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COMMISSIONER OF
POLITICAL PRACTICES

BEFORE THE COMMISSIONER OF POLITICAL PRACITCES
OF THE STATE OF MONTANA

<p><i>David E. Wanzenried,</i> Complainant and Requestor, v. <i>Raphael Graybill,</i> Respondent.</p>	<p>Cause No. COPP-2020-DR-0001 DECLARATORY RULING</p>
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The Commissioner of Political Practices (COPP) hereby issues this Declaratory Ruling under the authority and direction of Mont. Code Ann. § 2-4-501 and Mont. Admin. R. 1.3.227 through 1.3.229. This Declaratory Ruling is “subject to judicial review in the same manner as decisions or orders in contested cases.” Mont. Code Ann. § 2-4-501.

PROCEDURAL BACKGROUND

The Commissioner incorporates the background set forth in the Statement of Matters Officially Noticed (here, *Stmt.*), issued February 4, 2020, which included the procedural events up until 12:30 that afternoon. Admin. R. Mont. 1.3.227(4)(b). That Statement identified five matters for declaratory ruling.

The COPP received a request to amend the Statement from Mr. Wanzenried, which the Commissioner denied on February 5. On February 7, the parties discussed and waived a determination on Issue One. At the end of the day, both parties submitted supplemental legal argument and authorities on Issues Two through Five.

On Tuesday February 11, the Commissioner notified the parties that waiving a determination on Issue One would deprive the Commissioner of jurisdiction to make a determination on the remaining issues, and that he would deny the declaratory ruling request for failing to identify a statute under which the parties legal rights would be affected. On February 12, the parties stipulated to reinstate the request for a declaratory ruling on Issue One and submitted supplemental argument and legal authority by noon on February 13.

The issues having been fully briefed, the Commissioner now issues the following Declaratory Ruling.

**STATEMENT OF MATTERS OFFICIALLY NOTICED
FOR DECLARATORY RULING**

This statement of matters officially noticed for the Commissioner's declaratory ruling are as follows, Mont. Code Ann. § 2-4-501, *et. seq.* and Mont. Admin. R. 1.3.227(4)(b).

1. Mr. Wanzenried's request for declaratory ruling (former campaign finance complaint) alleges a potential violation of Montana's deceptive election practices statute, Mont. Code Ann. § 13-35-207(4).
2. The request alleges that Mr. Graybill does not meet the Constitutional qualifications to campaign for the Office of the Montana Attorney General which provide that:
 - (1) No person shall be eligible to the office of governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, or auditor unless he is 25 years of age or older at the time of his election. In addition, each shall be a citizen of the United States who has resided within the state two years next preceding his election.
 - (2) Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.

Mont. Const. art. VI, § 3, (1) and (2).

3. The request alleges that Montana's Campaign Finance and Practices Act's definition of "election" applies to the provisions of the Montana Constitution, Mont. Code Ann. § 13-1-101(12).

4. The request alleges that Mr. Graybill has not actively practiced law for five years as required by the Constitution. Specifically, the request alleges that neither Mr. Graybill's experience clerking for the Ninth Circuit, nor his experience in practice of law outside of Montana constitutes active practice of law in Montana.
5. Mr. Wanzenried asserts that these issues are of statewide importance and should be resolved prior to the closing of candidate filing with the SOS in March 2020, prior to the primary election in June, or no later than the November 3, general election.

JURISDICTION

The Commissioner has jurisdiction to issue declaratory rulings “when doubt exists as to how a statute or rule administered by an agency affects the party’s legal rights.” Mont. Admin. R. 1.3.226, as incorporated by Mont. Admin. R. 44.11.102(1). At issue here is a statute found in Title 13, Chapter 35 of Montana Code Annotated over which the Commissioner, in conjunction with the County Attorneys, are charged with enforcement if a potential violation is found. Mont. Code Ann. § 13-37-124.

A person is guilty of false swearing, unsworn falsification, or tampering with public records or information, as appropriate, and is punishable as provided in 45-7-202, 45-7-203, or 45-7-208, as applicable, whenever the person: ...falsely makes a declaration or certificate of nomination...

Mont. Code Ann. § 13-35-207(4).

The declaratory ruling shall address the “applicability of any statutory provision or any rule or order of the agency.” Mont. Code Ann. § 2-4-501. Here, Mr. Wanzenried alleges that Mr. Graybill falsely declared on his certificate of nomination that he had or would meet the qualifications for the office of the attorney general.

FINDINGS OF FACT

1. On September 22, 2015, Mr. Graybill was admitted to practice law in Montana by the Montana Supreme Court; his license is currently in “active attorney member” status with the State Bar of Montana.
2. Mr. Graybill has earned his Continuing Legal Education credits and is certified by the Montana Commissioner of Continuing Legal Education as compliant from 2016 through 2020.

3. From August 2015 through August 2016, Mr. Graybill was a judicial law clerk for the Chief Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable Sidney R. Thomas, in Billings, Montana.
4. From October 2016 through July 2017, Mr. Graybill was an attorney with Susman Godfrey, LLP, located in Seattle, Washington.
5. On February 3, 2017, Mr. Graybill was admitted as a member of the Washington State Bar Association; his license is currently inactive as of the date of this writing.
6. From August 2017 through the present time, Mr. Graybill has served as Chief Legal Counsel to the Office of the Governor of Montana.
7. Mr. Graybill filed his declaration for nomination to the office of Attorney General with the Secretary of State on January 9, 2020.
8. Montana's deadline for candidates to file for office is March 9, 2020.¹
9. Montana's primary election will be held on June 2, 2020.²
10. Montana's general election will be held on November 3, 2020.³

DISCUSSION

Between January 9 and March 9, an individual running for attorney general in the 2020 primary election for a qualified political party's nomination must file a "declaration for nomination" with the Montana Secretary of State's office.

The declaration for nomination must include an oath of the candidate that includes wording substantially as follows: "I hereby affirm that I possess, or will possess within constitutional and statutory deadlines, the qualifications prescribed by the Montana constitution and the laws of the United States and the State of Montana." The candidate affirmation included in this oath is presumed to be valid unless proved otherwise in a court of law.

Mont. Code Ann. § 13-10-201(4).⁴

¹ Secretary of State's [2020 Primary and General Election Calendar](#) (last visited Feb 25, 2020); *see also* Mont. Code Ann. § 13-10-201(7).

² *Supra*, n.1 (2020 calendar).

³ *Supra*, n.1 (2020 calendar).

⁴ [Declaration for Nomination and Oath of Candidacy](#), Secretary of State's website (last visited Feb. 25, 2020).

Mr. Graybill filed his declaration for nomination with the Secretary of State on January 9, 2020 (FOF 7). The Commissioner presumes, as the statute instructs, Mr. Graybill's oath contained therein is valid unless proven otherwise.

A. Issue Five: Matters of Statewide Importance

In the Statement of Matters Officially Noticed, the Commissioner accepted the party's representations that the issues raised in the request for declaratory ruling were matters of statewide importance which must be resolved as expeditiously as possible. The Commissioner adopts that decision as if set out in full herein. *Stmt.*, at 3.

B. Issue Three: Election Definition

Mr. Wanzenried asserts that the definition of "election" found in Title 13 of Montana Code Annotated applies to the Constitutional qualifications for Attorney General:

Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.

Mont. Const. art. VI, § 3(2) (emphasis added).

In 1972, the newly adopted Constitution of Montana included a Transition Schedule that provided:

'All laws . . . and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution.'

Nelson v. City of Billings, 2018 MT 36, ¶22, 390 Mont. 290, 412 P.3d 1058 (quoting Mont. Const. Transition Schedule § 6).

Montana's election laws in force at the time of the adoption of the new Constitution contained the following definitions:

'Election' means a general, special or primary election held to choose a public officer or submit an issue for the approval or rejection of the people.

'General election' means an election held for the election of public officers throughout the state at times specified by law.

'Primary' or 'primary election' means a statutory procedure for nominating candidates to public office at the polls.

Sec. 23-2601(1), (2), and (5) R.C.M. 1947; (Exhibit 1).

Today, Title 13 of Montana Code Annotated contains the election laws of Montana which definitions apply to the whole of Title 13, “unless the context clearly indicates otherwise[.]” Mont. Code Ann. § 13-1-101. There are three definitions at issue here:

‘Election’ means a general, special or primary election held pursuant to the requirements of state law, regardless of the time or purpose.

‘General election’ means an election that is held for offices that first appear on a primary election ballot, unless the primary is canceled as authorized by law, and that is held on a date specified in 13-1-104.

‘Primary’ or ‘primary election’ means an election held on a date specified in 13-1-107 to nominate candidates for offices filled at a general election.

Mont. Code Ann. § 13-1-101(12), (20) and (36).

A primary election in an even-numbered year is “the first Tuesday after the first Monday in June[.]” *Id.*, § 13-1-107(1). In the primary, qualified political parties “nominate candidates” to run for the offices “filled at a general election” which occurs in November. *Id.*, § 13-1-101(36). A general election in an even-numbered year is “on the first Tuesday after the first Monday in November.” *Id.*, § 13-1-104(1). In November, Montanans choose between the political party candidates, minor party candidates, and any write-in candidate to elect an individual to fill statewide office. Stated another way, the June primary nominates political party candidates to run in the November election, but the “election” to statewide office is not complete until the general election ballots have been cast, counted and certified in late November, early December of 2020. (*See supra*, n.1.)

In response, Mr. Graybill points out that the Constitution requires candidates for Governor to “file jointly with a candidate for lieutenant governor in primary elections,” and that “the offices of governor and lieutenant governor are voted upon together in primary and general elections.” Mont. Const. art. VI, § 2(2). The immediately preceding section provides that the executive branch officials “shall be elected by the qualified electors at a general election provided by law.” *Id.*, § 2(1).

The Commissioner finds that the term “election” as used in the executive branch “qualifications” section of the Montana Constitution (*id.*, § 3) means the general election to office (*id.*, § 2(1)), which occurs this cycle on November 3, 2020. The Commissioner further finds that the statutory definitions in place at the time the Constitution was

adopted are consistent with the holding that “election” means the general election “held for offices” and not the primary election for party candidate nominations, Mont. Code Ann. § 13-1-101(20).

Therefore, Mr. Graybill must meet the basic attorney general eligibility requirements no later than November 3, 2020.

C. Issue Two: Preliminary Eligibility

1. Age, Citizenship, and Residency

Neither party alleges that Mr. Graybill under 25 years of age, that he is not a United States citizen, or that Mr. Graybill will have failed to maintained residency in the state of Montana for the two years proceeding November 3, 2020. Therefore, in the Commissioner’s opinion, Mr. Graybill has met the age, citizenship, and residency qualification requirements in order to run for the executive branch office of attorney general. Mont. Const. art. VI, § 3(1).

The portions of Mr. Graybill’s declaration for nomination submitted under oath as to age, citizenship and residence are therefore found not to be in violation of Mont. Code Ann. § 13-35-207(4).

2. Admission

Mr. Graybill was admitted to practice law before the courts of the State of Montana on September 22, 2015 (FOF 1). The 2020 general election, at which an individual will be selected to be Montana’s next Attorney General will be held on November 3, 2020. If the individual selected is Mr. Graybill, he will have been “an attorney in good standing admitted to practice law in Montana” for over five years at the time of the general election this year. Mont. Const. art. VI, § 3(2); *see also* Mont. Code Ann. § 13-10-201(4) (oath requires candidate to affirm, “that I possess, *or will possess* within constitutional and statutory deadlines, the qualifications” emphasis added).

This interpretation is also consistent with the Montana Supreme Court’s holding that “that admission to the practice of law is conferred in accordance with the rules of this Court and not by an attorney’s active Bar membership status.” *Cross v. VanDyke*,

2014 MT 193, ¶ 30, 379 Mont. 535, 332 P.3d 215 (referring to *Shapiro v. Jefferson Co.*, 278 Mont. 109, 923 P.2d 543 (1996)).⁵

Therefore, in the Commissioner’s opinion the facts establish that Mr. Graybill has met the “admitted to practice law in Montana” qualification requirement in order to run for attorney general, Mont. Const. art. VI, § 3(2).

The portions of Mr. Graybill’s declaration for nomination submitted under oath as admission to practice law in Montana are therefore found not to be in violation of Mont. Code Ann. §13-35-207(4).

D. Issue Four: Practice Requirements

1. Five Year Requirement

Mr. Wanzenried asserts that Mr. Graybill’s experience clerking for the Ninth Circuit does not meet the definition of “active practice” as required by the Constitution and that Graybill’s experience in practice of law outside of Montana does not constitute “active practice of law” in Montana as required by the Constitution. Mr. Graybill asserts that the Constitution requires that a candidate for attorney general have “two years of residency in the state and five years of active practice of law without geographic limitation.”

To refresh, the Constitution adds to the qualifications for executive office that to be eligible for the office of attorney general, the person must be

an attorney in good standing admitted to practice law in Montana who has engaged in the active practice of law thereof for at least five years before election.

Mont. Const. art. VI, § 3(2). This provision has some parallels with the qualifications for judges, however,

[t]he Constitution provides a key relevant distinction between the qualifications for judicial officers and the qualifications for Attorney General. While candidates for both offices must reside within the state for two years immediately preceding election and both must be admitted to the practice of law in Montana, a candidate for Attorney General must

⁵ Although the *Van Dyke* decision concerned election to the office of Supreme Court Justice, it held the phrase “admission to the practice of law in Montana” (Article VII, section 9(1)), “does not connote active membership in the State Bar.” *Van Dyke*, ¶30. The Court held the admission requirement was satisfied where the candidate had three years in “active” status and six years “inactive” status with the State Bar of Montana. *Van Dyke*, ¶¶2, 33.

have “engaged in the active practice thereof for at least five years before election.”

VanDyke, ¶ 18. When interpreting constitutional language, “where both parties constructions ... ‘appear to be plausible[,] ... the sentence is ambiguous as to the present issue.” *VanDyke*, ¶ 21 (quoting *Racicot v. District Court*, 243 Mont 379, 385, 794 P.2d 1180 (1990)). “If after reviewing the plain words, however, confusion or ambiguity exists, we turn to the legislative history for guidance.” *State v. Gregori*, 2014 MT 169, ¶ 13, 375 Mont. 367, 328 P.3d 1128.

Here, the Commissioner finds that it is clear that a candidate for Attorney General must have been engaged in the “active practice” of law “for at least five years before election,” but that it is ambiguous whether or not the constitution requires the active practice to have been in Montana, and therefore necessary to resort to legislative history. Mont. Const. art. VI, § 3(2).

The legislative history for a constitutional provision begins with the Constitutional Convention itself. On February 24, 1972, the committee recommendations for the office of Attorney General were introduced:

Delegate Joyce: Section 3, subsection 2, of the majority and minority reports are identical. They are self-explanatory; what we’ve done is to require the Attorney General to have 5 years to be admitted – that the Attorney General shall be an attorney in good standing, admitted to practice in the State of Montana for 5 years. We did this to conform with the Judicial Article. It is self-explanatory....

Mont. Const. Conv., Vol. IV, at 893. In the questions that followed, conflicting versions of the five-year requirement were given:

Delegate Studer: The way I read that Section 2, I don’t think that he’s have to be engaged in 5 years proceeding. Wouldn’t 5 years of law practice outside of the state and then if he went back and was elected, as Section 1 says, and is otherwise a qualified voter – if he were back here for 2 years after he practiced law for 5 years, wouldn’t he be eligible? Under your –

Delegate Joyce: Yes. Yes, he would, so I guess I gave the wrong – Mr. Chairman.

Chairman Aasheim: Mr. Joyce.

Delegate Joyce: Yes, I guess that’s right. If he had engaged in 5 years’ active practice and then left the state and then came back, he’d have to

reside 2 years immediately preceding his election. So it isn't really the same as residency. You're correct sir....

Delegate Studer: Then if he had practiced, we'll say, 3 years and was out and practiced somewhere else for a couple of years and was back in here, would he still be qualified if he was in here for 2 years previous to the time he was elected? That would be a total of five years of active practice.

Delegate Joyce: I guess he would, yes, Mr. -...

Delegate Joyce: ...The intention of the majority of the Executive Committee was to put the Attorney General on the same status as the district judge, that he'd have to practice law in Montana for 5 years, learn the procedure in Montana so, therefore – so that he could then be a good, qualified, experienced lawyer when he became Attorney General...

Mont. Const. Conv., Vol. IV, at 895.

In the Commissioner's opinion, Delegate Joyce's answers to the questions posed by Delegate Studer give credit to a candidate for Attorney General engaged in "active practice of law" both outside and inside Montana. According to the assertions of the delegates in support of the attorney general eligibility requirements: a candidate must have been admitted to the Montana Bar for a period of at least 5 years, engaged in the active practice of law for at least 5 years, and a resident of Montana for the two years proceeding election.

By the time of the general election, Mr. Graybill will have been admitted to the bar for over 5 years (*supra* at C.2), a resident of Montana for the two years proceeding election (*supra* at C.1), and the remaining issue is whether Mr. Graybill's experience qualifies as "active practice of law" for five years.

2. Active Practice

Mr. Graybill asserts that he has always been in "active status" with the Montana State Bar since his admission in September of 2015. *VanDyke*, ¶ 13. "Only active and active military service members may practice law in the State of Montana." *Id.* (citing State Bar of Montana By-Laws, art. 1, § 3(b)). There has been no evidence provided to the Commissioner to the contrary, therefore the Commissioner accepts Mr. Graybill's

representation that he has been an active attorney member of the state bar, in good standing since his admission in September of 2015 (FOF 1 and 2).⁶

Neither party asserts that Mr. Graybill has not been actively practicing law in the state of Montana since August 2017 when he began serving as the Governor's Chief Legal Counsel (FOF 6). At the time of the election in November, Mr. Graybill will have engaged in three years and three months of "active practice" in Montana as an attorney. At issue here are whether Mr. Graybill's experience as a judicial law clerk for a year, and the 10 months he practiced law outside of Montana meet the minimum eligibility requirements of "active practice" under the Constitution.

The Commissioner is mindful of the guidance in the statute itself that the "candidate affirmation included in this oath is presumed to be valid unless proved otherwise." Mont. Code Ann. § 13-10-201(4). Mr. Graybill also asserts that the Supreme Court's "broad interpretation of minimum eligibility requirements" should fall in favor of finding eligibility to run for office, referring to *VanDyke*, ¶30.

1. Judicial Law Clerk

Mr. Wanzenried asserts that the law clerk handbook prevented Mr. Graybill from actively practicing law while clerking from August 2015 through August 2016 for a Judge in the Ninth Circuit Court of Appeals in Billings Montana (FOF 3).

The handbook provides:

If an outside activity relates in any way to the law or the legal system, *consult with your judge before* engaging in the activity. During your clerkship, you *may not* practice law. The rules permit only a few narrow exceptions: you may appear pro se; you may perform routine legal work concerning the management of your own affairs, or those of a family member (although you may not enter an appearance in federal court); and you may act pro bono in certain civil cases (although you may not enter an appearance in any state or federal court or administrative agency).

Federal Judicial Center, "Maintaining the Public Trust, Ethics for Federal Judicial Law Clerks," at 20 (4th Ed. 2013) (emphasis original). In the Commissioner's opinion, the

⁶ Mr. Graybill was exempt from the continuing legal education requirements during 2015 as it was the year he was admitted. Rules for Continuing Legal Education 4(F)(3) (Approved by Montana Supreme Court, April 3, 2013).

handbook plainly states that a clerk can engage in active practice of law with the permission of their supervising judge.

Mr. Graybill points out that the Montana Supreme Court amended and adopted the Rules for Admission to the Bar of Montana, on October 30, 2018, pursuant to its power to regulate the bar in Mont. Const. art. VII, § 2(3). Mont. Supreme Ct., AF 11-0244, *Order* (Oct. 13, 2018) (here, Admission Rules). The Court’s amendments permit the State Bar to admit an attorney to the Montana bar on motion if they meet certain qualifications. One of the qualifications is having been admitted to practice law in another jurisdiction and “engaged in the active practice of law for at least five of the seven years preceding application to Montana...” *Id.*, at V.A.2. In turn, the court defined the “active practice of law” to mean:

[A]ctive and continuous engagement or employment in the performance of legal services and includes the following activities if performed or treated as performed while the applicant was admitted in active status:

- a. representation of one or more clients in the practices of law;
- b. service as a lawyer with a United States local, state, territorial or federal agency;...
- e. service as a judicial law clerk in a local, state, territorial or federal court of record in the United States, which service was performed after admission to practice in the jurisdiction in which the service was performed;...

Id., at V(D)(1) (a), (b) and (e).

Mr. Graybill served 1 year as a federal judicial law clerk for a Judge in the Ninth Circuit Court of Appeals, in Billings, Montana (FOF 3). Setting aside that Mr. Graybill was already admitted to practice law in Montana in 2015 (FOF 1), if he had sought admission on motion at the conclusion of his clerkship the Montana Supreme Court’s rules for admission would have treated Mr. Graybill’s service as a law clerk as constituting the “active practice of law.” *Id.*, at V(D)(1)(e).

Therefore, the Commissioner finds a sufficient legal basis to conclude that Mr. Graybill’s clerkship for the Ninth Circuit while in Montana would qualify as being “engaged in the active practice of thereof for at least five years before election”, Mont. Const. art. VI, § 3(2).

The portions of Mr. Graybill's declaration for nomination submitted under oath as meeting the "active practice" requirements while a judicial law clerk are not in violation of Mont. Code Ann. §13-35-207(4).

2. Representing Clients in other Jurisdictions

Mr. Wanzenried also asserts that Mr. Graybill's experience as an attorney with Susman Godfrey, LLP, for 10 months is not qualifying experience in the active practice of law in Montana (FOF 4, 5). As found above, the practice of law in other jurisdictions was considered a part of five-year active practice of law minimum eligibility requirements for Attorney General by the Delegates to the Constitutional Convention (*supra* at D.1).

The Supreme Court's rules for admission also consider "[r]epresentation of one or more clients in the practices of law" as having been engaged in the "active practice of law." Admission Rules, at V(D)(1)(a). At the time Mr. Graybill represented clients in private practice, he was also admitted to the Montana State Bar in "active status" (*infra* at E). Had a client wanted representation in Montana's courts from an attorney with Susman Godfrey, LLP, Mr. Graybill would have been eligible to provide that representation. At no point in time did Mr. Graybill chose to go on inactive status with the State Bar, a decision which would have prevented him from representing clients in Montana. *VanDyke*, ¶ 16.

Therefore, the Commissioner finds there is a sufficient legal basis to conclude that Mr. Graybill's experience as an attorney with Susman Godfrey, LLP would qualify as being "engaged in the active practice of thereof for at least five years before election." Mont. Const. art. VI, § 3(2).

The portions of Mr. Graybill's declaration for nomination submitted under oath as meeting the "active practice" requirements while an attorney out of state are not in violation of Mont. Code Ann. § 13-35-207(4).

Having found that Mr. Graybill has been engaged in the active practice of law for one year as a judicial law clerk (FOF 3), 10 months in private practice (FOF 4), and will have served three years and three months as Chief Legal Counsel for the Governor of Montana by the time the election is held in November 2020 (FOF 5), the Commissioner finds sufficient factual and legal support to conclude that Mr. Graybill will meet the

minimum Constitutional eligibility requirements in order to run for Montana Attorney General in the 2020 election cycle. As the Supreme Court observed, “the Constitution ... determines minimum eligibility; the voters decide who is qualified to serve.” *Cross*, ¶131.

E. Issue One: Deceptive Election Practices

The Commissioner turns to the remaining allegation to be determined, the campaign finance law regarding deceptive election practices.

A person is guilty of false swearing, unsworn falsification, or tampering with public records or information, as appropriate, and is punishable as provided in 45-7-202, 45-7-203, or 45-7-208, as applicable, whenever the person: ...falsely makes a declaration or certificate of nomination...

Mont. Code Ann. § 13-35-207(4). The statute requires that the individual submitting a declaration of nomination had to act knowingly or purposefully in submitting false information.

In order to establish that Mr. Graybill violated the deceptive election practices statute, it would be necessary to prove that Mr. Graybill was acting knowingly or purposefully while making a false statement under oath to the Secretary of State when filing his declaration for nomination which contained information he knew to be untrue.

There is no evidence to support a finding that Mr. Graybill believed he would fail to meet the qualifications for attorney general by November 2020, and despite that belief filled out the declaration with false information. To the contrary, it appears to the Commissioner that Mr. Graybill thought carefully about whether or not he would meet the minimum eligibility requirements and reasonably concluded he could.

Even if any of the Commissioner’s interpretations or applications of laws herein were incorrect, the Commissioner still would not find a violation of this statute. There is ample evidence that Mr. Graybill had a good faith basis both factually and legally for filling the form out as he did and for making the arguments he asserts here, and therefore the Commissioner concludes Mr. Graybill is not in violation of Montana’s deceptive election practices law, Mont. Code Ann. § 13-35-207(4) or (5).

DECLARATORY RULING

Based on the preceding findings of fact and discussion of law, the Commissioner makes the following declaratory rulings:

1. There is insufficient evidence to support a finding that Mr. Graybill purposefully or knowingly submitted a false declaration of nomination to the Secretary of State in violation of Montana’s deceptive election practices statute, Mont. Code Ann. § 13-35-207.
2. Mr. Graybill will meet the Constitutional eligibility requirements for age, US Citizenship, and Montana residence by the general election in November 2020. Mont. Const. art. VI, § 3(1).
3. Mr. Graybill will meet the Constitutional eligibility requirements “to the office of attorney general” as he is “an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before” the general election in November 2020. Mont. Const. art. VI, § 3(2).
4. The Montana Constitution provides that candidates for Attorney General are “elected by the qualified electors at a general election,” which will occur on November 3, 2020. Mont. Const. art. VI, § 2(1); Mont. Code Ann. § 13-1-104.
5. Consistent with Mont. Const. art. VI, § 2(1), the election laws of Montana also provide that candidates for statewide office, like the Attorney General, are elected in the general election. Mont. Code Ann. § 13-1-104.
6. That this is a matter of statewide importance which should be resolved as quickly as possible.

NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW

The parties are hereby notified that this declaratory ruling of the Commissioner “shall be subject to judicial review in the same manner as decisions or orders in contested cases.”, Mont. Code Ann. § 2-4-501.

Dated this 28th day of February, 2020.



Jeff Mangan
Commissioner of Political Practices

cc: David Wanzenried
Raphael Graybill

CHAPTER 25

ELECTRONIC VOTING SYSTEMS

(Repealed—Section 248, Chapter 368, Laws of 1969)

23-2501 to 23-2507. Repealed.

Repeal
Sections 23-2501 to 23-2507 (Secs. 1, 2,
4 to 8, Ch. 20, L. 1965; Secs. 1, 2, Ch.

220, L. 1967) relating to the use of elec-
tronic voting systems, were repealed by
Sec. 248, Ch. 368, Laws 1969.

CHAPTER 26

DEFINITIONS AND GENERAL PROVISIONS

Section
23-2601. Definitions.
23-2602. Elections by secret ballot.
23-2603. Determination of candidate elected.
23-2604. General election, when to be held.
23-2605. Time of opening and closing of polls.

23-2601. Definitions. As used in Title 23 and Title 37, unless the con-
text clearly indicates otherwise, the following definitions apply:

(1) "Election" means a general, special, or primary election held to
choose a public officer or submit an issue for the approval or rejection of
the people.

(2) "General election" means an election held for the election of public
officers throughout the state at times specified by law.

(3) "Special election" means an election called by the proper author-
ities to fill vacancies or to raise money.

(4) "Vacancy" means an office which does not have an incumbent
who has a right to exercise its functions and take its fees or emoluments.

(5) "Primary" or "primary election" means a statutory procedure
for nominating candidates to public office at the polls.

(6) "Party" means any political organization which at the last pre-
ceding election for governor polled at least 3% of the votes for governor.

(7) "Taxpayer" means a person who has paid a tax on property as-
sessed on a county or city assessment roll next preceding the election at
which a question is to be submitted to the vote of the taxpayers.

(8) "Registrar" means the county clerk and recorder and any regularly
appointed deputy clerk and recorder.

(9) "Commissioners" means the board of county commissioners.

(10) "City" means any incorporated city or town.

(11) "Council" means any municipal council or commission.

History: En. Sec. 1, Ch. 368, L. 1969;
amd. Sec. 1, Ch. 365, L. 1977.

Title of Act

An act for the codification and general
revision of the laws relating to the elec-
tion laws of the state of Montana; repeal-
ing sections 23-101 through 23-106, 23-201
through 23-202, 23-301 through 23-311, 23-
401 through 23-407, 23-501, 23-501.1, 23-
502 through 23-534, 23-601 through
23-604, 23-604.1, 23-604.2, 23-605 through

Compiler's Note

Chapter 368, Laws 1969 provided: "It
is the intent of the legislative assembly
that all nonamendatory sections of this
bill be codified in Title 23, Revised Codes
of Montana, 1947."

EXHIBIT

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23-612, 23-701 through 23-713, 23-801 through 23-820, 23-901 through 23-929, 23-931, 23-933 through 23-936, 23-1001, 23-1008 through 23-1009, 23-1101 through 23-1107, 23-1109 through 23-1117, 23-1201 through 23-1228, 23-1301, 23-1302(1), 23-1302(2), 23-1303, 23-1303.1, 23-1304 through 23-1321, 23-1401 through 23-1406, 23-1501 through 23-1503, 23-1601 through 23-1608, 23-1608A, 23-1809 through 23-1618, 23-1701 through 23-1715, 23-1801 through 23-1808, 23-1812 through 23-1819, 23-1901 through 23-1904, 23-2001 through 23-2012, 23-2014, 23-2101 through 23-2111, 23-2201 through 2206, 23-2301 through 23-2323, 23-2401 through 23-2411, 23-2501 through 23-2507, R. C. M. 1947.

Amendments

The 1977 amendment substituted "Title 23 and Title 37" in the introductory clause for "this act"; substituted subdivision (1) for a subdivision reading "Election" means a general, special, primary nominating, municipal election, or an election in a school district"; inserted "public" in subdivision (2) and made minor changes in phraseology and style.

Cross-References

Election offenses and corrupt practices, sec. 23-4701 et seq.

DECISIONS UNDER FORMER LAW**"General Election"**

A general election is one held for the election of officers throughout the state. State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162.

"Special Election"

A special election is one held to supply a vacancy in a public office, or one in which is submitted to the electors a proposition to raise money for any public improvement. State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162.

"Vacancy"

The word vacancy as applied to a public office has no technical meaning, and it is not to be taken in a strict technical sense in every case. It may be said that an office is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments even though the vacancy is not a corporal one. "An office without an incumbent is vacant." LaBorde v. McGrath 116 M 283, 292, 149 P 2d 913.

23-2602. Elections by secret ballot. All elections shall be by secret ballot.

History: En. Sec. 2, Ch. 368, L. 1969; amd. Sec. 1, Ch. 8, L. 1973.

Amendments

The 1973 amendment inserted "secret" before "ballot" at the end of the section.

23-2603. Determination of candidate elected. The person receiving the highest number of votes for any office at an election is elected to that office.

History: En. Sec. 3, Ch. 368, L. 1969.

23-2604. General election, when to be held. A general biennial election shall be held throughout the state in every even-numbered year on the first Tuesday after the first Monday of November.

History: En. Sec. 4, Ch. 368, L. 1969.

Election law violations, corrupt practices, sec. 23-4701 et seq.

Initiative and referendum, sec. 37-101 et seq.

Cross-References

Cities and towns, elections of officers, secs. 11-701 to 11-734.

23-2605. Time of opening and closing of polls. (1) Except as provided in subsection (2):

(a) in precincts having 100 or more registered electors, the polls must be opened at 8 a.m. on the morning of election day and must be kept open continuously until 8 p.m. of that day;