JAMES E. TIERNEY
ATTORNEY GENERAL

86-19

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

October 9, 1986

Honorable John M. Diamond
House Majority Leader
1860 Broadway
Bangor, Maine 04401

Dear Representative Diamond:

This will respond to your letter of September 30, 1986 in which you request this Department's Opinion as to whether a person who seeks to be nominated at a primary election as a write-in candidate pursuant to 21-A M.R.S.A. § 338 (1985-1986 Supp.) must be enrolled in the party he wishes to represent on or before April 1. For the reasons discussed below, it is the Opinion of this Department that the relevant statutes are so unclear on this point that it is impossible to conclude that an April 1 enrollment deadline is applicable to a person who has been nominated at a primary election as a write-in candidate.

Your opinion request appears to have been prompted by the following situation: Prior to February 20, 1986, Mr. Lawrence Lockman was enrolled in the Democratic Party. On that date, he applied, pursuant to 21-A M.R.S.A. § 144 (1985-1986 Supp.), to change his enrollment from the Democratic Party to the Republican Party. Subsequently, Mr. Lockman was a write-in candidate for the Republican nomination for House District No. 134 at the June 10, 1986 primary election. At that election, he obtained a sufficient number of write-in votes so that, assuming he met all the other requirements of the law, he would be the Republican Party nominee for the office of Representative to the Legislature for House District No. 134, in accordance with 21-A M.R.S.A. § 723(1) (1985-1986 Supp.).

Pursuant to 21-A M.R.S.A. § 144(2), a change of enrollment does not become effective until three months after the registrar receives the application for a change. Therefore, Mr. Lockman was not, in legal contemplation, enrolled in the Republican Party on or before April 1, 1986, but was enrolled

in that Party three months following the registrar's receipt of his application for a change of enrollment, which would have been on or about May 20, 1986.

21-A M.R.S.A. § 338 deals specifically with write-in candidates at primary elections and provides:

> A person whose name will not appear on the printed primary ballot because he did not file a petition and consent under sections 335 and 336, but who fulfills the other qualifications under section 334, may be nominated at the primary election as a write-in candidate in accordance with section 723, subsection 1.

21-A M.R.S.A. § 334 provides as follows:

> A candidate for nomination by primary election must file a primary petition and consent under sections 335 and 336. He must be enrolled on or before April 1st, in the party named in the petition and must be eligible to file a petition as a candidate for nomination by primary election under section 144, subsection 3. The registrar in the candidate's municipality of residence must certify to that fact upon the petition.

Since a write-in candidate can still be nominated at a primary election even if he or she did not file a petition and consent, "the other qualifications under section 334" can only be those found in the second sentence of that section, namely, "[h]e must be enrolled, on or before April 1st, in the party named in the petition and must be eligible to file a petition as a candidate for nomination by primary election under section 144, subsection 3."

In your letter of September 30, 1986, you suggest that although section 334 expressly states that the candidate must be enrolled, on or before April 1st, in the party named in the petition, in the context of write-in candidates that language should be read as requiring the candidate to be enrolled in the party nominating him, since a write-in candidate, by definition, is not filing a petition. The language of 21-A M.R.S.A. § 334, however, does not say that, and given the important right at stake, namely, access to the ballot, this Office is not inclined to read into the law requirements which the Legislature has not expressly stated. Accordingly, since a write-in candidate is not required to file a petition, the requirement stated in § 334 that a candidate be enrolled on or before April 1st in the party named in that petition does not apply to such a write-in candidate.

The only other possible qualification provided for in § 334 which a write-in candidate must fulfill is that portion of the second sentence which provides that the person "must be eligible to file a petition as a candidate for nomination by primary election under section 144, subsection 3." That statute provides as follows:

> A voter may not vote at a caucus, convention or primary election or file a petition as a candidate for nomination by primary election within three months after filing an application to change his enrollment, ...

Section 334 provides that the person must be eligible to file a petition as a candidate for nomination by primary election "under section 144, subsection 3." The only eligibility requirement to filing a petition as a candidate for nomination under § 144, sub-§ 3 is that the voter may not file such a petition within three months after filing an application to change his enrollment. 21-A M.R.S.A. § 144(3) says nothing about April 1st. In other words, it is not § 144(3) which creates an April 1st requirement, but rather, 21-A M.R.S.A. § 335(8) which provides that a primary petition must be filed with the Office of the Secretary of State before 5 p.m. on April 1st of the election year in which it is to be used. The language of § 334 that a person must be eligible to file a petition as a candidate for nomination by primary election under § 144(3), as applied to write-in candidates, can reasonably be interpreted to mean only that the person must have waited the required three-month period after the change of his enrollment, since that is the only eligibility requirement under 21-A M.R.S.A. § 144(3).

To conclude otherwise could render the second sentence of 21-A M.R.S.A. § 334 non-sensical. For example, that sentence provides that the candidate must be enrolled, on or before April 1st, in the party named in the petition. The second portion of that sentence provides that a person must be eligible to file a petition as a candidate for nomination by primary election under § 144(3). If the latter portion of that sentence also means April 1st, then it is nothing but surplus to the requirement that the candidate be enrolled, on or before April 1st, in the party named in the petition. It is a well-established principle of statutory construction that nothing in a statute should be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible. See, e.g., Labbe v. Nissen Corp., 404 A.d 564 (Me. 1979); State v. Tulo, 366 A.2d 843 (Me. 1976); Finks v. Maine State Highway Comm., 328 A.2d 791 (Me. 1974). In addition, the legislative history of the provisions of Title 21-A M.R.S.A. dealing with write-in candidates, and their

predecessor statutes, sheds absolutely no light on the question of whether the Legislature intended write-in candidates to meet the April 1st enrollment deadline.

In this particular case, Mr. Lockman applied for a change of enrollment on February 20, 1986, and therefore, the three-month waiting period expired on or about May 20, 1986, well in advance of the June 10, 1986 primary. In view of the ambiguity surrounding the question as to whether a write-in candidate must be enrolled in the party he seeks to represent on or before April 1, 1986, and in view of the fact that a reasonable alternative interpretation is possible which will allow Mr. Lockman to appear on the general election ballot as the Republican nominee for House District No. 134, it is the Opinion of this Office that an April 1st enrollment deadline is not applicable to a person who seeks to be nominated at a primary election as a write-in candidate pursuant to 21-A M.R.S.A. § 338 (1985-1986 Supp.).

It should be emphasized that the interest of Mr. Lockman in appearing on the ballot implicates very fundamental First Amendment rights. See Anderson v. Celebrezze, 460 U.S. 780, 787 (1982); Anderson v. Quinn, 495 F. Supp. 730 (D. Me.), aff'd., 634 F.2d 616 (1st Cir. 1980); Stoddard v. Quinn, 593 F. Supp. 300, 302-03 (D. Me. 1984). Moreover, since Mr. Lockman was a write-in candidate an April 1st enrollment deadline cannot be justified on the ground that the Secretary of State's Office needs this lead time in order to prepare the primary election ballots. Given the fundamental nature of the rights involved, the obvious ambiguity concerning the requirements of Maine law, and the lack of any strong administrative justification for an April 1st enrollment deadline, it is the Opinion of this Office that any doubt concerning the elibility requirements of a write-in candidate should be resolved in favor of placement on the ballot.

I hope this information is helpful to you, and please don't hesitate to contact this office if we can be of further assistance.

Sincerely,

JAMES E. TIERNEY
Attorney General

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