incumbent judge and for that reason are not in strict conformity to Article VI, Section 24, supra. It is a fundamental rule in the construction of statutes that they shall be given an interpretation and application which will be constitutional if possible. It is not necessary to declare the proviso clause of Section 646 wholly unconstitutional and void. It can be constitutionally applied if read as restricted to use of the designation on the ballot only by an elected incumbent judge who is a candidate. So read, an appointed incumbent judge who is a candidate would not be entitled to the ballot designation and is precluded from the use of the designation on the ballot even though he should file the written request therefor.

FRANK J. KELLEY,
Attorney General.

640401.1

ELECTIONS: Nomination and election within a city of justices of the peace.

JUSTICES OF THE PEACE: Nomination and election.

In a city, the charter of which makes the state law applicable to the nomination and election on a nonpartisan ballot of justices of the peace, a primary election for that office should not be held where the number of candidates filing nominating petitions does not exceed twice the number to be elected.

Where but two candidates file nominating petitions for the office of justice of the peace, and through error of the election officials a primary election is held, the names of both candidates should be printed on the ballot for the election, irrespective of the number of votes received by them at the primary election.

No. 4265 April 1, 1964.

Mr. Stephen D. Condon
Prosecuting Attorney
Houghton County
Superior National Bank Building
Hancock, Michigan

Your request for opinion states:

> "Under date of September 3, 1963, the electors of the city of Hancock, at an election called for that purpose, adopted a new city charter known as the Council-Manager Form of Municipal Government. It is therein provided that a Primary Election be held on November 5, 1963, and a General Election on December 9, 1963, at which time there was to be elected seven councilmen and one justice of the peace. Nomination petitions were required to be filed on or before October 4, 1963. Both the Primary and General Elections were nonpartisan. Eighteen persons filed nomination petitions for the office of Councilman and qualified to have their names placed on the Primary ballots and to run for nomination to this office. Two persons filed nomination petitions for the office of Justice of the Peace and likewise qualified

to have their names placed on the Primary ballot and to run for nomination to this office. Fourteen persons were entitled to be nominated to the office of Councilman and two persons to the office of Justice of the Peace. Because of the number of persons who filed for the office of Councilman, the holding of a Primary Election was determined to be necessary and was held on November 5, 1963. The names of all eighteen persons who filed nomination petitions for the office of Councilman appeared on the Primary ballot along with the names of the two persons who had filed nomination petitions for the office of the Justice of the Peace.

"We are concerned here only with the office of the Justice of the Peace. Both persons ran on a nonpartisan ballot at the Primary and General Elections. The successful candidate at the Primary Election was defeated by the unsuccessful candidate at the General Election.

"Question:

"1. In view of the fact that only two persons had filed for the office of the Justice of the Peace, was it necessary to hold a Primary Election as to such office?

"It is my opinion that it was not necessary to hold a Primary Election as to the office of the Justice of the Peace. Section 6.1540, M.S.A., provided as follows:

" 'Sec. 540. If, upon the expiration of the time for filing petitions for any nonpartisan Primary Election, it shall appear that as to any office on any nonpartisan ticket there are not to exceed twice the number of candidates as there are persons to be elected, then the officer with whom such petitions are filed shall certify to the proper board of election commissioners the names of such candidates whose petitions have been properly filed and such candidates shall be the nominees for such offices and shall be so certified. As to such offices, there shall be no Primary Election and such offices shall be omitted from the Primary ballot.'

"2. In view of the fact that the Primary Election was held on November 5th as to the office of the Justice of the Peace, was it necessary that the candidate who received the highest number of votes at the Primary again run against the same opponent at the General Election held on December 9th?

"3. If so, was the candidate who received the least number of votes at the Primary Election held on November 5, 1963, entitled to have his name printed on the General Election ballot for the election held on December 9th?

"I can find no authority for the forming of any opinion as to questions two and three. Accordingly, however, your opinion on all three questions would be appreciated."

Among the provisions contained in the city charter of Hancock are the following:

"Section 3.3—All municipal elections shall be on a nonpartisan basis.

"Section 3.4—Unless otherwise provided herein, the General Election Laws of the State shall govern all procedure relating to City elections and to the registration of electors."

Section 17.1 establishes a justice court to be presided over by one justice. Section 20.2 provided for the holding of a primary election on November 5, 1963, followed by the first city election on December 9, 1963, "at which time there shall be elected seven (7) councilmen herein provided for and one Justice of the Peace who will hold office until the first day of January, 1967." Section 18.9 specifies that the provisions of the charter where in conflict with the state constitution shall be subject to and governed by the constitution and any general laws enacted pursuant thereto.

You have quoted section 540[1] of that act, which specifies that if not more than twice the number of candidates to be elected to a nonpartisan office file nominating petitions, the names of those candidates shall be certified as the nominees for that office, and as to such office there shall be no primary election. I am therefore in accord with the conclusion expressed by you that it was not necessary to hold a primary election as to the office of justices of the peace. Instead, the two candidates who filed nominating petitions for the office were the nominees for that office at the election held December 9, and should have been certified as such.

While the election officials erred in printing the name of the office and that of the two candidates on the primary ballots, that would not obviate the necessity of holding the election for that office on December 9, nor would it have the effect of eliminating as a nominee in that election the candidate who received the lesser number of votes at the November 5 primary.

A companion issue was presented to the Supreme Court with respect to the nomination of candidates for the office of circuit judge in 1947.[2] While that decision is not directly in point, the reasoning of the court is significant. Under a 1939 amendment to the State Constitution[3] candidates were elected at a nonpartisan judicial election, and a number equal to twice the number to be elected were to be nominated at a nonpartisan primary election. In the third judicial circuit, or Wayne County, 18 circuit judges were to be elected. Within the period limited for the filing of nominating petitions, there had been filed petitions for only 30 candidates. Plaintiff in that action sought the issuance of the court's writ of mandamus to prohibit holding of the primary election in Wayne County as to the office of circuit judge, and to require certification of the names of the 30 candidates as nominees for that office at the biennial spring election. Plaintiff relied upon a section of the election laws added in 1941, which section was the predecessor of section 540 of the Michigan election law, and contained provisions similar thereto. The Supreme Court construed section 23, as orig-

[1] Section 540, being C.L.S. 1961 § 168.540, M.S.A. 1956 Rev. Vol. § 6.1540.

[2] *Ranney v. Secretary of State,* 316 Mich. 637, 641-642.

[3] Article VII, Section 23, added by an amendment ratified at the election held on April 3, 1939.

inally adopted,[4] as requiring the holding of a primary for the purpose of nominating the 36 candidates, and thus prohibiting the certification of the names of those 30 candidates who filed nominating petitions without a primary, stating:

> "The Constitution plainly requires that nominations for certain judicial offices other than justices of the Supreme Court shall be made at nonpartisan judicial primary elections, and nowhere authorizes the legislature to do away with the holding of a nonpartisan judicial primary for the purpose of such nominations. The plain purport of article 7, § 23, is to require the holding of a nonpartisan primary election not only so that the 30 persons mentioned may be voted upon at the primary by electors in designating their choice of nominees, but also that electors may have the opportunity, by proper procedure, to vote for the direct nomination of others as nominees for the office of circuit judge; and thus have printed on the ballots for use at the April election the names of 36 candidates if nominated, which may or may not include the names of all of the 30 persons whose petitions have been filed with the secretary of State."

The decision in the *Ranney* case makes it clear that the holding of the primary election is not tantamount to election to the office and that the subsequent general election must be held in order to elect a nominee to the office. It must follow that the election of December 9, 1963 was required to be held in order to elect a justice of the peace in the city of Hancock.

FRANK J. KELLEY,
Attorney General.

640401.2

ATHLETIC BOARD OF CONTROL – Members of.
PUBLIC OFFICERS: Removal.
GOVERNOR: Power to remove appointed officer without cause.

Under section 3, Act 205, Public Acts of 1939, as amended, the Governor may lawfully remove one or more members of the Michigan State Athletic Board of Control without assigning cause therefor.

No. 4282 April 1, 1964.

Hon. George Romney
Governor
Lansing, Michigan

You have requested my opinion concerning the right of the Executive to remove members of the Michigan State Athletic Board of Control.

[4] Article VII, Section 23 was amended following the *Ranney* decision, which amendment was proposed by joint resolution of the 1947 legislature, and ratified at the election held on April 7, 1947, so as to contain provisions similar to those of section 540 of the Michigan election law. Article VII, Section 23 was later amended by an amendment ratified at the election held April 4, 1955.