall immediately upon the completion of such canvass be transmitted to the president of the United States senate." (Emphasis added).

Section 3-6-19, N.M.S.A., 1953 Compilation, dealing with the State canvass, makes it quite clear that the results as determined by the State canvass are public records and that this determination constitutes the official record.

Your third question asks whether the returns of the 1958 or the 1960 senatorial election are to be used in determining whether a petition candidate for the office of United States Senator has the number of signatures required by statute.

You will note that Section 3-11-7, supra, quoted in full earlier in this opinion, provides as follows:

"The petition shall be signed by a number of qualified electors resident in one-half of the counties in the state equal to at least three per cent of the votes cast **for the office for which said petition is being circulated, at the last general election held for such office**, in each of the counties wherein such petition is circulated."

Keeping in mind the above underscored language, note that the statutory form for nominating petitions reads in pertinent part as follows:

"We, the undersigned qualified electors of the State of New Mexico and members of the ____ (here insert name of party) Party in said State, do respectfully petition that the name of ____ (here insert name of declarant) be placed upon the official ballot of said party as a candidate for nomination for the office of ____ (here insert name of the office) . . . (Emphasis added).

When the office which the petition candidate seeks is United States Senator, then the last blank above will so state. Thus it will read "as a candidate for nomination for the office of United States Senator." That is the office "for which the petition is being circulated." Section 3-11-7, supra.

Unlike the situation in regard to United States Representative, there is no position one and position two for United States Senator. There is simply the office of United States Senator. A State's senators are frequently referred to as the "junior senator" and the "senior senator." But even if an analogy of such nomenclature to "position" is attempted, it breaks down. In the 1958 general election the populace was electing a "senior senator." In the forthcoming general election the populace will be electing a "junior senator." And in the 1960 general election the populace was also electing a "junior senator." We do not mean to imply from what we have just said that whether the **person** elected will be a "junior senator" or "senior senator" has any bearing on the question whatever. However, we mention it since we are cognizant of certain arguments that have been informally advanced as to why the 1958 senatorial results should be used this year in determining the required number of signatures for petition candidates for the office of United States Senator.

Section 3-10-17, N.M.S.A., 1953 Compilation, provides that:

"It shall be the duty of the county clerk to cause the names of the duly nominated candidates for **the Office of United States Senator** to be printed upon the official ballots for use at such election, **under the heading of 'United States senator.'**" (Emphasis Added).

It seems incontestable to us, both as a matter of logic and law, that the last general election for the **office of United States Senator** was held in 1960.

In summary, we conclude as follows on the question of how many signatures are required in order for a petition candidate for United States Senator to have his name placed on the primary ballot this year.

In **each** of at least sixteen counties the petition must be signed by a number of qualified electors who are members of petitioner's political party equal to three percent of the **total** votes cast for the office of United States Senator in each of said counties in the general election of 1960 as determined from the official election canvass of that year.

and

OLIVER E. PAYNE

Assistant Attorney General