

**Primary Elections—Candidates—Filing—County Clerk and Recorder—Petitions.**

Under the circumstances mentioned in the opinion prospective candidate was entitled to have his petition filed after five o'clock P. M. on the last day prescribed by law for filing the same.

Mr. Albert S. Baker,  
County Clerk and Recorder,  
Dillon, Montana.

June 22, 1932.

My dear Mr. Baker:

You request an opinion as to what official action you should take with reference to printing upon the primary election ticket the name of a person who presented his petition and filing fee to your office under the following circumstances:

In conformity with the custom in use in the office of the county

clerk and recorder of your county for the past several years, as well as in some of the other counties in the state, you fixed the hour of five o'clock P. M. Saturday, June 18th, as the final time for filing petitions for nomination in your office, and this determination on your part was given to all newspaper men in the county and it was accordingly given publicity through the newspapers. At the hour of five o'clock P. M. on Saturday, June 18th, and in the presence of several witnesses the books were closed and the doors to your office locked. At about five minutes after five o'clock on Saturday a person knocked on the door of your office which was thereupon opened by you or your deputy and the person presented to you, or the deputy, his petition for nomination together with the necessary filing fee, but acceptance of the petition for filing and of the fee was declined because the tender was made after the hour of five o'clock P. M. and the petition and filing fee were returned to the person tendering the same. On opening the office on Monday morning, June 20th, the petition with the necessary fee was found on the floor in the office, it having been placed there by shoving the same under the door. Investigation disclosed the fact that the petition had been placed there late Saturday night or early Sunday morning. The petition was filed "under protest" and the fee was deposited with the county treasurer.

You inquire, under the above facts and circumstances, whether the prospective candidate was entitled to have his petition filed and his name printed as a candidate upon the party ticket.

The petition was required to be filed not less than thirty days before the date of the primary nominating election. As the date of holding the primary nominating election is the 19th day of July the last date for filing was the 18th day of June. (State ex rel. Bevan vs. Mountjoy, 82 Mont. 594, 268 Pac. 558.) The petition could be filed at any time on June 18th, up to midnight. (State ex rel. Bevan vs. Mountjoy, supra.)

Section 4736, R.C.M. 1921 provides that the clerk must keep his office open for the transaction of business from nine o'clock A. M. until five o'clock P. M. continuously, every day in the year except holidays, "and at any other time when business requires it."

In the case of State ex rel. Jones vs. Board of Deputy State Supervisors, reported in 112 N. E. 136, the Ohio supreme court had under consideration the question of whether a person desiring to file his petition for nomination was entitled to have the same filed where he attempted to file his petition shortly after five o'clock P. M. on what was assumed to be the last day allowed by law for the filing thereof but found the office closed. There was no statute in that state requiring the office in which the petition was to be filed to be kept open during any specific hours, but the court held that candidates were entitled to file their nominating petitions at any time on the last day allowed by law and that that day did not expire until midnight; the court said:

"No rules or regulations of the board of deputy state supervisors and inspectors of elections as to office hours should be permitted to deprive candidates of rights which they have under the law. A well-established rule of construction requires that

this statute shall be so construed as to avoid a penalty or forfeiture, or deprivation of any right conferred by law.

“Assuming that September 2d was the last day for the filing of nominating petitions, that day did not expire until midnight, and hence opportunity should have been afforded for the presentation of nominating petitions throughout the period allowed by law, which, under the assumption that September 2d was the last day, would not expire until the end of that day, which was midnight.”

Unlike Ohio, Montana does have a statute which specifically requires the office of the county clerk to be kept open during certain specified hours, “and at any other time when business requires it.” The rule as laid down by the Ohio court would seem to be fortified by our statute. The law gives to any person desiring to become a candidate the whole of the last day upon which to file his petition. Within that time the prospective candidate, in the matter under consideration, went to the office of the county clerk for the purpose of exercising his legal right. The officials were in the office but the door was closed. In response to a knock upon the door one of the officials came to the door, opened it, and he was presented with the petition and the filing fee. Here was public business, within the meaning of the statute, to be transacted, and the offer to transact it was at the place fixed by law and with the officers designated by law to transact it. Under these circumstances the officer could not, because of the rule or regulation adopted by him, decline to transact the business. The transaction of the business merely required the acceptance of the petition and the filing fee and the usual entries thereof. To refuse to transact the business simply because of the rule or regulation, under these circumstances, would be an arbitrary act which is not sanctioned by equity or the statute above mentioned. The legal right of the prospective candidate cannot be forfeited merely because of the rule or regulation mentioned and especially so when to accept the filing would have been but little more onerous than to decline.

For the reasons above stated, it is my opinion that the petition should have been accepted when it was presented shortly after five o'clock P. M. on June 18th, and that you should file it as of that date and that the candidate is entitled to have his name appear upon the party ticket of the party designated in the petition.

Very truly yours,

L. A. FOOT,  
Attorney General.