VOLUME NO. 43 OPINION NO. 59

ELECTIONS - Effect on election results of election officer's failure to follow statutory requirement for preparation of ballots;
ELECTIONS - Rotation of candidates' names on ballot;
PUBLIC OFFICERS - Effect on election results of election officer's failure to follow statutory requirement for preparation of ballots;
MONTANA CODE ANNOTATED - Sections 13-12-205, 13-12-205(2);
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 75 (1974), 18 Op. Att'y Gen. No. 252 (1940), 15 Op. Att'y Gen. No. 618 (1934), 10 Op. Att'y Gen. at 276 (1924).

HELD: Failure of an election administrator to rotate the names of candidates on the ballot so that each candidate's name appears at the top of the list on substantially an equal number of ballots does not render the results of the election invalid.

March 23, 1990

Hon. Mike Cooney
Secretary of State
State Capitol
Helena MT 59620

Dear Mr. Cooney:

You have requested my opinion on the following questions:

1. How should candidates' names be rotated on the ballot when it is mathematically impossible to place each name at the top of the ballot a substantially equal number of times?

2. Does the failure to rotate the list so that each candidate's name appears at the top of the ballot in substantially equal numbers render the election invalid?

Your request arises out of the primary election conducted in Flathead County in 1988. There were six candidates in the Democratic Party for the office of Governor and four Democratic Party candidates for the office of County Commissioner. The ballots were rotated so that the name of each gubernatorial candidate appeared at the top of the ballot an equal number of times. As a result, the names of two of the county commissioner candidates appeared at the top of the ballots twice as many times as the names of the other two. One of the two candidates whose names appeared at the top less frequently has objected to the method of name placement on the ballots.

Arrangement of candidates' names on the ballot is governed by section 13-12-205, MCA, which requires that the names be arranged alphabetically by surnames under the title of the respective offices. That section further provides in pertinent part:

> (2)(a) ... [I]f two or more individuals are candidates for nomination or election to the same office, the election administrator shall divide the ballot forms into sets equal in number to the greatest number of candidates for any office. The candidates for nomination to an office by each political party shall be considered separately in determining the number of sets necessary for a primary election.
>
> (b) The election administrator shall begin with a form arranged alphabetically and rotate so that each candidate's name will be at the top of the list for each office on substantially an equal number of ballots. If it is not numerically possible to

> place each candidate's name at the top of the list, the names shall be rotated in groups so that each candidate's name is as near the top of the list as possible on substantially an equal number of ballots.

The purpose of rotation of names on the ballots is "undoubtedly to give all candidates as fair a chance as possible by the placement of names and positions on the ballot." 18 Op. Att'y Gen. No. 252 at 252 (1940). See also 35 Op. Att'y Gen. No. 75 at 187, 189 (1974). Rotation of names on the ballot in some manner has long been required by Montana law. See, e.g., 10 Op. Att'y Gen. at 276 (1924). By its terms, the statute does not require mathematical precision where impossible, but simply requires that each candidate's name appear at the top on "substantially an equal number of ballots." § 13-12-205(2)(b), MCA.

It appears from your inquiry that the election administrator in this case did not assure that each candidate's name was as near the top as possible on substantially an equal number of ballots. The statute clearly requires that if it is impossible to place each candidate's name at the top an equal number of times, the names must be rotated so that each is "as near the top of the list as possible on substantially an equal number of ballots." (Emphasis added.) It appears, therefore, that the requirements of section 13-12-205(2)(b), MCA, were not satisfied. The critical inquiry is whether a failure by the election administrator to abide strictly by the rotation requirements invalidates the election. The answer to this question depends upon whether the statute is mandatory or directory in nature. Generally, acts taken in violation of a mandatory provision are void, whereas acts taken in violation of a directory provision, while improper, may nevertheless be valid. 29 C.J.S. Elections § 214(2), at 606 (1965); State ex rel. Stabler v. Whittington, 290 A.2d 659, 661 (Del. Super. Ct. 1972); In re Chairman in Town of Worcester, 29 Wis. 2d 674, 139 N.W.2d 557, 561 (1966).

Factors to be considered in determining whether a statute is mandatory or directory include the subject matter, the importance of the provision that allegedly has been disregarded, and the relation of the provision to the general object intended to be secured by the statute. Martin v. Porter, 47 Ohio Misc. 37, 353 N.E.2d 919, 923 (1976).

> "Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and the same

> is true where no substantial rights depend on the statute, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results."

Chicago, M., St. P.& P.R. Co. v. Fallon County, 95 Mont. 568, 574-75, 28 P.2d 462, 463 (1933) (citation omitted).

A previous Attorney General's Opinion concluded that statutory provisions relating to the arrangement of names on the ballots are mandatory and must be substantially complied with, but cautioned that any error in the preparation of the ballots "must be corrected, if at all, before the election is held." 15 Op. Att'y Gen. No. 618 at 423, 424 (1934). This admonition is consistent with the principle to which the Supreme Court of Montana historically has adhered, to wit, that all provisions of the election law are mandatory if enforcement is sought before election, but after election they will be held directory only. State ex rel. Wolff v. Geurkind, 111 Mont. 417, 433, 109 P.2d 1094, 1102 (1941). Thus, if an election procedure is challenged after an election, the election will not be invalidated unless the challenged law is "of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void." *Id.*, (quoting Weber v. City of Helena, 89 Mont. 109, 125, 297 P.2d 455, 462 (1931)).

In the few reported cases relevant to this issue, the Supreme Court of Montana consistently has found that an error which does not affect the results of an election cannot subsequently be used to invalidate the election. See Chicago, M., St. P.& P.R. Co., 95 Mont. at 580, 28 P.2d at 465 (election held after date prescribed by statute valid notwithstanding noncompliance with statutory directive); Atkinson v. Roosevelt County, 71 Mont. 165, 181-82, 227 P. 811, 816 (1924) (votes cast at improper polling place not void where election otherwise honestly and fairly held); State ex rel. Brooks v. Fransham, 19 Mont. 273, 290, 48 P. 1, 7 (1897) (election not invalidated by error of election administrator in placing candidate's name under wrong party designation); Geurkind, 111 Mont. at 431, 109 P.2d at 1101 (election of write-in candidate valid notwithstanding election administrator's failure to remove name of deceased candidate from ballot, even where deceased candidate received more votes).

Decisions of other courts reflect the same interpretation of the mandatory/directory distinction. In pre-election challenges, it has been held that a statutory provision governing the arrangement of names on the ballot is mandatory. Resnick v. Board of Supervisors of Elections of Baltimore, 244 Md. 55, 222 A.2d 385, 389 (1966); Nugent ex rel. Manning v. La France, 91 R.I. 398, 164 A.2d 230, 232 (1960); City of St. Louis v. Crowe, 376 S.W.2d

185, 190 (Mo. 1964); Harder v. Denton, 9 Cal. App. 2d 607, 51 P.2d 199 (1935). Where the challenge is raised after the election, however, the courts have held that failure of the election administrator to place candidates' names on the ballots as required by statute is not ground for invalidating the election results. Nelson v. Robinson, 301 So. 2d 508, 511-12 (Fla. Ct. App. 1974); Roberts v. Byrd, 344 S.W.2d 378, 381 (Ky. 1961); Schell v. Studebaker, 15 Ohio Op. 2d 314, 174 N.E.2d 637, 639-40 (1960); Bees v. Gilronan, 66 Ohio L. Abs. 130, 116 N.E.2d 317, 321 (1953). See also Tsongas v. Secretary of Commonwealth, 362 Mass. 708, 291 N.E.2d 149, 152-53 (1972) (failure to rotate names, even if required by state constitution, did not lessen opportunity of voters to cast vote for candidate of choice and therefore did not invalidate election results); Pellegrino v. State Board of Elections, 100 R.I. 71, 211 A.2d 655, 658-59 (1965) (printing of name "Josephine" rather than candidate's true name of "Joseph," being mere technical noncompliance with statutory provision relating to form and content of ballot, did not vitiate election); Mochary v. Caputo, 100 N.J. 119, 494 A.2d 1028 (1985) (issue involving choice of ballot positions for candidates moot where general election already occurred). As stated by the court in Nelson, 301 So. 2d at 512:

> Keeping in mind that we are talking about a claim made after an election, and not one which may have been enforceable before, if a candidate appears on the ballot in such a position that he can be found by the voters upon a responsible study of the ballot, then such voters have been afforded a full, free and open opportunity to make their choice for or against that particular candidate; and the candidate himself has no constitutional right to a particular spot on the ballot which might make the voters' choice easier. [Emphasis in original.]

Similar reasoning was applied in Bees, 116 N.E.2d at 321, in which the court stated:

> Where the honesty of the ballots cast is not in question, where all the voters have an opportunity to give a free and fair expression of their will, and where the actual result thereof is clearly ascertained, a procedural neglect by election officials will not justify the rejection of such votes.

This principle has been established in Montana law since State ex rel. Brooks v. Fransham, *supra*, 19 Mont. at 290, 48 P. at 7, in which the Court observed that "where the will of the people is supreme, when clearly expressed it cannot be defeated by a claim that an official neglected to properly make up the ballot published and voted." See also Thirty Voters of County of Kauai v. Doi, 61 Haw. 179, 599 P.2d 286, 290 (1979) (election not invalidated for failure of election officials to comply strictly with election statute where there is substantial compliance and no showing of fraud).

In view of the history of Montana law, and in accordance with the weight of authority from courts of other states, it is my opinion that section 13-12-205(2), MCA, is not a mandatory provision of law when challenged after an election, because an error in the rotation of names on the ballot does not obstruct a free and intelligent casting of the vote and is not essential to the validity of the election. Therefore, failure to arrange candidates' names on the ballots as required by section 13-12-205(2), MCA, does not give rise to a challenge to the election results.

THEREFORE, IT IS MY OPINION:

> Failure of an election administrator to rotate the names of candidates on the ballot so that each candidate's name appears at the top of the list on substantially an equal number of ballots does not render the results of the election invalid.

Sincerely,

MARC RACICOT
Attorney General