

April 30, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Cenarrusa:

This guideline is in response to your recent inquiry regarding the eligibility of L. Karl Shurtliff to run for lieutenant governor. Your inquiry is threefold:

1. Do article III, section 2(6) of the Idaho Constitution and Idaho Code § 72-1502(3) preclude a member of the commission for reapportionment from running for the office of lieutenant governor?
2. If a member of the commission for reapportionment is precluded from running for the office of lieutenant governor, what jurisdiction or authority does the secretary of state have to declare a candidate for lieutenant governor ineligible and remove the candidate from the ballot?
3. Are the election contest provisions of Idaho Code §§ 34-2101(2) and 34-2104 the exclusive methods of challenging the election of an executive department officer?

Question 1: A court would most likely hold that a member of the commission for reapportionment is not precluded from running for lieutenant governor.

The Idaho Constitution sets forth the following prohibition, which applies to members of the commission for reapportionment (“commission”):

A member of the commission shall be precluded from serving in either house of the legislature for five years following such member’s service on the commission.

Idaho Const. art. III, § 2(6). This prohibition is echoed in the Idaho Commission for Reapportionment Act. Idaho Code § 72-1502. Therefore, it would not be permissible under Idaho’s laws for a member of the commission to become lieutenant governor within five years of service on the commission if the lieutenant governor serves in either house of the legislature.

Article IV of the Idaho Constitution sets forth the executive department of the State of Idaho. Article IV, § 1, identifies the lieutenant governor as a member of the executive department. Article IV also sets forth a variety of other provisions relating to the executive branch offices, including the requirement that the lieutenant governor is elected by the qualified electors of the state. Idaho Const. art. IV, § 2.

Article III of the Idaho Constitution sets forth the legislative department of the State of Idaho.¹ The membership of the legislature is set forth as follows:

Following the decennial census of 1990 and in each legislature thereafter, the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

Idaho Const. art. III, § 2(1). Notably, no mention of the lieutenant governor is made within the entirety of article III of the Idaho Constitution.

It is evident that the lieutenant governor is not a senator or a representative; the lieutenant governor is not a member of the legislative branch of government. The lieutenant governor is elected by the qualified electors of the state, not by the electors in a legislative district. There are a variety of other provisions (qualifications, terms) in article IV that distinguish the lieutenant governor from a state legislator.

The sole provision associating the lieutenant governor with the legislature is set forth in article IV, § 13 of the Idaho Constitution:

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

Idaho Const. art. IV, § 13.

This provision, read together with article III, §§ 9-10 of the Idaho Constitution has been construed by the Idaho Supreme Court to simply provide a mechanism for the efficient operation of the senate in the event of deadlock. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). In Sweeney, the Idaho Supreme Court, quoting Joseph Story in Story on the Constitution, (1873), observed that there is nothing novel about a

presiding officer who “is not a constituent member of the body over which he is to preside.” Sweeney, 119 Idaho at 141, 804 P.2d at 314. The court noted further, “[t]he source of the American governmental concept of a non-legislative person presiding over the Senate and having a casting vote originates with the New York Constitution drafted in 1777.” *Id.*, citing N.Y. Const. of 1777, art. XX (emphasis added).

“The general rules of statutory construction apply to constitutional provisions as well as statutes.” Rudeen v. Cenarrusa, 136 Idaho 560, 567, 38 P.3d 598, 605 (2001), citing Sweeney, *supra*. The law must be followed as written when the language is clear. *Id.*, citing Westerberg v. Andrus, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988). When the law is not clear, *i.e.*, ambiguous, then a court will apply rules of construction to give effect to what was intended by the legislature, and, in so doing, may consult the provision’s legislative history. City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

In this case, it appears likely that a court would rule that the constitutional prohibition on “serving in either house of the legislature” is clear on its face. In other words, a member of the commission cannot be a state representative or senator for five years after service on the commission. Furthermore, it is also likely that a court would not rule that the lieutenant governor, a statewide elected officeholder in the executive branch of government, falls within the reach of this prohibition.

Even if it is argued that the constitutional prohibition is ambiguous,² the legislative history of the constitutional prohibition supports the clear intent discussed above. During the legislative debates over Senate Joint Resolution 105 (1993), the minutes for the House State Affairs Committee reflect the following testimony by Senator Evan Frasure:

As a true citizens committee those individuals could not run for the legislature for five years after serving on this committee, so they would have no personal vested interest.

Hearing Minutes, State Affairs Committee, Idaho House of Representatives, March 17, 1993.

This statement is consistent with and reinforces the intent discussed above. In other words, future legislators should have no direct influence, *i.e.*, debate and a vote, on the borders/constituents of their prospective legislative districts. The lieutenant governor does not fit within this intent—he or she is an executive branch official selected by all of the qualified electors of the State of Idaho, not from a legislative district drawn by the commission.

Question 2: The secretary of state has authority to determine the qualifications of candidates.

Idaho Code § 34-1404 provides in pertinent part:

The election official shall verify the qualifications of the nominees, and shall not later than seven (7) days after the close of filing, certify the nominees and any special questions placed by action of the governing board of the political subdivision. . . . For all other elections, the nomination shall be filed not later than 5:00 p.m. on the sixth Friday preceding the election for which the nomination is made. The election official shall verify the qualifications of the nominee, and shall not more than seven (7) days following the filing, certify the nominees and any special questions, placed by action of the governing board of the political subdivisions, to be placed on the ballot of the political subdivision.

(Emphasis added.)

Under this statute, the secretary of state verifies the qualifications of the nominee and thereafter certifies that a candidate for lieutenant governor is qualified. In the event that a candidate is not qualified for the office sought, then his or her name would not be certified and, accordingly, not placed on the ballot. *See* Idaho Code § 34-904 (“All candidates who have filed their declarations of candidacy and are subsequently certified shall be listed” on the primary ballot). A candidate who seeks to challenge a decision against certification may seek to do so in an extraordinary proceeding.

I note that, upon certification, the only apparent recourse a complainant may have is to file an action in the district court for Ada County. *See* Idaho Code §§ 34-2122 and 34-2123 (election contests in primary elections and Ada County venue for statewide executive offices). The timelines for election contest proceedings are very short, and an appeal of the district court’s determination is assigned priority in the Idaho Supreme Court. *See* Idaho Code § 34-2124 (the candidate challenging a primary election must file an affidavit with the appropriate court within five (5) days of completion of the canvass); Idaho Code § 34-2128 (a court opinion is due no more than ten (10) days after the hearing); Idaho Code § 34-2129 (an appeal must be filed within ten (10) days of judgment, and the Idaho Supreme Court must issue a decision within ten (10) days after receipt of the appeal).

I also note that a procedure for contesting the qualifications of a candidate prior to the conduct of a primary election is not set forth in the Idaho Code. It is possible, however, that a court may review a candidate’s qualifications in an extraordinary proceeding.

Question 3: Election contests are governed by Idaho Code §§ 34-2101 through 31-2130.

If a candidate is elected to an executive office for which he is not qualified, Idaho Code §§ 34-2101(2) and 34-2104 embody the exclusive method for contesting the election. Idaho Code § 34-2104 provides:

The legislature, in joint meeting, shall hear and determine cases of contested election for all officers of the executive department. The meeting of the two (2) houses to decide upon such elections shall be held in the house of representatives and the speaker of the house shall preside.

Aside from the provisions mentioned above regarding contest of a primary election, this is the sole course of action provided in the Idaho Code to contest the election of an executive officer.

I hope that you find this guideline helpful. As always, if you have any questions, or would like to discuss this more fully, please contact me.

Sincerely,

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Intergovernmental & Fiscal Law
Division

¹ The third branch of government, the judicial department, is set forth in article V of the Idaho Constitution.

² Certainly, there may be other ways to express intent—*e.g.*, “a member of the Commission may not serve as a state senator or state representative for five years following service on the Commission.” However, this office believes it is most likely a court would rule the prohibition clear on its face.