

Opinion No. 115**Elections—State Senator—Resignations—Vacancy.**

Held: The resignation of a State Senator should be made to the Governor. The resignation of a State Senator will create a vacancy in that office from the effective date of the resignation, or if no effective date is set out in the resignation, then the vacancy exists from the acceptance of the resignation by the Governor. A vacancy created by the resignation of the incumbent in the office of State Senator can only be filled by a special election ordered by the Governor, and it is the duty of the Governor to issue an election proclamation at least ten (10) days before such special election. The Governor should proclaim a primary for the purpose of nominating candidates to be voted on at the special election.

June 14th, 1950.

Mr. E. W. Popham
County Attorney
Dawson County
Glendive, Montana

Dear Mr. Popham:

Governor Bonner has referred your letter of March 29th, 1950, relative to the resignation of the Honorable J. D. Walsh as State Senator from Dawson County, Montana, to me. The Governor has requested that I render an official opinion upon the questions which you have set out in your letter. These questions are:

1. With what officer or in what office should the resignation of a State Senator be filed?
2. When and in what manner will the resignation of a State Senator create a vacancy in that office?
3. How is a vacancy in the office of State Senator filled when the vacancy is created by the resignation of the incumbent?

Section 59-601, Revised Codes of Montana, 1947, provides:

"Resignations How Made. Resignations must be in writing and made as follows: . . .

3. By Senators and members of the House of Representatives, if the legislative assembly is not in session, to the Governor; if it is in session, to the presiding officer of the branch to which the member belongs, who must immediately transmit the same to the Governor. . . ."

This is a plain and unambiguous statement of the proper method of making and designation of place of filing of a resignation of a State Senator.

In answer to your second question, Section 59-602, Revised Codes of Montana, 1947, provides for the creation of vacancies in public offices. This section provides:

"Vacancies, How They Occur. An office becomes vacant on the happening of either of the following events before the expiration of the term of the incumbent:

1. The death of the incumbent.
2. His insanity, found upon a commission of lunacy issued to determine the fact.
3. His resignation.

The resignation of an incumbent State Senator creates a vacancy in that office, from the effective date set forth in the resignation, but the resignation must be properly filed with the Governor in order to be-

come effective. The Supreme Court of Montana, in determining when a vacancy exists, has stated:

"He officially advised the governor to that effect stating that he was retiring from his office 'as of midnight, December 31st, 1947 . . . and that from and after my retirement a vacancy will exist in the office of District Judge for said District.' This was the considerate judgment of a learned district judge in his own case. He declared that a vacancy would exist from and after midnight on the last day of the year, 1947. We find that such a vacancy does now exist and that it is wholly immaterial whether the writing handed the Governor announcing the Judge's voluntary permanent withdrawal is termed 'resignation' under subdivision 3 of Section 511, Revised Codes, or a 'retirement' under subdivision (ad) of Section 2 of Section 1, Chapter 297, Laws of 1947."

State ex rel. Jardine v. Ford (1948) 116 Mont. 507, 188 Pac. (2d) 422.

See also:

Laborde v. McGrath, 116 Mont. 283, 149 Pac. (2d) 422.

State ex rel. Patterson v. Lentz, 50 Mont. 322, 146 Pac. 932.

State ex rel. Chenoweth v. Acton, 31 Mont. 37, 77 Pac. 299.

When no effective date is set forth in the resignation of the incumbent, then the resignation will become effective and a vacancy will exist in the office from the date of the acceptance of the resignation by the Governor. State ex rel. Neill v. Page, 20 Mont. 238, 50 Pac. 719. See also, Klick v. Wittmer, 50 Mont. 22, 144 Pac. 648.

In answer to your third question, Section 45, Article V, Constitution of Montana provides:

"When vacancies, caused by death, occur in either house of the legislative assembly, such vacancies shall be filled by appointment by the Board of County Commissioners of the county from which such vacancy occurs. All vacancies occurring from any other cause shall be filled by election upon proclamation by the Governor."

The provisions of this Section of the Montana Constitution are mandatory and prohibitory (Article III, Section 29, Constitution of Montana; State ex rel. Patterson v. Lentz, 50 Mont. 322, 146 Pac. 932), and prescribes the only and the exclusive method of filling a vacancy occasioned by death or by any other cause, including resignation. (State ex rel. Greene v. Anderson, 1942, 113 Mont. 582, 129 Pac. (2d) 879; State ex rel. McGowan v. Sedgwick, 46 Mont. 187, 127 Pac. 94; State ex rel. Cutts v. Hart, 56 Mont. 571, 185 Pac. 769).

Section 23-103, Revised Codes of Montana, 1947, provides:

"At least sixty days before a general election, and whenever he orders a special election to fill a vacancy in the office of State

Senator or member of the House of Representatives, at least ten days before such special election, the Governor must issue an election proclamation, under his hand and the great seal of the State, and transmit copies thereof to the Boards of Commissioners of the counties in which such elections are to be held."

The election of a State Senator to fill a vacancy in that office is a special election, even though it may be held at the same time as a general election, and the provisions of the statute relative to a special election must be followed. (State ex rel. Rowe v. Kehoe, 49 Mont. 582, 144 Pac. 162; State ex rel. Grant v. Eaton, Lieutenant Governor, 114 Mont. 199, 133 Pac. (2d) 588).

Section 23-104, Revised Codes of Montana, 1947, provides the contents of the Governor's proclamation for such special elections and Section 23-105, Revised Codes of Montana, 1947, prescribes the duties of the County Commissioners upon the receipt of the Governor's proclamation of election. Section 23-105, Revised Codes of Montana, 1947, provides:

"The Board of County Commissioners, upon the receipt of such proclamation, may, in the case of general or special elections, cause a copy of the same to be published in some newspaper printed in the county, if any, and to be posted at each place of election at least ten days before the election; and in case of special elections to fill a vacancy in the office of State Senator or member of the House of Representatives, the Board of County Commissioners, upon receipt of such proclamation, may in their discretion, cause a copy of the same to be published or posted as hereinbefore provided, except that such publication or posting need not be made for a longer period than five days before such election."

The Supreme Court of Montana has outlined the procedure for filling vacancy in the office of State Senator when it stated in State ex rel. Grant v. Eaton, Lieutenant Governor, 114 Mont. 199, 208, 133 Pac. (2d) 588, 592:

"The method prescribed by statute for filling all vacancies in the legislative assembly, other than those occasioned by death, is through an election that may be called on ten days' notice. The law provides that whenever the governor 'orders a special election to fill a vacancy in the office of State Senator . . . at least ten days before such special election, the Governor must issue an election proclamation . . . and transmit copies thereof to the Boards of Commissioners of the counties in which such elections are to be held.' (Sec. 533, Rev. Codes).

The people have thus reserved in themselves the power to elect members to the legislative assembly and 'the people retained in themselves, and in themselves alone, the power to fill vacan-

cies in the legislative bodies' (State ex rel. Cutts v. Hart, *supra*), excepting only vacancies caused by death, in which event alone, have the people entrusted to the Boards of County Commissioners the power to appoint a successor. (State ex rel. Greene v. Anderson, 113 Mont. 582, 129 Pac. (2d) 874.

The nomination of the candidates to be voted on at the special election should be chosen by a primary election conducted according to the provisions of the primary laws of Montana. It is the duty of the Governor to proclaim a primary for the purpose of selecting candidates to participate in the election called on his proclamation to fill the vacancy in the office of State Senator. As stated by the Supreme Court of Montana in *LaBorde v. McGrath*, 116 Mont. 283, 149 Pac. (2d) 913:

"It is quite apparent from the language and purpose of the Act that the people of this state, in initiating the measure, sought to curb and correct the alleged abuses obtaining under the convention and caucus methods of nominating candidates by making the provisions of the Primary Nominating Election Law generally applicable in all situations wherein they could be made reasonably operative."

See also: Dissenting opinion of Mr. Chief Justice Adair, in *Bottomly*, Attorney General, v. Ford, Governor, 117 Mont. 160, 157 Pac. (2d) 108.

By way of summary, the resignation of a State Senator should be filed in the office of the Governor. The resignation of a State Senator will become effective and a vacancy will exist in the office of State Senator on the effective date set out in the resignation of the incumbent, and if no effective date is specified in the resignation, it will be effective on the date of the acceptance of the resignation by the Governor. When the office of State Senator becomes vacant by any cause other than death, including a vacancy created by resignation, it is the duty of the Governor to order a special election to fill the vacancy and to issue an election proclamation at least (10) days before such special election. It is the duty of the Governor to transmit copies of his election proclamation to the Board of County Commissioners of the County wherein the election is to be held. It is the duty of the Board of County Commissioners to publish the proclamation of the Governor in some newspaper in the County and to post the election proclamation at the place of election at least five (5) days before the election is to be held. The candidates for such election should be nominated at primary elections proclaimed by the Governor and conducted according to the provisions of the primary election laws of Montana.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.