

Opinion No. 46

COUNTY COMMISSIONERS; Vacancy; election to fill—ELECTIONS; Vacancy; County Commissioners—ELECTIONS; Ballots; election to fill vacancy—Section 23-801, RCM, 1947—Section 23-803, RCM, 1947—Section 23-807, RCM, 1947.

- Held:**
1. Where a county commissioner dies after a primary election but before a general election, nominees for the vacancy thus created may be selected according to the methods provided by Chapter 8 of Title 23, RCM, 1947, specifically, Sections 23-801 and 23-804.
 2. Section 23-807 does not apply to such an election.
 3. Separate ballots need not be provided for such an election.

August 24, 1962

Mr. James P. Lucas,
Custer County Attorney
Miles City, Montana

Dear Mr. Lucas:

You have advised me that one of the members of the Custer County Board of County Commissioners recently died. The office which he held was not up for election at the forthcoming general election and his death occurred after the primary elections held on Tuesday, June 5, 1962.

On these facts, you wish to know the proper method to be followed for a person to have his name placed on the ballot as a candidate for the vacancy thus created. You also wish to know whether Section 23-807, which requires certificates of nomination to be filed at least 90 days before the date of the election applies to this situation. Finally, you ask if a special and separate ballot is necessary for this election since it will be held at the same time as the next general election—November 6, 1962.

Article XVI, Section 4, of the Montana Constitution provides in pertinent part:

“When a vacancy occurs in the board of county commissioners the judge or judges of the judicial district in which the vacancy occurs, shall appoint, someone residing in such commissioner district where the vacancy occurs, to fill the office until the next general election when a commissioner shall be elected to fill the unexpired term.”

In the case of *Laborde v. McGrath*, 116 Mont. 283, 149 Pac. 2d 913 (1944), a similar situation was before our Supreme Court. There, a county treasurer had died approximately four years before the expiration of his term of office. There, as here, the constitution provided that the appointee to fill a vacancy in the office of county treasurer should hold office until the next general election. (Art. XVI, Section 5, Mont. Const.). The following statement of the court in the *Laborde* case appears to resolve your first question:

“Should a vacancy be filled by an appointment made subsequent to the holding of the primary election but prior to the general election or should the appointment be made at such other time as would make it impossible or unreasonable for candidates to file and otherwise comply with the Primary Nominating Election Law, then the prohibition of Section 639 (now Section 23-909, RCM, 1947) would not apply and the nominations of a candidate could then be made pursuant to the provisions of Section 612, Revised Codes, or of Section 615. (Now Sections 23-801 and 23-804, RCM, 1947.) See also *Bottomly v. Ford*, 117 Mont. 160, 157 P. 2d 108 (1945).”

It is therefore my opinion that, where a county commissioner dies after a primary election but before a general election, nominees for the vacancy thus created may be selected according to the methods provided by Sections 23-801 and 23-804, RCM, 1947. In other words, a candidate for this office may be entitled to have his name printed on the ballot if he is selected by a party convention held for that purpose (Section 23-801, RCM, 1947) or by presenting a certificate of nomination signed by registered voters of the county. The number of such signatures must equal at least 5% of the number of votes cast for the successful candidate for the office of county commissioner in the 1960 general election. (Section 23-804, RCM, 1947). A candidate nominated by the latter method must be designated as an independent candidate on the printed ballot.

In answer to your second question, it is my opinion that the provisions of Section 23-807, RCM, 1947, does not apply to the situation as you have described it. That section specifically provides that:

“. . . the provisions of this section shall not be held to apply to nominations for special elections or to fill vacancies.”

Any doubt about the meaning of this exception was resolved in the case of State **ex rel.** Mitchell v. District Court, 128 Mont. 325, 275 P. 2d 642 (1954), in which it was held that the statute did not apply to nominations for an election to fill a vacancy in the office of Railroad and Public Service Commissioner. The same reasoning would apply to elections to fill a vacancy in the office of county commissioner.

In answer to your third question, it is my opinion that a special and separate ballot need not be used for the county commissioner in question. According to the opinion in Laborde v. McGrath **supra**, this is not a “special election.” For this reason, I believe that previous Attorney’s General opinions holding that a separate ballot should be used in such cases, (19 Ops. Att’y. Gen. 828, 15 Ops. Att’y. Gen. 430, 12 Ops. Att’y. Gen. 363,) have been overruled by the Laborde case.

In summary, it is my opinion that:

1. Where a county commissioner dies after a primary election but before a general election, nominees for the vacancy thus created may be selected according to the methods provided by Chapter 8 of Title 23, RCM, 1947, specifically, Sections 23-801 and 23-804.
2. Section 23-807 does not apply to such an election.
3. Separate ballots need not be provided for such an election.

Very truly yours,
FORREST H. ANDERSON
Attorney General