

Dear Mr. French:

You have asked me the following question:

How many votes are required to obtain a write in nomination for the office of Clerk and Recorder and other state and county offices in the event no petition for nomination has been filed on the ticket where the write in nomination is sought?

The statute applicable to this question is Section 23-910, Revised Codes of Montana, 1947, which states:

"Any person receiving the nomination by having his name written in on the primary ballot, and desiring to accept such nomination, shall file with the secretary of state, county clerk, or city clerk, a written declaration . . . provided that such person must receive at least five per cent of the votes cast for such office at the last preceding general election . . ." (emphasis supplied)

In your request for opinion you inquired whether this 5% requirement means 5% of the total number of votes cast for all candidates for an office in the preceding general election, or 5% of the number of votes cast for the successful candidate, as is specified in Section 23-804, Revised Codes of Montana, 1947, which provides for nomination by certificate signed by qualified electors. Section 23-804 states:

"The number of signatures must not be less in number than five per cent of the number of votes cast for the successful candidate for the same office at the next preceding election . . ."

There is no reason to believe that Section 23-910 was intended to embody the same rule as 23-804. The two statutes were enacted at different times and by different methods. Section 23-804 was passed by the Legislature in 1889 and was part of the convention system of nominating then in use. Section 23-910 was passed by initiative in 1912 as part of the general act setting up the direct primary system. The 5% requirement was added by legislative amendment in 1945 and specifically repealed all acts and parts of acts in conflict therewith.

Opinion No. 119

**Elections—Primary Elections—
Nominations by Write In Vote—
Percentage of Total Vote Required
For Write In Nomination.**

- Held:** 1. The 5% requirement of Section 23-910, Revised Codes of Montana, 1947, means 5% of the votes cast for all candidates for the office at the last preceding general election.
2. Where several offices of the same kind are filled at the same election, such as the state legislature, and voters may cast several votes for several different candidates, the proper total upon which to base the 5% requirement of Section 23-910 is the vote of the lowest elected candidate and the lowest unsuccessful candidate of each other party at the last preceding general election.

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Section 23-804 referred to the proper number of signatures on a petition which was a supplementary method of nomination under the convention system. Section 23-910 defines the proper number of votes necessary to nominate by write in under the direct primary law. The language of each statute is clear and should be given effect as written, unless there is reason to believe that the Legislature intended that the requirement of one statute should be read into the other. There is no such indication of legislative intent in this case. It is a rule in Montana that legislative intent must be inferred from the plain meaning of the words used, if this is possible, before other rules of statutory construction may be resorted to. (*Great Northern Utilities Co. vs. Public Service Commission*, 88 Mont. 180, 293 Pac. 294; also, *State vs. Bowker*, 63 Mont. 1, 205 Pac. 961). In the case of *State vs. Moody*, 71 Mont. 473, 230 Pac. 575, it was said:

"To ascertain thought expressed by statute, first resort is to natural signification of words employed, in order of grammatical arrangement in which placed, and if, thus regarded, they embody definite meaning involving no absurdity or contradiction between different parts of same writing, neither courts nor Legislatures may add to or take away from meaning."

The words of Section 23-910 are clear and under the above rules of statutory construction must be given effect unless there is some other reason to believe that the Legislature intended that they should be interpreted as embodying the requirement of Section 23-804. There is none, since the primary election law, of which Section 23-910 is a part, was intended to supersede the provisions of the convention system in all cases where the direct primary law was applicable.

In *LaBorde vs. McGrath*, 16 Mont. 283, it was said:

". . . Whenever the provisions of the primary nominating election law apply then the convention or primary meeting methods of making nominations provided for in section 23-801 are expressly ruled out and prohibited . . ."

It is clear that under this case if both statutes applied to the same situation, 23-910 would rule. (See, also, *Opinions of the Attorney General*, Volume 22, Opinion No. 136).

It is therefore my opinion that the requirements of Section 23-910 clearly mean 5% of the total votes cast for all candidates for the office at the last preceding general election. In the case of candidates for State Legislature, there has been some question as to what is the total vote upon which the 5% requirement is to be computed since when there is more than one member to be elected from a certain county, each elector in the county is entitled to as many votes as there are members to be elected. Therefore, the total number of votes cast for all members of the Legislature is always much greater than the total number of voters who have cast their ballots. However, each seat in the state legislature is a separate office. (See, *State vs. Eaton*, 114 Mont. 199; *Rickers Petition*, 66 N. H. 207, 42 Am. Jur., page 896).

In a general election there are only as many candidates on each ticket as there are offices to be filled. Therefore, the 5% requirement is to be computed upon the total vote cast for one office, that is, for one single seat in the State Legislature. This raises the question: Which seat is to be the criterion upon which the total vote is to be computed—the seat for which the highest number of votes was cast, or the lowest number, or some intermediate number, if there are more than two? The statute does not specifically provide for this case, however, every statute must be given effect when possible (*State vs. Callow*, 78 Mont. 308, 254 Pac. 107), and whenever possible a construction must be placed upon all enactments which will make them operative for the length of time they may be enforced. (*Fergus Motor Co. vs. Sorenson*, 73 Mont. 122, 235 Pac. 422).

It is a rule in this jurisdiction that election laws must be liberally construed. In the case of *Peterson vs. Billings*, 109 Mont. 390, it was said:

"This court, in *Stackpole vs. Hallahan*, 16 Mont. 40, 40 Pac. 80, on page 57, announces that 'in the construction of election laws the whole tendency of American authority is toward liberality, to the end of sus-

taining the honest choice of the electors.' The reason for this rule is that the paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them."

This is the general American rule. (See, *Turner vs. Fagg*, 39 Nev. 406, 159 Pac. 56; *Othus vs. Koger*, 119 Ore. 101, 248 Pac. 146, also, 46 C. J. 937, *Officers*, s 32.) Under these rules the only proper construction is that the vote for the office which was filled by the candidate who drew the smallest total number of votes of all the successful candidates for the state legislature is the vote to be considered. The total vote for the office should be the combined total votes of the successful candidate receiving the smallest number of votes of all the successful candidates plus the votes of the defeated candidate of all other parties who received the smallest total vote among all defeated candidates.

It is therefore my opinion that the number of votes upon which the 5% requirement for a write in candidate for the state legislature is based, is the total number of votes received by the lowest successful candidate for the state legislature in the last preceding general election, plus the number of votes received by the lowest unsuccessful candidate of each other political party.

Very truly yours,
ARNOLD H. OLSEN
Attorney General