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August 17, 1984

ATTORNEY GENERAL OPINION NO. 84- 86

The Honorable Jack H. Brier
Secretary of State
Capitol, Second Floor
Topeka, Kansas 66612

Re: Elections -- Official Ballots -- Simultaneous Candidacies; Simultaneous Nomination to Same Office.

Synopsis: The Kansas Legislature has provided that there will be separate ballots for each political party participating in a primary election. When no person has sought the nomination of a political party to a particular office at a primary election, the law provides that the ballot shall list the office to be elected, followed by a blank space, so that party members may write in the name of any person they choose to nominate as their party candidate. K.S.A. 25-213, which prescribes the form of a primary election ballot, does not prohibit a person from appearing on the ballot as a candidate for nomination of one political party and at the same time receiving write-in votes sufficient to nominate the person for the same office on the ballot of another political party. K.S.A. 25-213 also does not prohibit a person from appearing on the primary election ballot of one political party as a candidate for nomination to one office and also receiving sufficient write-in votes to win the nomination to another office on the ballot of a different political party.

K.S.A. 25-306, which prevents a person from accepting more than one nomination to the same office, applies only to nominations accomplished by convention, caucus,

or independent petition and cannot be construed to apply to nominations accomplished by primary election.

K.S.A. 25-613, which prescribes the form of general election ballots, does not prevent a single name from appearing twice on the same ballot, for the same or different offices. K.S.A. 25-123 addresses the problem of the simultaneous election of a single person to incompatible offices and clearly indicates a legislative intent to permit simultaneous candidacies for more than one office. Cited herein: K.S.A. 25-123; 25-206; 25-210; 25-213; 25-302; 25-303; 25-304; 25-306; 25-306b; 25-613; 25-3110; 25-3211; 25-3301; K.S.A. 1983 Supp. 25-205; 25-305.

* * *

Dear Secretary Brier:

You have requested an opinion from this office concerning two situations which have arisen following the recent primary election. Both circumstances concern the question of whether the same name may appear more than once on the same general election ballot.

You describe the factual circumstances which give rise to your inquiry as follows:

- "1. A person is nominated by two parties for the same office. For example, a person's name appears on the Republican primary ballot and is written in on the Democratic primary ballot. The person receives sufficient votes to secure the nomination of each party for the same office.
- "2. A person is nominated by two parties for two offices that would appear on the same general election ballot. For example, a person is nominated at the primary for the office of county clerk by the Republicans and receives sufficient write-in votes at the primary to be nominated by the Democrats for the office of county treasurer."

As you point out, until 1981, K.S.A. 25-613 provided that, except in certain situations not relevant here, "the name of each candidate shall be printed on the [official general election] ballot only once" and that "no name that is printed on the ballot can be written in elsewhere on the ballot." In 1981, the legislature deleted the above-quoted language from K.S.A. 25-613 (L.

1981, ch. 165, §5). K.S.A. 25-613 as it presently reads does not prevent a single name from appearing on the general election ballot more than once.

It is also clear that the statute prescribing the form of official primary election ballots does not prevent the simultaneous appearances on the general election ballot which you have described. K.S.A. 25-213 provides in pertinent part:

"At all national and state primary elections, the national and state offices as specified for each in this section shall be printed upon the official primary election ballot for national and state offices and the county and township offices as specified for each in this section shall be printed upon the official primary election ballot for county and township offices. The official primary election ballots shall have the following heading:

OFFICIAL PRIMARY ELECTION BALLOT
_____ Party

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"The words national and state or the words county and township shall appear on the line preceding the part of the form shown above.

"The form shown shall be followed by the names of the persons for whom nomination petitions or declarations have been filed according to law for political parties having primary elections, and for the national and state offices in for following order:

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"In case there are no nomination petitions or declarations on file for any particular office, the title to the office shall be printed on the ballot followed by a blank line with a square No blank line shall be printed following any office where there are nomination petitions or declarations on file for the office except following the offices of precinct committeeman and precinct committwoman.

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"No name that is printed on the official primary election ballot for national and state

offices shall be printed or written in elsewhere on such ballot or on the official primary election ballot for county and township offices except for precinct committeeman or committeewoman. No name that is printed on the official primary election ballot for county and township offices shall be printed or written in on the official primary election ballot for national and state offices or elsewhere on such county and township ballot except for precinct committeeman or committeewoman." (Emphasis added.)

We are unable to conclude that the prohibitory language quoted above precludes a name from appearing on one party's ballot and, at the same time, receiving write-in votes on another party's ballot for the same or another office. To reach such a conclusion it would be necessary to read the words "official primary election ballot for state and national offices" (or county and township offices) to mean that the official ballots for each party participating in the primary for national and state or county and township offices are to be considered as a single whole. It is abundantly clear that this is not the case. K.S.A. 25-210 provides that:

"The official primary election ballot for national and state offices and the official primary election ballot for county and township offices of each political party shall be arranged . . . printed, voted and canvassed in the same manner as is now or hereafter provided by law" (Emphasis added.)

In addition, K.S.A. 25-213 provides that there will be an official primary election ballot for each political party having a primary election. Moreover, K.S.A. 25-3301 states the requirements of eligibility to vote at a partisan primary and declares in subsection (d):

"No voter shall be allowed to receive the ballot of any political party except that with which such voter is affiliated."
(Emphasis added.)

Thus, the language in K.S.A. 25-213 prohibiting the appearance of a single name more than once on a primary election ballot can only apply to the official primary ballots for a single party. For example, a name printed on the republican primary ballots for either national or state offices or county and township of-

fices may not be printed or written elsewhere on those republican primary ballots. Unfortunately, the language and context of the statute as a whole makes it impossible to conclude that democratic electors are precluded from writing a name on the democratic primary ballots which also appears on the republican primary ballot.

We are forced to conclude, as the Kansas Supreme Court did when considering earlier versions of these statutes, that the primary election statutes do not prevent the electors of one party from writing in on their ballots (when write-in votes are permitted), the name of a person who is enrolled or officially listed as a member of another party and giving that person their party nomination if the person is otherwise eligible and receives the requisite numbers of votes. See State v. Tipton, 166 Kan. 145, 149 (1948). Further, we find nothing in K.S.A. 25-213 to prevent a person who appears on a primary election ballot as a candidate from one party, from being nominated for an office at a primary election by the voters of another party. As the court noted in State v. Tipton, "[t]here may be those who doubt the fairness and soundness of permitting this to be done, but that is a question of public policy for the legislature and not for judicial determination." 166 Kan. at 149.

Furthermore, in the context of the first situation you describe, we have carefully considered the possible application of K.S.A. 25-306. For the reasons detailed below we have concluded, although not without some difficulty, that K.S.A. 25-306 does not apply to nominations made at a primary election and thus, does not prevent a person from being twice nominated by primary election for the same office.

K.S.A. 25-306 provides in relevant part:

"No person shall accept more than one nomination for the same office.

• • • •

"Whenever any person shall receive two or more nominations for the same office on the same date, it shall be his duty, within the time limited for the filing of certificates of nomination, to file with the officer with whom the certificates of nomination are filed a written statement, signed and sworn to by him, designating which one of such nominations he desires to accept, and upon the filing thereof he shall be deemed to have declined the other nominations; and if

he shall refuse or neglect to so file such an election, the officer with whom the certificates of nomination are filed shall, immediately upon the expiration of the time for the filing of certificates of nomination, make and file in his office an election of one nomination for such candidate. The county election officer shall print such candidate's name upon the official ballot under the designation so selected, but under no other designation whatever." (Emphasis added.)

At first glance, it may be argued that 25-306 refers to all nominations, including those made by primary election. However, certain language in K.S.A. 25-306, and a reading of the relevant statutes as a whole, belies that conclusion. As the emphasized portions of the language quoted above make clear, a person who receives two or more nominations for the same office on the same date (as has happened at the most recent primary election) is duty-bound to file a written statement designating the one nomination he will accept. Such designation must be made "within the time limited for the filing of certificates of nomination" and filed "with the officer with whom the certificates of nomination are filed." This language, as we will detail further, has no meaning in the context of a nomination made by primary election.

The only statute which prescribes deadlines for filing "certificates of nomination" is K.S.A. 1983 Supp. 25-305. That section, by its terms, does not apply to nominations made by primary election. K.S.A. 1983 Supp. 25-305 provides in part:

"Certificates of nomination by convention or caucus and independent nomination petitions for the nomination of candidates for a national, state, county, and township offices, shall be filed with the Secretary of State, or the county election officer, not later than 12:00 noon, June 10, preceding the . . . general election . . ."
(Emphasis added.)

This is the same deadline which is imposed on persons seeking to have their names placed on the primary election ballot either by filing "nomination petitions" or a declaration of intent. See K.S.A. 1983 Supp. 25-205 and K.S.A. 25-206. Despite the unfortunate use of the term "nomination petitions" in K.S.A. 25-205, no nomination is accomplished by a primary election until after the election is held on the second Tuesday in August as is required by K.S.A. 25-203.

By contrast, party nominations accomplished by convention or caucus (K.S.A. 25-302) or by independent nomination petition (K.S.A. 1983 Supp. 25-303) are completed and the "certificates of nomination" are filed before 12:00 noon on June 10 before the general election. Nothing further is necessary to complete such nominations.

Thus, we find that the language in K.S.A. 25-306 which requires the filing a certificate of nomination by a June deadline, is meaningless in the context of nominations made by primary election. A candidate nominated by primary election is not required by any statute to file a "certificate of nomination" as described in K.S.A. 25-304. A candidate nominated by primary election is issued a certificate of nomination after the final canvass of the election pursuant to K.S.A. 25-3110 or K.S.A. 25-3211. The person so nominated is not required, however, to prepare or file such a certificate, as is a person nominated by some method other than primary election.

The only way to read 25-306 to prohibit a person from holding two primary election nominations for the same office is to ignore the language of K.S.A. 25-306 requiring that such person choose a single nomination within the limits of the deadline for filing certificates of nomination. Certain well documented rules of statutory construction prevent such a reading of this statute.

The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature must govern if that intent may be ascertained from the statute. Intent must be determined by a general consideration of the whole act. When construing statutes, it is necessary, so far as is practicable, to reconcile the different provisions, "so as to make them consistent, harmonious and sensible." State ex rel. Stephan v. U.S.D. 428, 231 Kan. 579, 584 (1982); State v. Dumler, 221 Kan 386, 389 (1977). We cannot interpret K.S.A. 25-306 to make one portion of it inapplicable in the case of nominations made by primary and then conclude that all other portions of the statute apply to primary nominations. Such a construction simply does not qualify as a "sensible, harmonious or consistent" construction. See State v. Dumler, 221 Kan. at 390.

As the preceding discussion demonstrates, when K.S.A. 25-306 is considered as a whole and in the context of related enactments, the only harmonious and sensible construction is that K.S.A. 25-306 does not apply to nominations accomplished by primary election.

We find no other statutes pertaining to elections which prevent a person, nominated by primary election, from being nominated

by two parties for the same office. K.S.A. 25-613 and 25-213, which pertain to ballot forms, fail to prevent this circumstance and, as we have concluded, K.S.A. 25-306 does not apply to nominations made by primary election.

Regarding the second factual circumstance described in your request, that situation where one person holds the nomination of the democratic party for one office and the nomination of the republican party for a different office, we again find nothing in the Kansas statutes to prevent this occurrence. In fact, the relevant statutes appear to contemplate and provide (up to a point) for the exact circumstance described in your letter. As discussed previously, K.S.A. 25-213, which pertains to primary election ballots, does not prevent the nomination of one person to two different offices by two different parties. The language of 25-213 prohibiting the appearance of a single name more than once on a primary election ballot can only apply to the official primary election ballots for one party. There are separate ballots for each party participating in the primary and the prohibition applies to a single party ballot. Thus, a person may not be nominated for more than one office on a single party ballot but there is nothing in K.S.A. 25-213 to prevent nomination to more than one office on different party ballots.

In addition, in 1981 the Kansas Legislature amended K.S.A. 25-613 and deleted the language which provided that a name could appear (in printed or written form) only once on a general election ballot. This amendment occurred in section 5 of chapter 165 of the 1981 laws of Kansas. In section 9 of the same chapter, the 1981 legislature enacted into law the following language, which appears in the statute books as K.S.A. 25-123:

"When a person is simultaneously elected to more than one office, such person may accept any such offices that are not incompatible with any other office accepted by such person. If a person accepts election to incompatible offices, the person shall be deemed to have accepted the office last accepted and to have declined any previously accepted incompatible office."

It is quite clear that the legislature contemplated and intended to allow the situation whereby a person may be nominated and elected to more than one office. This conclusion also is consistent with the rules of statutory construction discussed earlier in this opinion. A consideration of the entire act can lead to no other construction but that the legislature specifically intended to allow a person to be nominated and elected to more than one office and to hold both offices as long as the offices are not incompatible. The question of what makes

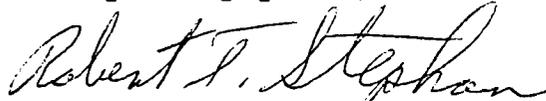
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offices incompatible is not raised by your request and will not be considered in this opinion.

Finally, it is important to point out that, although Kansas law permits a person nominated by primary election to hold two different party nominations for the same or different offices, it does not require the persons so nominated to retain both or either nominations. K.S.A. 25-306b permits a person to withdraw from a nomination made "by any means whatsoever" through filing a written request with the appropriate officer. Such requests for withdrawal must be filed within ten (10) days of the meeting of the board of canvassers for the final canvass of the primary election.

We conclude, therefore, that under Kansas law it is permissible for a person's name to appear on the general election ballot once as the republican nominee for an office and once as the democratic nominee for the same office. Kansas law also permits a person's name to appear on the general election ballot once as the republican nominee for one office and as the democratic nominee for another office.

Very truly yours,


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