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STATE CAPITOL
PHOENIX, ARIZONA

July 1, 1968

DEPARTMENT OF LAW OPINION NO. 68-10 (R-63)

REQUESTED BY: THE HONORABLE J. KENDALL HANSEN
Apache County Attorney

QUESTION:

1. May a Justice of the Peace, whose term is not expiring in the current election year be a candidate for a non-judicial office and still retain his office as Justice of the Peace?
2. What is the duty of the Clerk of the Board of Supervisors should a Justice of the Peace, under the conditions described in paragraph 1 above, file with the Clerk of the Board a nominating petition and nominating papers for a non-judicial office?

ANSWER:

1. No.
2. Refuse to accept them.

"A.R.S. § 38-296. Limitation upon filing for election by incumbent of elective office; election.

"A. No incumbent of an elective office, whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing. (Emphasis supplied)

"B. The resignation of the incumbent elective officer duly filed in writing with the officer, board or commission having jurisdiction of the office shall, if not accepted within ten days,

be deemed to have become effective as of the date of filing.

"C. This section shall not be construed to prohibit a person whose resignation from office has become effective from qualifying as a candidate for another office during the unexpired portion of the term affected by the resignation, nor shall it apply to any incumbent elective officer who seeks re-election to the same office or to any other public office during the final year of the term to which he has been so elected. (Emphasis supplied)

"D. A person violating any provision of this section is guilty of misfeasance in office and the office held by such person shall be declared vacant."

The above statute, consisting of a general limitation on an incumbent's eligibility for nomination or election to another office, has been interpreted and limited in several cases.

Moore v. Bolin (1950) 70 Ariz. 354, 220 P.2d 50, showed that a complaint of a State Tax Commissioner alleging that he was advised by the Secretary of State, that his name would not be placed on ballots as a candidate for Governor unless he complied with this section by first resigning as a member of the State Tax Commission, did not present a justiciable controversy between the State Tax Commissioner and the Secretary of State that could be adjudicated in a declaratory judgment action.

Under Whitney v. Bolin (1959) 85 Ariz. 44, 330 P.2d 1003, the statute prohibiting incumbents of elective offices from being eligible for nomination or election to any office other than the office so held, was found to be unconstitutional when applied to the office of Judge of the Supreme Court of Arizona. The court found the qualifications for Judge of the Supreme Court are enumerated specifically in the Arizona Constitution, (Art. 7, § 13), and the Legislature is without authority to prescribe

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additional qualifications. The court did not pass upon the effect of the statute when applied to any other public office.

In State, ex rel., Pickrell v. Senner (1962), 92 Ariz. 243, 375 P.2d 728, the court held that the statute making an incumbent of an elective office ineligible for nomination or election to any other office, did not disqualify a Corporation Commissioner who had not resigned from seeking the nomination of a political party for the office of Representative in the United States Congress. The Court used as the basis of this opinion the fact that a "Federal" office was involved.

See also: Candidacy of Incumbent, Superior Court Judge for Supreme Court. 1 Ariz. Law Rev. 165 (1959); Qualifications for Office. 1 Ariz. Law Rev. 129 (1959).

Apart from the limitations imposed by the statute itself, other statutes dealing with specific incumbents further limit its scope. The statute specifically dealing with a Justice of the Peace is as follows:

"A.R.S. § 22-111. Election; term of office.

"In each Justice Precinct there shall be elected by the qualified electors of the precinct, at the general election, one Justice of the Peace, who shall hold office for a term of four years from January 1, following his election, and who may continue in office during his candidacy for another judicial office of the state and, if elected, until he assumes the duties of the other judicial office. As amended Laws 1966, Chap. 105, §1." (Emphasis supplied)

Under the maxim "expressio unis est exclusio alterius", if a statute specifies one exception to a general rule, other exceptions are excluded. Bushnell v. Superior Court of Maricopa County (1967), 102 Ariz. 309, 428 P.2d 987, affirmed 102 Ariz. 465, 433 P.2d 15.

For general information, and opinions as to the propriety of a Justice of the Peace holding more than one public office,

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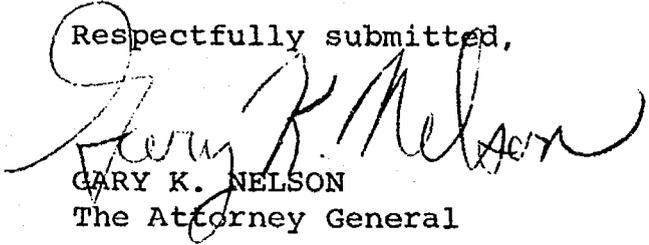
or his appointment to adjoining vacant Justice Court Precinct, see Attorney General Opinions No. 59-30; 67-16; and Judicial Reform in Arizona - Justice of the Peace Court. Heinx R. Hink, 6 Ariz. Law Rev. 13, 24 (1964).

It is therefore the opinion of this office that A.R.S. § 22-111, as amended, is controlling when a Justice of the Peace seeks another judicial office. A.R.S. § 38-296 controls the candidacy of a Justice of the Peace to a non-judicial office.

The Clerk of the Board of Supervisors should not accept for filing the nominating petitions and papers of a Justice of the Peace for a non-judicial office, unless he is within an exception enumerated in A.R.S. § 38-296(C).

If we may be of further assistance to you in this matter, please do not hesitate to call.

Respectfully submitted,


GARY K. NELSON
The Attorney General

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