



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 5

The Honorable Bill Graves  
Kansas Secretary of State  
State Capitol, 2nd Floor  
Topeka, Kansas 66612

Re: Elections -- Primary Elections -- Ballot Access by  
Nominating Petitions; Signatures Required; Change  
of Precinct Boundaries

Synopsis: By statute, a candidate in Kansas can have her or  
his name placed on the ballot by either filing a  
nominating petition, or filing a declaration of  
intention and paying a filing fee. Due to the  
change in district and precinct boundaries,  
however, the number of signatures required on  
nominating petitions cannot be determined. Until  
the statutory method of calculating the number is  
changed, the only means of becoming placed on the  
ballot is by filing fee.

The United States Supreme Court has ruled that,  
based on the Equal Protection Clause of the  
Constitution, an indigent candidate cannot be  
required to pay a filing fee, and that a reasonable  
alternative means of ballot access must be  
available. Until current law is amended, the  
filing fee requirement must be waived for persons  
unable to pay. Cited herein: K.S.A. 1988 Supp.  
25-205, as amended by L. 1989, Ch. 106, § 3;  
K.S.A. 25-206, as amended by L. 1989, Ch. 106, § 4.

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Dear Secretary Graves:

You request our opinion as to how your office should calculate the number of signatures required on a nominating petition to become a candidate for elective office. The question arises due to the change in precinct boundaries.

K.S.A. 1988 Supp. 25-205, as amended by L. 1989, Ch. 106, § 3, provides two ways by which a person can have her or his name placed on the ballot to become a candidate: (1) file a nomination petition, or (2) file a declaration of intention to become a candidate and pay a filing fee. To file by nomination petition a person must obtain a certain number of signatures. Depending upon the office the person is seeking, the number of signatures is based on a certain percentage of the total vote of the party designated in that district. The basis of the percentage is "the vote of the party for secretary of state at the last preceding election. . . ." K.S.A. 1988 Supp. 25-205(e), as amended. For example, a person wishing to become a candidate for county commissioner must obtain the signatures of not less than 3% of the total vote of the party cast for secretary of state in 1986 in that commission district.

The determination of how many votes were cast for secretary of state for a certain political party is made from precinct data. Subsequent to the last election new district boundaries have been drawn for members of the House of Representatives and many local offices. The new district boundaries do not correspond with the old precincts for which your office has election results. In addition, recent census legislation has resulted in the change of boundaries for hundreds of precincts. As an example, you inform us that all the precincts in Sedgwick county have new boundaries and that the new precincts form the building blocks for the new House of Representatives districts. Therefore, since the boundaries of the districts and precincts changed after the last election, it is impossible to determine for the new district how many persons voted for the party's candidate for Secretary of State.

Because of the new district and precinct boundaries, data does not exist for your office to calculate the number of signatures required for nomination petitions. The statutes do not provide an alternative means to calculate this number. Therefore, we must conclude that, since it is impossible to calculate the number of signatures needed to file by petition for a certain office, persons who desire to become a candidate for that office cannot file by petition.

The amount of the filing fee for each office is prescribed in K.S.A. 25-206(a), as amended by L. 1989, Ch. 106, § 4:

"For the office of United States senator, United States representative from any district or at large, all state offices, and all county offices, where the salary is over \$1,000 per year, a sum equal to 1% of one year's salary. . . . For all county offices where the salary is \$1,000 or less, a fee of \$5; for a state senator, \$75; for representatives, \$50; for all township offices, \$1. Nothing in this act shall be construed as requiring any fee of a candidate filing a declaration of intention to become a candidate for precinct committeeman or precinct committeewoman."

The question arises whether payment of a filing fee can constitutionally be the only means by which a person can become a candidate for public office.

This question was first addressed by the United States Supreme Court in Bullock v. Carter, 405 U.S. 134, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972). In that case suit was brought by persons who met all the qualifications for office but were unable to pay the large filing fees required by Texas statutes. The filing fee was an absolute prerequisite to be placed on the ballot with no alternative procedure. The court ruled that the statutory filing fee scheme denied equal protection of the laws:

"By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to our determination of constitutional

invalidity." 405 U.S. at 149, 31 L.Ed.2d at 103.

The question was before the Supreme Court again in Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). The court ruled:

"The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. As we have noted, the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." 94 S.Ct. at 1320-21.

In West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W.Va. 1980), West Virginia had a filing fee requirement similar to that of Kansas. Persons desiring to become a candidate for a state office were required to pay 1% of their annual salary as a fee to be placed on the ballot. Relying on Bullock and Lubin, the court ruled that "failure to provide a reasonable alternative to filing fees for impecunious candidates to obtain access to the ballot renders the filing fee requirement . . . unconstitutional as to such candidates." 270 S.E.2d at 639. The courts have recognized that "certain ballot restrictions are reasonable to forestall frivolous candidacies and concomitant 'laundry list' ballots that merely serve to confuse the voter. . . ." Andress v. Reed, 880 F.2d 239, 241 (9th Cir. 1989).

However, the courts have invalidated filing fee requirements on constitutional grounds when no alternative means exist for indigent persons to be placed on the ballot. Hatten v. Rains, 854 F.2d 687 (5th Cir. 1988).

Nominating petitions have been recognized as a reasonable alternative to the filing fee requirement to gain ballot access. Socialist Workers Party v. Hechler, 696 F.Supp. 190, 203 (S.D. W.Va. 1988); Cross v. Fong Eu, 430 F.Supp. 1036 (1977). We also note that there is a difference between potential candidates who are able but unwilling to pay the filing fee and those who are simply unable to pay. Adams v. Askew, 511 F.2d 700, 702 (5th Cir. 1975). Alternative procedures for ballot access are required only for those who are unable to pay the filing fee.

In summary, Kansas law provides an alternative means to the filing fee - nominating petitions - to become placed on the ballot as a candidate. However, due to the change in district boundaries and precinct boundaries, this alternative is not available as the number of signatures required for a petition cannot be calculated as provided by statute. This matter should be brought before the 1990 session of the legislature for statutory amendment of the means to calculate the number of signatures required on a nominating petition. Until the law is amended, the filing fee is the only means available to be placed on the ballot. Therefore, to meet the dictates of the constitution and Supreme Court, until an alternative means to ballot access becomes available, the filing fee requirement must be waived for impecunious candidates.

Very truly yours,



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