

School Districts—Election of Trustees—Nomination of.

A person can be elected to the office of school trustee without having been nominated as provided in Section 502 of the School Law. Trustees to fill unexpired terms should be elected at the next annual election, even though more than a majority of the board be chosen at such election.

Helena, Montana, March 22, 1917.

Olive H. Lovett,
County Superintendent of Schools,
Miles City, Montana.

Dear Madam:

You have requested from me an opinion upon the following questions: 1. Can a person be elected to the office of School Trustee who has not been nominated in accordance with the provisions of Section 502 of the School Law? 2. In a district of the second class where the term of office of one trustee regularly expires in 1917, one in 1918, and one in 1919, and the two remaining trustees have been appointed by the County Superintendent to fill vacancies in terms which would

have expired in 1918 and 1919, how many trustees shall be elected and for what terms?

1. The first question presented has been previously passed upon by this department in an opinion dated March 2, 1914, and it was there held that the provisions of subdivision 3a of Section 502, Chapter 76 of the 1913 Session Laws, are in conflict with the Constitution of the State, as depriving electors of the right to express their free choice for the office of school trustee.

Section 502 (2a) of the school law, provides as follows:

"In districts of the second and third class, the names of all candidates for membership on the school board must be received and filed by the clerk and posted at each polling place at least five days next preceeding the election. Any five qualified electors of the district may file with the clerk the nominations of as many persons as are to be elected to the school board at the ensuing election."

Section 502 (3a) provides in part as follows:

"In districts of the first class, no person shall be voted for or elected as trustee, unless he has been nominated therefor by a bona fide public meeting held in the district at least ten days before the day of election. * * * The nomination and election of any person shall be void, unless he was nominated at a meeting as above provided. * * * and the Board of Trustees, acting as a Canvassing Board shall not count any votes cast for any person, unless he has been so nominated and a certificate thereof filed as herein required."

The above sections of the school law in connection with the nomination of candidates for the office of school trustee are directory, merely, and not mandatory, and a non-compliance is not fatal to the election of the person receiving the highest number of votes. The Supreme Court of California in the case of *Russell v. McDowell*, 23 Pac. at 185, distinguishes between a mandatory and a directory statute in this connection, as follows:

"It is only those provisions of the statute relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. All others are directory, merely, and a failure to observe them caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of the precinct."

To the same effect are the following authorities:

Bowers v. Smith, 111 Mo. 45, 33 Am. St. Rep. 491.

Buckner v. Lynip, (Nev.) 41, Pac. 762, 15 Cyc. 317-319.

Fowler v. State, 68 Tex. 30, 3 S. W. 255.

Montgomery v. Henry (Ala.) 1 L. R. A. (N. S.) 656.

The provisions as to nominations are not unconstitutional, because they provide for legal nominations and require them to be made in a certain way, in order to entitle the candidate to have his name printed on the official ballot, **provided**, the voter is allowed, by writing on the

ballot, to vote for others than those nominated, if he sees fit, but as the Constitutions guarantee to voters the right to vote for whom they please, a law restricting the right to vote for those candidates whose names appear on the official ballot, is to that extent, unconstitutional.

10 Am. & Eng. Ency. (2nd Ed.) 586, 587 and 633.

15 Cyc. 346, 288 and 289.

People, ex rel Bradley v. Shaw (N. Y.) 16 L. R. A. 606.

Cole v. Tucker (Mass.) 29 L. R. A. 668.

State, ex rel Lamar v. Dillon (Fla.) 22 L. R. A. 124.

The Constitution of the State of Montana provides in relation to the election of public officers as follows:

"All elections shall be free and open and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Art. III, Sec. 5.

"All elections by the people shall be by ballot."

Art. IX, Sec. 1.

"In all elections held by the people under this constitution, the person or persons who shall receive the highest number of regular votes shall be declared elected."

Art. IX, Sec. 13.

The case of Littlejohn v. the People, decided by the Supreme Court of Colorado, February 5, 1912, 121 Pac. 159, involved practically the identical facts as in the question submitted by you, and it was there held that the provisions of the Statute, requiring candidates for school trustee to file a written notice of intention a certain number of days prior to the annual election, and requiring the clerk to print ballots bearing the name of candidates who had certified such intention, and providing that no other person shall be voted for, constituted a restriction on the right to vote, and was therefore, unconstitutional, "for that reason it co-erces the elector into voting for one who has filed a notice of his intention to be a candidate, and prohibits the free choice of the elector as to whom he shall have to serve him as a public officer, and thereby prevents 'the free exercise of the right of suffrage'".

2. In considering the second question submitted by you, I will designate the five trustees for convenience, A, B, C, D and E. It appears that A's term of office expires in 1918, that B's term of office expires in 1917, that D's term of office expires in 1919, that C was appointed to take the place of the trustee whose term of office would have expired in 1918, and that E was appointed to take the place of a trustee whose term of office would have expired in 1919.

Section 502 (5) provides in part as follows:

"A vacancy in the office of school trustee must be filled by appointment by the County Superintendent * * * which trustee so appointed shall hold office until the next annual election, at which election there shall be elected a school trustee for the unexpired term."

Paragraph 9 of this section, quoted by you, provides in part as follows:

"When at any annual school election, the terms of a majority of the trustees regularly expire * * * in districts of the second class, two trustees, * * * shall be elected for three years, and the remaining trustee or trustees, whose term expires, shall hold over for one or two years as may be necessary to prevent the terms of a majority of the board of trustees expiring in any one year; Provided that it shall be determined by lot what trustees shall be held over and for what term."

It has been previously held by this department in opinions dated February 27, 1914 and March 15, 1915, that the provisions of sub-division 9 do not apply to elections to fill vacancies, but that it only applies at the close of a **regular** term. This is the only interpretation which could give effect to the provisions of sub-division 5. Therefore, at your next annual school election, your school district will elect one trustee for the term of three years to succeed B, whose term "regularly" expires in 1917. Your school district will also elect one trustee for the term of one year, to fill out the unexpired term of the trustee in whose place C was appointed. And a trustee will be elected for the term of two years to fill out the unexpired term of the trustee in whose place E was appointed. After the annual election in April, the Board of Trustees of this school district will then be composed of two trustees who will hold office for the period of one year, two trustees who will hold office for the period of two years, and one trustee who will hold office for the period of three years.

Respectfully,

S. C. FORD,

Attorney General.