Opinion No. 80-28

August 15, 1980

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Honorable I. M. Smalley, New Mexico State Senate, 501 West Pine Street, Deming, New Mexico 88030

COSTS

A non-homerule municipality may not enforce an ordinance requiring, without exception, that a candidate for the office of municipal judge pay a filing fee in the amount of five percent of the annual salary for that office.

FACTS

City of Deming Ordinance 360, enacted August 5, 1963 provides that:

"Any person who shall hereafter file with the Clerk-Treasurer, as a candidate for the office of Municipal Judge of the Village shall at the time of filing as a candidate for such office, pay a filing fee to the Clerk-Treasurer in an amount equal to five percent (5%) of the annual salary paid to such municipal judge.

No person otherwise qualified as a candidate for such office shall be entitled to be a candidate unless he shall have first paid the filing fee as hereinabove provided."

There is no alternative to this filing fee requirement.

QUESTIONS

May a non-homerule municipality enforce an ordinance requiring, without exception, that a candidate for the office of municipal judge pay a filing fee in the amount of five percent of the annual salary for that office?

CONCLUSIONS

No.

ANALYSIS

It is not disputed that a state legislature, in the exercise of its power to regulate elections, may under certain circumstances, require filing fees of candidates for elected office. See, e.g., **Cassidy v. Willis,** 323 A.2d 598 (Del. 1974), **aff'd,** 419 U.S. 1042

(1974). Moreover, there is a presumption of legality which attaches to legislative actions taken by municipalities. **City of Albuquerque v. Jones,** 87 N.M. 486, 535 P.2d 1337 (1975).

OPINION

Nevertheless, there are two grounds on which the validity of Ordinance 360 may be seriously questioned. First, does a non-homerule municipality have inherent authority to adopt an ordinance imposing a filing fee on candidates for municipal judge? Second, does the absence of an alternative to the filing fee violate the equal protection guarantee of the constitution?

1. Municipal Authority

Non-homerule municipalities exist by virtue of statute and may exercise only such powers as are defined by law. **Sanchez v. City of Santa Fe,** 82 N.M. 322, 481 P.2d 401 (1971). The conduct of a municipal *{*167}* election is thus dependent upon constitutional and statutory authorization.

With respect to elected municipal officers, the New Mexico Constitution provides at Article VII, Section 2 that:

"Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this constitution."

and at Article V, Section 13 that:

"All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed."

The legislature has designated the position of municipal judge as one of the elective offices of a municipality, Section 3-10-1 NMSA 1978, and has defined the procedure by which a qualified elector may become a candidate for municipal office, Section 3-8-8 NMSA 1978. In particular, Section 3-8-8 provides that:

"A. After the publication of the notice of the election and between the hours of 8:00 a.m. and 5:00 p.m. on the fifth Tuesday preceding the day of election, a candidate for municipal office, or his authorized representative, shall file a declaration of candidacy in the office of the municipal clerk who shall provide a form for the declaration of candidacy which shall contain:

(1) the name, as shown on the affidavit of registration of the candidate, and the address of the candidate;

(2) the office to which the candidate seeks election;

(3) a statement that the candidate will be eligible and legally qualified to hold the office for which he is filing at the beginning of its term;

(4) a statement to the effect that the declaration of candidacy is an affidavit under oath and that any false statement made therein constitutes a fourth degree felony under the laws of New Mexico; and

(5) the signature of the candidate seeking that particular office.

B. The municipal clerk shall determine if the candidate filing a declaration of candidacy is a qualified elector of the municipality. If the candidate is a qualified elector of the municipality and he does not withdraw his name as provided in this section, the municipal clerk shall place the candidate's name on the ballot in the manner provided in Section 3-8-14 NMSA 1978."

Neither the constitution nor the laws authorize a municipality to impose a filing fee. Where a municipal ordinance requires such a fee it is usually authorized by statute. **Jenness v. Little,** 306 F. Supp. 925 (N.D. Ga. 1969), **app. dismd., sub nom Matthews v. Little,** 397 U.S. 94 (1970).

In another context, this office has concluded that "it is plain that the obligation of any candidate to pay a filing fee is one imposed entirely by statute." Opinion of Attorney General No. 58-125, dated June 12, 1958. See, e.g., Sections 1-8-41 and 1-8-42 NMSA 1978.

It therefore follows that without legislative authorization, a non-homerule municipality may not adopt an ordinance requiring candidates to pay a filing fee. An ordinance adopted by a municipality beyond the scope of its legislative *{*168}* authorization may be declared invalid. **City of Lovington v. Hall,** 68 N.M. 143, 359 P.2d 769 (1961).

2. Equal Protection

The United States Supreme Court has held that a state may not regulate access to the ballot by requiring candidates to pay filing fees if such a requirement could exclude otherwise qualified candidates from running.

In **Bullock v. Carter,** 405 U.S. 134, 149 (1972), the Court held that the Texas filing fee statute resulted in a denial of equal protection of the laws and explained:

"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 utlizes 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."

The filing fees challenged in **Bullock v. Carter, supra,** were, however, especially high; a candidate for county judge being required to pay 32% of the annual salary of the office. 405 U.S. at 138, n. 10.

The California filing fees challenged in **Lubin v. Panish,** 415 U.S. 709, 710 (1974) were more moderate, being one or two percent of the annual salary of the office sought. Nevertheless, the Court stated that:

"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. 415 U.S. at 718."

In New Mexico, a filing fee statute requiring candidates to pay a filing fee of six percent of the annual salary for that office was challenged by a candidate for United States Senate and struck down by a three judge district court in **Dillion v. Fiorina,** 340 F. Supp. 729 (D.N.M. 1972) on the basis of **Bullock v. Carter, supra.** Later, in **Gallagher v. Evans,** 536 F.2d 899 (10th Cir. 1976), the Court of Appeals held that enforcement of the statute with respect to candidates for other offices would deny those candidates equal protection of the laws. The statute at issue in these cases, Section 3-8-26 NMSA 1953, was repealed by Laws 1973, Chapter 228 and replaced by what are now Sections 1-8-41 and 1-8-42 which require only a fifty dollar fee from candidates for county offices and permit, as an alternative to payment of the fee, the filing of a statement to the effect that the candidate is financially unable to pay.

Thus, Ordinance 360, on its face, could be found in violation of equal protection for making wealth an absolute criteria for office without providing an alternative means of access to the ballot. It is, however, only the court which may declare a legislative enactment unconstitutional. **Espanola Housing Authority v. Atencio,** 90 N.M. 787, 568 P.2d 1233 (1977).

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