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OPINION NO. 09-02

From: Daniel S. Jurkowitz, Deputy County Attorney
Christopher Straub, Chief Civil Deputy County Attorney

Date: December 17, 2009

Re: *Investigation of Potential Violations of A.R.S. § 38-296 - "Resign-to-Run" Provisions.*

EXECUTIVE SUMMARY:

Due to a conflict of interest, Arizona Attorney General Terry Goddard has referred to this Office for review and potential civil action a series of allegations concerning purported violations of the "resign-to-run" laws. These allegations have been asserted against the Attorney General himself, as well as against Senator John Huppenthal, Representative Kyrsten Sinema, Representative Ray Barnes, and Representative Daniel Patterson. Arizona's "resign-to-run" laws are found in Article 22, Section 18 of the Arizona Constitution and in A.R.S. § 38-296. These resign-to-run laws prohibit an incumbent of a salaried elective office from offering himself or herself for nomination or election to other salaried offices except during the last year of the officer's term. See A.R.S. § 38-296(A). An incumbent officer who files a "nomination paper" or makes a "formal public declaration of candidacy" before the last year of the officer's term is "deemed to have offered himself for nomination or election" to another office. A.R.S. § 38-296(B). An incumbent who does either or both commits "misfeasance in office," and the office currently occupied by the incumbent is deemed vacant. A.R.S. § 38-296(E). If the incumbent does not vacate the office, a *quo warranto* civil action may be brought to remove the offender. A.R.S. § 12-2041 *et seq.*

For each of the five public officers with respect to whom the allegations have been made, the time window for submission of nominating papers for the next election cycle will not occur until next year, the last year of their terms. A.R.S. § 16-311. Therefore, the issue in this Opinion is whether these public officers have made "formal public declarations of candidacy" for public offices other than those they currently occupy.

For the reasons discussed more fully below, it is the opinion of this Office that several of the allegedly improper acts clearly fall outside the scope of the statute's prohibitions, or within statutory exemptions from those prohibitions. The remainder, though more questionable, do not

so clearly rise to the level of a “formal public declaration” as to make an action against the incumbents appropriate given the policy, established in case law, disfavoring the removal of a popularly elected official without clear evidence of impropriety. *McCarthy v. State*, 55 Ariz. 328, 334-335, 101 P.2d 449, 451 (Ariz. 1940) (“Statutes imposing qualifications upon the right to hold office should receive a liberal construction as it impairs the right of the people to select officers of their own choosing. Furthermore, disqualifications provided by the legislature are construed strictly and will not be extended to cases not clearly within their scope, and the rule is also that there is a presumption in favor of the eligibility of one who has been elected or appointed to public office.”); see also *Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 (1999) (reluctance to remove popularly elected office holder).

In addition to explaining the legal basis for our conclusions with respect to each of the five public officers, the purpose of this formal County Attorney Opinion is provide guidance to other salaried public officers regarding the resign-to-run laws and to illustrate the laws’ current shortcomings in a way that might provide guidance to the Legislature to remedy the same.

DISCUSSION:

Historical background.

Arizona voters approved Article 22, Section 18 of the Arizona Constitution, proposed by Laws 1979, S.C.R. 1002, at the 1980 general election. It states:

Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

The purpose of the amendment is to encourage elected public officers to devote themselves exclusively to the duties of their current office, prevent abuse of a current office to campaign for a second office, safeguard the expectations of the electorate, and hinder stepping-stone candidates whose chief motivation is to further their own careers at the expense of their current public duties. S. Con. Res. 1002, Legislative Council Arguments Favoring Proposition 100 (1979) (adopted). See also, *Joyner v. Mofford*, 706 F.2d 1523, 1532 (9th Cir. 1983).

In 1982, the Attorney General first confronted the question of when an incumbent “offer[s] himself for nomination or election” within the meaning of the constitutional provision and concluded that this can occur prior to and separately from the filing of a nominating paper under A.R.S. § 16-311(A). Op.Atty.Gen. I82-001. Because nominating papers for state offices are filed in the last year of the terms of incumbent state officers, the Attorney General reasoned that the filing of a nominating paper could not be the only trigger to the resignation requirement; otherwise the constitutional provision would be meaningless and its purposes thwarted. *Id.* The Attorney General concluded his opinion by suggesting that the Legislature should specifically define the conduct that would violate the constitutional provision. *Id.* The Attorney General suggested that some examples might be public announcement of candidacy, organizing a campaign committee, and raising money. *Id.*

In 1984, the Legislature responded by adopting A.R.S. § 38-296(B) to better define the prohibited conduct. It states:

B. An incumbent of a salaried elected office shall be deemed to have offered himself for nomination or election to a salaried local, state or federal office upon the filing of a nominating paper pursuant to § 16-311, subsection A or formal public declaration of candidacy for such office whichever occurs first.

Laws 1984 (2nd Reg. Sess.) Ch. 275, § 2.

Since its adoption, there have been no reported court decisions interpreting the phrase “formal public declaration.” The Attorney General, however, has issued two opinions relevant to our analysis concerning this statute.

In the first such opinion, issued in 1988, the Attorney General concluded that an incumbent state officer, whose nominating petition had been circulated by others for the purpose of “drafting” him to run in the upcoming gubernatorial recall election, did not have to resign his office if he himself did not “make a formal public declaration of candidacy, or personally file the nominating paper required by A.R.S. § 19-212, or otherwise offer himself as a candidate in the recall election.” Op.Atty.Gen. I88-029.

In the second opinion, the Attorney General opined that an incumbent state officer does not violate the resign-to-run laws by forming an “exploratory committee to consider the possibility of a candidacy” for another salaried elective office. In that opinion, the Attorney General added a caution that “the mere creation of an exploratory committee does not automatically shield an incumbent from the resign-to-run laws if other statements or conduct constitute a formal declaration of candidacy.” Op.Atty.Gen. I93-003. That same year the Legislature adopted another statute, A.R.S. § 16-903, specifically providing in what was then subsection E (now subsection F) that an elected official does not offer himself for nomination for purposes of the resign-to-run law solely by designating a candidate’s campaign committee. Laws 1993 (1st Reg. Sess.) Ch. 226, § 3.

Application of the Resign-to-Run Law to Each Officer.

It is with this limited historical and precedential background in mind that we evaluate the allegations presented as to each of the five incumbents.

Representative Patterson

Representative Patterson has unambiguously announced his candidacy for reelection to the same office. He maintains a publicly-accessible campaign website and this summer posted the following statement on dpatterson.blogspot.com: “I’m proud to announce I’ll be running for re-election in 2010 to keep serving the good people of Tucson’s downtown, south and southeast sides as a State Representative from Arizona’s Legislative District 29.” Representative Patterson, however, has not violated the resign-to-run laws because he has declared himself a candidate for reelection to the *same office*. This is specifically permitted by A.R.S. § 38-296(D):

D. 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 added.)

A comma inserted after the emphasized language would have made this point more clearly, but that this was the intent of the Article 22, Section 18 is confirmed by the ballot language which stated: "A "yes" vote shall have the effect of requiring salaried office holders to resign their position if they desire to run for a *different* salaried local, state or federal office except during the final year of their term" (emphasis added). S. Con. Res. 1002, Proposition 100 Ballot Format (1979) (adopted).

Attorney General Goddard

Attorney General Goddard announced his *intention* to run for Governor on May 27, 2009 at a meeting of the Grand Democrats with approximately sixty people in attendance. He expressed this intention in response to a question from a member of the audience. He stated: "Since you were kind enough to ask, I intend to run for Governor." The question is whether this qualifies as a "formal public declaration of candidacy."

Given the lack of prior judicial interpretations of this phrase, we are left with the standard rules of statutory construction. The cardinal rule of statutory construction is to give effect to the intention of the Legislature. *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002). "Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial." *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (alteration in original) (emphasis omitted) (quoting *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949)). Words in a statute are to have their plain and ordinary meaning unless the context dictates otherwise. *Haas v. Colosi*, 202 Ariz. at 58, 40 P.3d at 1251. We may refer to a widely used dictionary to determine the meanings of undefined statutory terms. See *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 183, ¶ 33, 181 P.3d 219, 230 (App. 2008).

"Formal" has been defined as: "1. Pertaining to or following established procedural rules, customs, and practices 2. Ceremonial." BLACK'S LAW DICTIONARY (8th ed. 2004). "Public" has been defined as: "1. Relating or belonging to an entire community, state or nation 2. Open or available for all to use, share, or enjoy." *Id.*

Attorney General Goddard did not announce without equivocation that he was *currently* running for Governor; he simply stated that this was his future intent. Even assuming that this statement qualifies as a "declaration of candidacy," it was neither "formal" nor "public" as defined above. With respect to the former, it was an impromptu response to a question from a member of the audience. It did not follow "established procedural rules, customs, and practices" - to the extent any exist for announcing one's candidacy - and it certainly was not "ceremonial," which would imply some degree of forethought. As to the latter, a statement to a meeting of a political organization, attended by a limited number of people, does not qualify as a "public"

declaration of candidacy. The statement was not made “to an entire community, state or nation,” nor was it “available for all to use, share, or enjoy” at the time it was made. Accordingly, we conclude that Attorney General Goddard did not violate the resign-to-run laws.

Representative Sinema

Representative Sinema filed paperwork to form a candidate’s committee under A.R.S. § 16-903(A) for State Senate on December 23, 2008. Designating a candidate’s committee could be construed as both a “formal” and a “public” declaration under the previously discussed definitions. But as noted above, A.R.S. § 16-903(F) explicitly exempts this action, in and of itself, from constituting a “formal public declaration of candidacy.” Thus, there is no violation and no cause exists for removal based solely upon the committee designation. Nevertheless, on December 29, 2008, she terminated that committee and instead designated an exploratory committee.

On December 31, 2008, a statement was posted on one of Representative Sinema’s Facebook pages, specifically, her “politician” page, that read: “This is my brand new ‘politician’ page. I’m running for State senate in 2010 and would love to have your support. Join as a supporter and I’ll keep you updated on all the work that we’re doing at the capitol this year.” On June 10, 2009, however, she amended this statement to read that she was “CONSIDERING a run for State Senator” (emphasis in original) and told the Arizona Republic in September, 2009, that the previous post was a “typographical error.”

Facebook members have unlimited access to Representative Sinema’s Facebook pages, which include the main “personal” page and other separate pages, such as the politician page. This was apparently the case in December, 2008, since Representative Sinema told us that she has not changed her security settings since opening her Facebook account earlier that year. Facebook is one of the most frequently visited internet sites. Membership in Facebook, and, thus, access to other members’ Facebook pages, is easily and quickly obtained. Although one first must become a member of Facebook to view Representative Sinema’s accessible Facebook pages, one could reasonably argue that the December 31, 2008 posting on the politician page of her Facebook site was both “formal” and “public.” As the Attorney General has indicated, however, an incumbent cannot be held responsible for the independent actions of third persons ostensibly made on behalf of the incumbent but in fact not made at the direction of the incumbent. Op.Atty.Gen. I88-029. Therefore, we needed to determine whether Representative Sinema was directly responsible for the subject posting.

When we questioned Representative Sinema at length with respect to the December 31, 2008 Facebook posting, she steadfastly denied that she herself had made the posting and she denied giving anyone authorization to post that statement on her Facebook politician page. At one point in the interview, Representative Sinema further stated that she did not think she herself had created the politician page, but she was aware that in December, 2008, “something had been created,” referring to the politician page. In any event, Representative Sinema said she *never* used the politician page and did not even view the politician page until June 10, 2009, when she learned there might be a problem with a posting on that page.¹ She furthered stated that upon

¹ As best as we can determine without asking Facebook Inc. to do an audit on that page, there were only two

discovering the problematic language in that post, she immediately deleted it and created the new post indicating that she was merely considering a run for the Senate.

Representative Sinema said she has exclusively used her “personal” page for everything, including political issues and her exploratory activities for the Senate race. And with respect to her personal page, she states that she has been very careful to assert that she is merely considering or exploring a possible race for the Senate.

When questioned further, Representative Sinema said she does not know who posted the December 31, 2008 statement and only assumes it may have been one of her volunteers. She explained that she had given password access to her Facebook account to her volunteers to make content changes to her main, “personal,” page. When asked which one of her volunteers could have made the posting on her politician page, she responded that she did not know and indicated that she had many volunteers who could have done so.

A violation of A.R.S. § 38-296 is civil in nature. We do not have the ability to subpoena records prior to the initiation of an enforcement action to verify further the statements of Representative Sinema or of the complaining witnesses, even assuming that such records exist. Nevertheless, the fact that she quickly changed her committee designation from “candidate” to “exploratory” suggests that she was aware of the restrictions on campaigning imposed by the resign-to-run laws at the time of the alleged posting by one of her many volunteers in December of 2008. It seems unlikely that Representative Sinema would have made this change in designation of committees but not have changed the posting on her politician page had she been aware of it sooner than June of 2009. Accordingly, considering the evidence available at this time, we cannot conclude that Representative Sinema violated the resign-to-run laws even if the posting is deemed “public.”

Representative Barnes

Representatives Barnes designated a candidate’s committee for State Senate on February 11, 2009. On September 3, 2009, in an interview with the *Arizona Capitol Times*, he was quoted as stating, “I have to [run]. I’m termed out in the House...I don’t think you have to resign to run for office.” On September 6, 2009, in an interview with the *Arizona Republic*, he was quoted as stating, “It’s not a surprise to anybody that I’m going for that office. I’ve got no choice.” Representative Barnes filed an exploratory committee for State Senate on October 20, 2009.

Again, designating a candidate’s committee is exempt, under A.R.S. § 16-903(F), and the formation of an exploratory committee was previously found by the Attorney General to fall short of a formal public declaration. Op.Atty.Gen. I93-003. This leaves the statements made to reporters. While Representative Barnes’ reported statements would undoubtedly qualify as “public,” as there would be a reasonable expectation that such statements would be printed in the media, it is questionable whether merely responding to a reporter’s question is sufficient to qualify as “formal.” It is not generally accepted practice to announce one’s candidacy for office in such fashion, and there was certainly a lack of ceremony. These statements most likely

postings on her politician page, the initial December 31, 2008 posting and then a change Sinema made June 10, 2009 when she learned there was some concern about the wording of a posting on her Facebook politician page.

qualify as “informal declarations.” Accordingly, they cannot be deemed to violate the proscriptions set forth in A.R.S. § 38-296.

Senator Huppenthal

Senator Huppenthal designated an exploratory committee on March 16, 2009, and made public statements to the *Arizona Capitol Times* and the *Yuma Sun* consistently indicating that he is currently only exploring a run for State Superintendent of Public Instruction. In an Arizona Capitol Times article from June 8, 2009, Senator Huppenthal acknowledged that he and volunteers have been gathering signatures on nominating petitions, but that he had received legal advice that this was permissible.

As noted above, the formation of an exploratory committee is not a violation of the resign-to-run laws. Op.Atty.Gen. I93-003. A prospective candidate can engage in certain exploratory actions such as raising money “for the purpose of determining whether an individual should become a candidate.” *Id.* As also previously noted, the Attorney General opined in 1988 that a third party gathering petition signatures for a prospective candidate does not constitute a formal public declaration of candidacy. Op.Atty.Gen. I88-029. At issue here is whether it makes a difference when it is the candidate himself who is passing the petitions.

It is logical that attempting to gather sufficient nomination petition signatures, especially the large number necessary for a statewide election, would be a part of the process of determining whether one could become a viable candidate. Indeed, in Texas, which has a similar resign-to-run provision, the ability to circulate nominating petitions is expressly authorized.² Moreover, nowhere in the language of the nomination petition does it indicate that a person has declared for an office.³ Thus, passing petitions, while a formal prerequisite to nomination and a public activity, does not appear to be a “formal public declaration of candidacy.” The resign-to-run laws’ prohibition is on offering oneself for nomination, and this does not occur until signature petitions have been filed along with a nomination paper.

There is, however, a persuasive counter-argument that circulating one’s own nominating petitions would implicate the resign-to-run laws. In determining the scope of permissible *exploratory* activities, the Attorney General has looked to Federal Campaign Finance laws. See Op.Atty.Gen. I93-003. Under Federal Campaign Finance Regulations, funds received by a prospective candidate to engage in activities such as polling, traveling, speaking and meetings are not “contributions” and need not be reported under the Federal Election Campaign Act of

2 See e.g. Section 172.021 of the Texas Election Code which provides that circulation of a signature petition in connection with a candidate’s application for a place on the ballot does not constitute candidacy or an announcement of candidacy.

3 The petition states, “I, the undersigned, a qualified elector of the county of ___, state of Arizona, and of ___ (here name political division or district from which the nomination is sought) and a member of the ___ party or a person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot, hereby nominate ___ who resides at ___ in the county of ___ for the party nomination for the office of ___ to be voted at the primary election to be held ___ as representing the principles of such party, and I hereby declare that I am qualified to vote for this office and that I have not signed, and will not sign, any nomination petition for more persons than the number of candidates necessary to fill such office at the next ensuing election.”

1971 (Pub. L. 92-225). See generally 11 C.F.R. § 100.72(a). But funds received by “individuals who have decided to become candidates” explicitly fall within the act’s reporting requirements. 11 C.F.R. § 100.72(b). One relevant example of conduct indicating candidacy is: “[t]he individual has taken action to qualify for the ballot under State law.” 11 C.F.R. § 100.72(b)(5). Obtaining signatures on nominating petitions is indeed a necessary part of qualifying for the ballot under Arizona Law, A.R.S. § 16-314, but whether that action qualifies as an “action taken to qualify for the ballot” is not entirely clear inasmuch as no regulatory body or court has addressed this precise issue.

There is a similar suggestion in the Arizona statutes that circulating candidate petitions is not a permitted exploratory activity, at least for campaign finance purposes. Circulating a nominating petition is not listed as being permissible after filing an exploratory committee,⁴ but is listed as being permissible after filing a candidate’s committee.⁵

Nevertheless, even if persuasive, the use of federal and state campaign finance laws to determine whether an incumbent has violated the resign-to-run laws has not been supported by binding legal precedent in Arizona. Therefore, it is unclear whether circulating petitions constitutes offering oneself for nomination until the petitions have in fact been filed. As the facts presented are not “clearly within the scope” of the resign-to-run laws’ disqualification, it would be inappropriate to conclude that Senator Huppenthal violated the resign-to-run laws or to pursue any enforcement action against him. *McCarthy*, 55 Ariz. 328, 101 P.2d 449. Senator Huppenthal’s case demonstrates the need for the Legislature to more clearly define the permissible activities that exploratory committees can undertake without fear of violating the resign-to-run laws.

CONCLUSION:

Based upon the facts uncovered in our investigations, the specific terms of the constitutional and statutory provisions at issue, the lack of clarifying interpretations of the laws, and applying the legal principles that govern the interpretation of statutes, particularly those statutes that provide for the removal of elected officers, there are insufficient grounds for this Office to seek the removal of any of the incumbents from their offices. We encourage the Legislature to provide definitions for the terms “formal” and “public” or further specify what conduct qualifies as “offering” oneself for nomination. In the absence of clarifying legislation,

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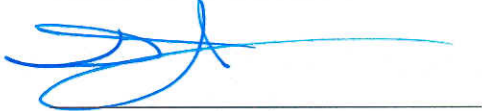
⁴ A.R.S. § 16-903(B).

⁵ A.R.S. § 16-903(A).

the resign-to-run laws will not be effective in achieving their goals, and prospective candidates will continue to lack the guidance they need to avoid the risk of prematurely forfeiting their offices.

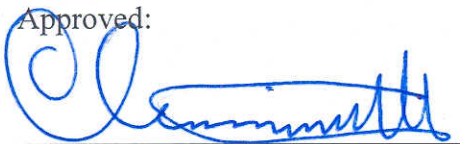
Respectfully submitted,

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