Opinion No. 90-04

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OPINION OF: HAL STRATTON, Attorney General

BY: Carol A. Baca, Assistant Attorney General; Elizabeth A. Glenn, Assistant Attorney General

TO: Honorable Cisco McSorley, New Mexico State Representative, 804 Loma Vista, N.E., Albuquerque, New Mexico 87106

QUESTIONS

May a district judge file a declaration of candidacy for retention of office and, at the same time, file a declaration of candidacy in a primary election for a statewide judicial office?

CONCLUSIONS

No.

ANALYSIS

The answer to this question requires an analysis of N.M. Const. art. VI, §§ 33, 34, adopted in 1988, and Section 1-8-27 of the Election Code, NMSA 1978, ch. 1 (Repl. Pamp. 1985 and Cum. Supp. 1989). We conclude that, under those provisions, a judge may not file a declaration of candidacy for retention in the same election year he files a declaration of candidacy in a primary election for another statewide judicial office.

Article VI, Section 33 of the New Mexico Constitution provides, in part, that

[e]ach justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot.

Supreme court justices and court of appeals judges are subject to retention or rejection at the general election every eighth year, district court judges every sixth year and metropolitan judges every fourth year. Id. Article VI, Section 34 states that "[t]he date for filing a declaration of candidacy for retention of office shall be the same as that for filing a declaration of candidacy in a primary election."[1] Before Sections 33 and 34 were adopted, all judges in the state were elected to office through a partisan election process.

Under NMSA 1978, § 1-8-27 (Repl. Pamp. 1985),

[e]ach declaration of candidacy shall be delivered for filing in person by the candidate therein named or by a person acting, by virtue of written authorization, solely on the candidate's behalf. **The proper filing officer shall not accept for filing more than one declaration of candidacy from any one individual**.

(Emphasis added). The provision, titled "Primary Election Law; declaration of candidacy; manner of filing," is included in the portion of the Election Code designated the "Primary Election Law," NMSA 1978, §§ 1-8-10 to -52 (Repl. Pamp. 1985 and Cum. Supp. 1989), and has not been changed since adoption of the new constitutional amendments concerning judicial retention.

We believe that the restriction in Section 1-8-27 of the Election Code applies to declarations of candidacy for both retention and primary elections. The constitution requires a judge subject to retention to file a declaration of candidacy on the same date required for a declaration of candidacy in a primary election. The statute forbids any one individual from filing more than one declaration of candidacy, without distinguishing between those for retention or for a primary. Thus, the plain terms of the statute preclude a judge from simultaneously filing for candidacy for more than one judicial office. See Atencio v. Board of Educ., 99 N.M. 168, 171, 655 P.2d 1012, 1015 (1982) (court must give a statute its literal meaning if the words used are plain and unambiguous).

Our conclusion is not affected by the title of Section 1-8-27 or its inclusion in the Primary Election Law. Section 1-1-2 of the Election Code expressly provides that "[a]rticle and section headings do not in any manner affect the scope, meaning or intent of the provisions of the Election Code," and nothing in Section 1-8-27 limits coverage of that provision to declarations of candidacy in primary elections.

Courts apply to the constitution the same rules of construction used to interpret statutes. State ex rel. State Hwy. Comm'n v. City of Aztec, 77 N.M. 524, 526, 424 P.2d 801, 803 (1967). One presumption is that drafters of a provision know existing law and do not intend to enact a law inconsistent with any existing law. Quintana v. New Mexico Dep't of Corrections, 100 N.M. 224, 227, 668 P.2d 1101, 1104 (1983). Another is that the drafters are well-informed and reasonable so that their enactments "must be interpreted to accord with common sense and reason." Sandoval v. Rodriguez, 77 N.M. 160, 163, 420 P.2d 308, 310 (1966).

In other states, courts have held that, in the absence of any controlling statute, a candidate may not run simultaneously for two offices if the candidate could not hold both offices if elected. In State ex rel. Fair v. Adams, 139 So.2d 879 (Fla. 1962), a person attempted to qualify as a candidate for three offices. The state's constitution prohibited a person from holding more than one state office at the same time and each candidate was required by statute to take an oath providing the candidate would be qualified to hold the office for which he desired to be nominated. According to the court,

It is our opinion that a candidate who can, if nominated and elected, fill but one state office at a time, cannot make a truthful oath on every application to become a candidate for nomination to several state offices to the composite effect that he is qualified to hold them all.

This court cannot sanction any such inconsistent statements. It might be said that relator could fail to take the oath of office in, or repudiate, all but one position to which he had been elected and thus become eligible to fill the one of such offices which he might choose to accept. Such procedure would not, however, render truthful those oaths which were impossible of performance when they were taken. Moreover, they would be misleading to the electors and productive of vain effort and fruitless labor, by supporters and campaign workers.

139 So.2d at 882. See also Moore v. Panish, 32 Cal.3d 535, 543 n.9, 186 Cal. Rptr. 475, 479 n.9, 652 P.2d 32, 36 n.9 (1982) (logic of cases from other states would apply to prevent candidates from simultaneously running for incompatible offices in California); Burns v. Wiltse, 303 N.Y. 319, 323, 102 N.E.2d 569, 571 (1951) (spirit and intent of election law forbids dual nomination particularly when the candidate may not, if elected, take and hold both offices); Williams v. Huntress, 153 Tex. 443, 447, 272 S.W.2d 87, 89 (1954) (one person may not be the party candidate for both county court and district court).

The declaration of candidacy filed in primary elections in New Mexico requires the candidate to state, under oath, that the candidate "will be eligible and legally qualified to hold this office at the beginning of its term." NMSA 1978, § 1-8-29 (Cum. Supp. 1989). We have been provided with the form of declaration of candidacy for retention, which contains the following statements, also made under oath: "I desire to retain my position as _______________ at the General election...." and "I am eligible and legally qualified to hold this office." Form NME-43R (1989). The Code of Judicial Conduct provides that "no full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed." Canon 21-500(I) (Supp. Pamp. No. 2, Jan. 1990). Moreover, except in the case of a candidate for United States senator or representative who also is a candidate for president or vice-president, NMSA 1978, § 1-10-7 (Repl. Pamp. 1985) prohibits a person's name from appearing more than once on the general election ballot. These provisions raise the same question presented in State ex rel. Fair v. Adams about the ability of a person to state truthfully that he will be qualified to hold all offices for which he declares candidacy with the knowledge that the law permits him to hold only one. It is reasonable to assume that Section 1-8-27's proscription against filing more than one declaration of candidacy was intended to prevent this situation, and interpreting Section 1-8-27 to govern declarations of candidacy both for retention of office and in a primary election advances that purpose.

We note that our conclusion that a judge may not file both a declaration of candidacy for retention of office and a declaration of candidacy in a primary election does not conflict with Canon 21-700(B) of the Code of Judicial Conduct, which states:

Notwithstanding other provisions of the Code of Judicial Conduct, no judge may be nominated or elected to other than a judicial office. A judge must, when filing a statement of candidacy for a nonjudicial office, take a leave of absence without pay pending the results of the nominating process or until after the primary. Once nominated or placed on the ballot for a nonjudicial office, the judge must resign judicial office immediately.

This provision indicates that a judge may be nominated or run for another judicial office without resigning. It does not, however, state that a judge may simultaneously run for separate judicial positions.

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GENERAL FOOTNOTES

n1 Declarations of candidacy for supreme court and court of appeals judges are due the first Tuesday in March in an election year. Declarations of candidacy for district court and metropolitan court judges are due the first Tuesday in April in an election year. See NMSA 1978, § 1-8-26 (Repl. Pamp. 1985).