

## **Opinion No. 74-11**

March 27, 1974

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** The Honorable Betty Fiorina Secretary of State Legislative-Executive Building Santa Fe, New Mexico 87501 The Honorable Vernon N. Kerr New Mexico State Representative District 43 113 Sherwood Blvd. Los Alamos, New Mexico 87544 Mr. Richard H. Folmar Assistant Director New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

### **QUESTIONS**

#### **QUESTIONS**

Under the provisions of Section 3-8-24.2, N.M.S.A., 1953 Comp. (1973 P.S.), can the filing officer (county clerk or Secretary of State) reject a signature on a nominating petition if:

- (1) the signature is not exactly the same as the signature on the voter's affidavit of registration?
- (2) the signature is not that of a voter who resides within the required district in legislative or congressional petitions?
- (3) the petition is not in the proper form?
- (4) the petition is not complete?

#### **CONCLUSION**

A filing officer charged with the duty of accepting nominating petitions pursuant to the Primary Election Law cannot use discretion in accepting or rejecting nominating petitions unless the petition form is not in substantial compliance with the requirements of the law or the form is incomplete.

### **OPINION**

#### **{\*19} ANALYSIS**

Section 3-8-19, N.M.S.A., 1953 Comp. ( **1973 P.S.**), requires that candidates for nominations to be made at primary elections file a declaration of candidacy and either a nominating petition, filing fee or "paupers statement of inability to pay" with the appropriate filing office. Opinion of the Attorney General No. 73-49, dated June 15, 1973, held that officers charged with the duty of carrying out election laws also have the

duty of determining whether candidates are entitled to have a place on the ballot. The following rationale supported this conclusion:

". . . voters finding a ticket or the names of candidates on the official ballot should not be required to determine {\*20} whether they are entitled to a place thereon, but must be able to safely rely on the action of the officers of the law and on the presumption that they have performed their duty." Opinion No. 73-49, **supra**.

In New Mexico, election officials have repeatedly been held to have a duty in accepting or rejecting filings or ballots. **State ex rel. Chavez v. Evans**, 79 N.M. 578, 446 P.2d 445 (1968); **State ex rel. Palmer v. Miller**, 74 N.M. 129, 391 P.2d 416 (1964); **Reese v. Dempsey**, 48 N.M. 485, 153 P.2d 127 (1944); **State ex rel. Van Schoyck v. Board of County Comm'rs of Lincoln County**, 46 N.M. 472, 131 P.2d 278 (1942); **Wilson v. Gonzales**, 44 N.M. 1093, 106 P.2d 1093 (1940); **Territory ex rel. Lester v. Suddith, et al.**, 15 N.M. 728, 110 P. 1038 (1910). But, as pointed out in **Wilson v. Gonzales, supra**, the chief purpose of election laws is the obtaining of a fair election and an honest return, and although such laws should not be interpreted in order to defeat the main design, officers charged with duties in regard to election laws can only be required to perform duties that exist under the laws.

The Primary Election Law [§§ 3-8-9 to 3-8-32, N.M.S.A., 1953 Comp. (1973 P.S.)] does not specify the grounds upon which a filing officer must accept or reject a nominating petition. The law does state, however, that a "signature shall be counted on a nominating petition" unless:

"(1) the signature is not upon the form prescribed by the Primary Election Law;

(2) there is evidence presented that the person signing is not a registered voter of the state, district, county or **area to be represented by the office for which the person being nominated is a candidate;**

(3) there is evidence presented that the person signing has signed more than one [1] petition for the same office or has signed one [1] petition more than once except as provided in subsection A of this section;

(4) there is evidence presented that the person signing is not of the same political party as the candidate named in the nominating petition as shown by **the signer's affidavit of registration; or**

(5) there is evidence presented that the person signing is not the person whose name appears on the nominating petition." Section 3-8-24.2.

This statute presents a presumption of validity of a signature and requires "evidence" of the insufficiency of a signature. Thus, only upon presentment of such evidence can a signature on a nominating petition be considered invalid. The question then arises as to how such evidence is presented and who determines the sufficiency of the evidence

As stated above, election officials in New Mexico perform ministerial duties only, and normally lack the right to exercise discretion in the performance of their duties. **State ex rel. Van Schoyck v. Board of County Comm'rs of Lincoln County, supra; Territory ex rel. Suddith, supra; Wilson v. Gonzales, supra.** The word "evidence" means, in its legal application, that which is legally submitted to a competent tribunal as a means of ascertaining the truth. **State v. Helm**, 66 Nev. 268, 209 P.2d 187 (1949). See **Knox County Feed & Hatchery, Inc. v. Ivers**, 130 Ind. App. 481, 166 N.E.2d 132 (1960), **Application of Everts**, 175 Neb. 310, 121 N.W.2d 487 (1963). Where the law fails to grant an officer the right to exercise discretion, it cannot be said that the officer is required to act as a "tribunal."

Section 3-8-24.6 sets out a procedure whereby a "court action challenging a nominating petition" can be filed within ten days after the last day for filing the declaration of candidacy. Where this procedure is available for the presentation of "evidence" on questions relating to the sufficiency of nominating petitions, it is unnecessary for the filing officer to first determine the same issues. We must conclude therefore, that where the law {21} requires "evidence" presented to invalidate a signature, such evidence can only be presented in a court action as allowed in Section 3-8-24.6, and the filing officer is not required to exercise discretion in accepting or rejecting names on nominating petitions except as provided in Section 3-8-24.2(B)(1). This portion of the law fails to require "evidence" to prove the sufficiency of the nominating petition "form." Even though our strict interpretation of Section 3-8-24.1 in Opinion No. 73-49 has been modified by the enactment of Chapter 18, Laws of 1974, wherein the form of petitions must only "substantially" conform to the form set out in the law, the petitions presented to the filing officer must be complete and in "substantial" compliance with the statutory requirements. See **Adam v. Bolin**, 77 Ariz. 316, 271 P.2d 472 (1954); **Clark v. Nash**, 192 Ky. 594, 234 S.W. 1 (1921); **State ex rel. Andrews v. Board of Elections**, 175 Ohio St. 249, 24 Ohio Op.2d 413, 193 N.E.2d 390 (1963). Thus the filing officer has the duty under Section 3-8-24.2(B)(1) to accept or reject names or petitions not in "substantial" compliance with the forms set out in Section 3-8-24.1, remembering always that election laws should be liberally construed to accomplish their purpose, and technicalities should not be permitted to deprive voters of their franchise. **State v. Miller, supra.**

By: Leila Andrews

Assistant Attorney General