

VOLUME NO. 41

OPINION NO. 55

ELECTIONS - Nonpartisan election ballot;  
ELECTIONS - Qualifications for candidacy;  
SECRETARY OF STATE - Certification of candidates on the  
ballot;  
MONTANA CODE ANNOTATED - Section 13-12-201;  
MONTANA CONSTITUTION - Article VII, section 9(1).

HELD:           The Secretary of State should not certify to  
                 election administrators for the primary  
                 election ballot the name of an individual who  
                 cannot possibly meet the eligibility  
                 requirements for the office of Supreme Court  
                 Justice.

21 March 1986

Mike McGrath  
Lewis and Clark County Attorney  
Lewis and Clark County Courthouse  
Helena MT 59623

Dear Mr. McGrath:

You have asked my opinion on the following question:

Is the clerk and recorder required to place on the ballot the name of a person obviously not legally qualified for the office of Supreme Court Justice?

The circumstances which give rise to your question are as follows: On February 20, 1986, an individual filed with the Secretary of State a declaration for nomination to the office of Supreme Court Justice; the declaration was a notarized statement that the declarant possessed the qualifications prescribed by the Montana Constitution and laws for the office of Supreme Court Justice; the declarant subsequently admitted in public, as described in various newspaper articles, that he, in fact, had no formal legal training and had not been admitted to the practice of law in Montana; on March 13, 1986, this individual was held in contempt of court in Kalispell for practicing law without a license. In addition, the Clerk of the Montana Supreme Court has certified that the declarant is not listed in the roll of attorneys licensed to practice law in the State of Montana, nor has he been issued a certificate or license to practice law here.

In light of the above-mentioned circumstances, you ask whether the declarant's name should appear on the ballot for Supreme Court Justice. Under section 13-12-201, MCA, the Secretary of State may certify to election administrators the name of each candidate "entitled to appear on the ballot." Underlying your inquiry is the question of whether the Secretary of State should certify the declarant's name to the state's election administrators.

Article VII, section 9(1) of the Montana Constitution requires that a citizen be admitted to the practice of law in Montana for at least five years prior to the date of election in order to be eligible to the office of Supreme Court Justice. Under the situation described above, the declarant does not presently possess the qualifications necessary to hold the office of Supreme Court Justice nor can he possibly acquire them by the date on which the election is held, as is required by the Montana Constitution. Thus, regardless of the declarant's actions or the mere passage of time, he will

be ineligible to hold the office of Supreme Court Justice for the term which begins in January 1987.

One who is ineligible to hold a public office has no right to be a candidate for election thereto, since his election would be a nullity. Jenness v. Clark, 129 N.W. 357, 358 (N.D. 1910). To permit the candidacy and perhaps the election of one who is not qualified to hold the office he seeks would frustrate the democratic process represented by the state's electoral system. It could result in the unwarranted expenditure of funds both on behalf of such a candidate's campaign and for the purpose of holding an election for such a candidate. State ex rel. Willis v. Larson, 539 P.2d 352, 355 (Wyo. 1975). Moreover, it could mislead electors to waste their votes on a candidate who could not hold office.

The courts of some jurisdictions have permitted election officials to refuse declarations for nomination only if the election official can determine, from the face of the declaration, whether a declarant is ineligible to hold the office he seeks. See, for example, Fischnaller v. Thurston County, 584 P.2d 483 (Wash. 1978); County Election Board v. Robinson, 352 P.2d 920 (Okla. 1960). However, the form of declaration used for candidates for Montana Supreme Court Justice does not require that a declarant list the specific qualifications for that office. Rather, the form of the declaration for nomination contains a general statement that the declarant possesses "the qualifications prescribed by the Constitution and laws of the State of Montana for the office herein named." Thus, if a candidate has not been admitted to the practice of law for five years prior to the date of the election, his failure to meet this constitutional requirement to hold the office of Supreme Court Justice will not appear on the face of the declaration for nomination. Under the decision in Fischnaller, supra, the Secretary of State could not refuse the declarant's filing of his nomination form.

Fischnaller, however, does not address the situation where, as here, a candidate's ineligibility becomes clear subsequent to his filing for nomination. In addition, Montana case law does not interpret an election official's responsibilities as narrowly as did the Washington court in Fischnaller, supra. Mahoney v. Murray, 159 Mont. 176, 496 P.2d 1120 (1972), involved a delegate to the Constitutional Convention who attempted

to file a declaration of nomination for the office of state treasurer. The Montana Constitution prohibited the state treasurer from holding any other public office. Because the position of delegate to the Constitutional Convention was considered to be a "public office," the Secretary of State refused to accept Mahoney's declaration of nomination. The Montana Supreme Court held that Mahoney's membership in the Constitutional Convention had not terminated and that because Mahoney was prohibited by the Constitution from holding both the office of state treasurer and that of constitutional convention delegate, the Secretary of State "was correct in refusing to file the declaration for nomination, and the petition for a writ of mandamus [was] denied." 496 P.2d at 1127.

In light of the holding in Mahoney, supra, and the general policy in favor of preventing candidacies of individuals who are ineligible to hold the office they seek, I conclude that the name of an individual who has admitted subsequent to his declaration of nomination that he does not meet the legal requirements for holding the office he seeks should not be placed on the primary election ballot.

THEREFORE, IT IS MY OPINION:

The Secretary of State should not certify to election administrators for the primary election ballot the name of an individual who cannot possibly meet the eligibility requirements for the office of Supreme Court Justice.

Very truly yours,

MIKE GREELY  
Attorney General