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DEPARTMENT OF LAW

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OFFICE OF THE ATTORNEY GENERAL

October 30, 2006

Whitney H. Brewster, Director
Division of Elections
P.O. Box 110017 (MS 0017)
Juneau, Alaska 99811-0017

Re: Party Affiliation of No-Party
Candidate Running Mate
Our File No. 663-06-0110

Dear Ms. Brewster:

On September 20, 2006, no-party gubernatorial candidate Andrew Halcro submitted to the Division of Elections the name of Fay von Gemmingen to replace Ken Lancaster as his running mate and candidate for lieutenant governor. We previously had received of a letter on this subject from attorney Wev Shea to Lieutenant Governor Leman (enclosed). In his letter, Mr. Shea contends that Mr. Halcro may not select a running mate who is affiliated with a recognized political party. You have asked us to respond. As discussed below, Mr. Halcro may select a running mate who is either affiliated or not affiliated with a recognized political party.

As a preliminary note, in past opinions this office has consistently advised against disqualification of gubernatorial candidates when for some reason the candidate does not have a running mate prior to the general election. In 1982, a no-party candidate for lieutenant governor withdrew. We concluded that constitutional principles required that the gubernatorial candidate be permitted to remain on the ballot, and that emergency regulations be promulgated to afford the candidate the opportunity to replace the running mate. 1982 Op. Att'y Gen. No. 10 (Aug. 27; 366-103-83). In 2002, a party candidate for governor had no running mate because no one from that party ran for lieutenant governor in the primary. We again concluded that constitutional considerations favoring ballot access required providing the candidate with a means to select a running mate. 2002 Inf. Op. Att'y Gen. (Sept. 13; 663-03-0064). We recommended the adoption of an emergency regulation to provide these means. *See* 6 AAC 25.205.¹

¹ This regulation was subsequently made permanent.

Mr. Halcro's case is identical to and therefore governed by our 1982 formal opinion. Accordingly, we recommended the promulgation of an emergency regulation to provide Mr. Halcro with the opportunity to replace his running mate. *See* 6 AAC 25.215. Mr. Halcro complied with this regulation and submitted Fay von Gemmingen as his new running mate.

Despite running as no-party candidates, both Mr. Halcro and Ms. Von Gemmingen are registered members of the Republican Party. The question is whether no-party candidates, and specifically no-party candidates for lieutenant governor, are prohibited from being formally affiliated with a recognized political party. The answer is no.

There are two means by which a candidate may be formally placed on the general election ballot. The first is to participate in and win the primary of a recognized political party. Primary elections are governed by AS 15.25.010–15.25.130. The second way is to file a no-party petition. The petition process is governed by AS 15.25.140–15.25.200. The petition process is a mechanism by which “political groups” that have not achieved recognized political party status can nominate candidates for placement on the general election ballot. But the petition process is not limited to use by political groups. *See, e.g.*, AS 15.25.180(a)(4) (requiring the candidate to identify the name “if any” of the political group supporting the candidate).

There are many statutory requirements to qualify as a no-party candidate. *See* AS 15.25.180. But there is nothing in statute that prohibits a no-party candidate from being affiliated with a recognized political party. As noted below, the Alaska Supreme Court has embraced a policy of open ballot access. If the election code does not explicitly prohibit something, then the Court is likely to rule that it is permitted. *See, e.g.*, *O'Callaghan v. State*, 826 P.2d 1132, 1137 (Alaska 1992). Therefore, we conclude that under statute a no-party candidate may be either affiliated or not affiliated with any recognized political party or political group.

We have previously recognized that the framers of the Alaska Constitution intended for the governor and lieutenant governor to be politically compatible. *See* 1990 Inf. Op. Att'y Gen. at 6-8 (Oct. 12; 663-91-0148); 1982 Op. Att'y Gen. No. 10 at 2, 4 (Aug. 27; 366-103-83). But, “while the delegates spoke clearly of the need for a compatible executive team, a popularly elected governor is clearly the paramount constitutional feature.” 1982 Op. Att'y Gen. No. 10 at 4.

A similar issue regarding the political affiliation of a lieutenant governor candidate arose during the 1990 election. Arliss Sturgelewski and Jack Coghill won the Republican Party's primary for governor and lieutenant governor, respectively. John Lindauer and Jerry Ward won the Alaskan Independence Party's primary for governor and lieutenant governor. Shortly before the deadline for withdrawal as a candidate for the general election, Mr. Lindauer and Mr. Ward withdrew as candidates for the Alaskan Independence Party. Mr. Coghill withdrew as a candidate for the Republican Party. The Alaskan Independence Party nominated Walter Hickel and Mr. Coghill to fill the vacancies.

Questions were immediately raised concerning whether Mr. Coghill, as the former Republican Party lieutenant governor candidate, could now serve as the Alaskan Independence Party lieutenant governor candidate. This office opined that:

[T]he Alaska Supreme Court would most likely find a presumption of validity in the case of Mr. Coghill's nomination due to the lack of a specific statute barring a political party from nominating a candidate registered with another political party and based upon recent U.S. Supreme Court rulings regarding political parties' freedom of association.

1990 Inf. Op. Att'y Gen. at 5 (Oct. 12; 663-91-0148) (footnote omitted). We did, however, harbor concern about the fact that Mr. Coghill was not a registered member of the Alaskan Independence Party:

In spite of the intent of the delegates [to the Alaska Constitutional Convention] to have the secretary of state² and the governor be of the same party, there is no mention in the constitution itself that the candidates be members of the same party. Article III, section 8, only makes reference to running "jointly." It can certainly be argued that to run jointly means more than being on the same party ticket – that both candidates must be members of the same party. However, based on the lack of reference to political parties in article III, sections 7 and 8, we cannot conclusively state that a governor and lieutenant governor must be registered members of the same party in order to run jointly on the same ticket. The delegates spoke of "compatibility" of the governor and lieutenant governor candidates

² The secretary of state designation was changed to lieutenant governor in 1970.

and, undoubtedly, political compatibility was the intent. Whether that compatibility is achieved by the gubernatorial candidates being on the same party ticket, but registered with different parties, is not altogether clear.

Id. at 7-8 (footnote omitted).

The Alaska Supreme Court ultimately addressed certain issues related to the 1990 election in *O'Callaghan v. State*, 826 P.2d 1132 (Alaska 1992). Notably, the issues considered in our opinion, whether a candidate nominated by petition must be a member of the nominating political party and whether the running mates must be of the same political party in order to satisfy constitutional concerns of compatibility, were not addressed by the Court. The Court only considered whether the statute that permits the withdrawal and replacement of a candidate who won in the primary (AS 15.25.110) also prohibited that candidate from accepting another party's nominating petition. While the Court observed that the issue was not entirely clear in statute, the Court concluded that AS 15.25.110 did not prohibit Mr. Coghill from withdrawing from one party's nomination to accept another party's nomination: "given our clear policy favoring open access to the ballot, it would be incongruous for us to now stretch to find a prohibition against Coghill's candidacy when the election code does not clearly prohibit it." *Id.* at 1137. Thus, the issues raised by our 1990 informal opinion were not resolved.

Over the past few decades, the U.S. Supreme Court has issued several opinions firmly establishing the associational rights of political parties and limiting the power of states to interfere with such rights. States may not: control how party delegates vote (*Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1982)); require primary ballots that are closed to independent voters (*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986)); forbid political parties from endorsing candidates (*Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)); regulate the internal affairs of a political party unless necessary for a fair and orderly election (*Id.*); or require blanket primary ballots if a party objects (*California Democratic Party v. Jones*, 530 U.S. 567 (2000)). In recognition of these cases, the Alaska Supreme Court has held that a political party has the associational right to insist on a limited blanket primary, that is, a combined ballot for the parties that desire to have such a ballot. *State v. Green Party of Alaska*, 118 P.3d 1054 (Alaska 2005).

There are obviously significant constitutional protections in place for the associational rights of political parties. We think these protections extend to the associational rights of the no-party candidates in the case. *See, e.g.*, 1980 Inf. Op. Att'y

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Gen. (May 5; J-66-661-80) (no-party and party candidates must be treated alike). With respect to Mr. Halcro and Ms. Von Gemmingen, there appears to be no issue of political compatibility because Mr. Halcro personally selected Ms. Von Gemmingen and they are both registered members of the same political party. But to be absolutely clear, we think that no-party gubernatorial candidates are free to choose any running mate they wish, regardless of political affiliation or lack thereof, whether it be at the initial petition stage or later when the original running mate may withdraw and need to be replaced.

Please let us know whether you have any questions or would like to discuss this matter further.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By:
Michael Barnhill
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MAB/ajh

Enclosure