

Opinion No. 220.

**Elections—County Central Committees
Central Committees—Political Parties
Candidates—Nominations.**

Held: The county central committee does not have power to designate a candidate for state senator where the person who received the highest number of votes by write-in in a primary election fails to accept the nomination (Section 640, Revised Codes of Montana, 1935, as amended by Chapter 27, Laws of 1945)—or fails to designate the party upon which his name shall appear at the general election when he receives the highest number of votes by both parties at the primary (Section

651, Revised Codes of Montana, 1935)—for no vacancy by resignation occurs, as required by Section 662, Revised Codes of Montana, 1935, as amended by Chapter 84, Laws of 1939.

November 19, 1946.

Mr. Oskar O. Lympus
County Attorney
Missoula County
Missoula, Montana
Dear Mr. Lympus:

You have presented the following:

X filed a petition for nomination on the Republican ticket to the office of state senator and was duly nominated by the Republican party at the July primary. No one filed for the nomination on the Democratic party; but X's name was written in on that party's ticket and he received the highest number of votes for the Democratic nomination. He did not file an election to accept the Democratic party's designation within ten days after the primary election, and his name was therefore printed on the official ballot for the general election upon the party ticket for which his nominating petition had been filed—the Republican—in accordance with Section 651, Revised Codes of Montana, 1935.

A week before the general election X died. The Republican county central committee nominated a candidate to fill the vacancy in the Republican nomination created by X's demise.

Question: Did X's death also create a vacancy in the Democratic nomination which the Democratic county central committee could fill?

Section 662, Revised Codes of Montana, 1935, as amended by Chapter 84 of the laws of 1939, provides—so far as pertinent here:

“ . . . Said county and city central committees shall have the power to make nomination to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election where such vacancy is caused by death, resignation or removal from the electoral district, but not otherwise.”

Our Supreme Court—in the case of State ex rel. Wilkinson v. McGrath, (1940) 111 Mont. 102, 106 Pac. (2d) 186—ruled on this situation which is applicable here: A successful write-in candidate at a nominating election failed to file his acceptance of such nomination within ten days after the election. After the expiration of the ten day period, he filed a “resignation” of the nomination; and his political party's county central committee attempted then to fill the vacancy by appointment. The court said:

“Since Killian failed to file his acceptance within ten days from the election, no vacancy by resignation occurred, and the Central Committee was without power to nominate the relator to fill that vacancy.”

See also Volume 13, Report and Official Opinions of the Attorney General, page 295, wherein Attorney General Foot ruled the county central committee of a political party does not have the power to make nominations of persons for election to offices where the persons who received the highest number of votes for the respective offices by the write-in process failed to accept the nominations. In that opinion, the then Attorney General stated with regard to a person receiving the highest number of votes by write-in:

“ . . . if he fails to accept the nomination he thereby declines to become the candidate of his party for election to the office. Obviously, the same act which prevents a candidacy for election to office from ever arising cannot be said to create a vacancy in that candidacy. There can be no vacancy in a candidacy that has never existed. The act of declining, instead of creating a vacancy in an existing candidacy, prevents the candidacy from coming into existence in the first instance.”

In the factual situation you present X failed to designate the Democratic Party as the party on which his name was to be printed as a candidate. His failure to make any designation did not create a vacancy in the Democratic nomination.

It is therefore my opinion the county central committee does not have the power to designate a candidate for

state senator where the person who received the highest number of votes by write-in at the primary fails to accept the nomination (Section 640, Revised Codes of Montana, 1935, as amended by Chapter 27, Laws of 1945) —or fails to designate the party upon which his name shall appear at the general election when he receives the highest number of votes of both parties at the primary (Section 651, Revised Codes of Montana, 1935)—for no vacancy by resignation occurs, as required by Section 662, Revised Codes of Montana, 1935, as amended by Chapter 84, Laws of 1939.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General