

VOLUME NO. 35

Opinion No. 95

ELECTIONS—Vacancies, how filled; ELECTIONS—Public Service Commission Districts; NOMINATIONS—Vacancies, after primaries; PUBLIC SERVICE COMMISSION—Vacancy, how filled; Sections 23-801, 23-809, 23-3318, 23-3320, 23-3321, 23-3406, 70-101, 72-101, R.C.M. 1947; Chapter 339, Laws of 1974.

- HELD:**
1. The office of public service commissioner which became vacant upon the death of Louis Boedecker after the primary election must be placed on the November 5, 1974 general election ballot.
 2. The elected successor to the office of public service commissioner will take office when elected and qualified and will serve out the unexpired term of Mr. Boedecker.
 3. Political party nominations for the general election may be made in accordance with the customs of each political party.
 4. Nominations for independent candidates or candidates of parties not eligible for the direct primary shall be made in accordance with section 23-3318 (1-4), R.C.M. 1947.
 5. The time of 5:00 p.m., September 18, 1974, is the final date that certificates of nomination can be accepted by the secretary of state.
 6. The successor to the office of public service commissioner must be nominated by representatives representing Mr. Boedecker's selected district under the new Public Service Commission law.
 7. The successor to the office of public service commissioner must be elected by voters of Mr. Boedecker's selected district under the new Public Service Commission law.

August 13, 1974

Honorable Thomas L. Judge
Governor of the State of Montana
State Capitol
Helena, Montana 59601

Dear Governor Judge:

In your letter of August 1, 1974, you requested my opinion on the following questions:

1. Should a successor to Commissioner Boedecker be elected at the general election in November, 1974?
2. Will this successor hold office for the remainder of the unexpired term to which Mr. Boedecker was elected?
3. In what manner should political party nominations for the election be made?
4. In what manner should other nominations, such as those of independent candidates or candidates of parties not eligible for the direct primary be made?
5. When should certificates of nomination be delivered to the secretary of state?
6. Since Commissioner Boedecker was elected at a statewide election, must his successor be nominated by representatives representing the entire state or his selected district under the new Public Service Commission law?
7. Should this successor be elected by a district or a statewide vote?

Mr. Boedecker was elected at the general election in November, 1972, to serve a six-year term from the first Monday of January, 1973, to the first Monday of January, 1979.

Subsequent to that election, by Chapter 339 of the Laws of 1974, the three-member Public Service Commission to which Mr. Boedecker had been elected was abolished and replaced by a five-member Public Service Commission which will commence its duties on the first Monday of January, 1975. The legislature specifically provided, however, that any member whose term had not expired should continue in office to the end of his term. This provision applied to Mr. Boedecker.

The statute under which Mr. Boedecker was elected (section 72-101, Revised Codes of Montana, 1947, repealed by section 3, Chapter 339, Laws of 1974), and the statute now in force (section 70-101, R.C.M. 1947, as amended by section 1, Chapter 339, Laws of 1974), both contain identical language concerning the method of filling vacancies:

Any vacancy occurring in the board shall be filled by appointment by the governor, and such appointee shall hold office until the next general election, and until his successor is elected and qualified.

This language was construed in **State ex rel. Mitchell v. District Court**, 128 Mont. 325, 275 P.2d 642, where the facts were substantially identical to this case. In **Mitchell**, a commissioner whose term had several years to run, resigned after the primary election, but before the general election. The supreme court ruled that the vacancy in the office should be filled by a governor's appointment,

but only until the coming general election. Since there had been no opportunity to nominate by direct primary, the court further held that party nominations should be made according to the customs of each political party. The special statutory language quoted above was deemed controlling over any conflicting provisions of the general election laws. The court held, in part:

We are also of the opinion that the provisions of sec. 23-809, a general statute, are in conflict with the specific provisions of sec. 72-101, a special statute which applies specifically and exclusively to the filling of vacancies occurring in the board of railroad commissioners of the State of Montana. To hold otherwise would utterly defeat the express intent of the legislature as expressed in sec. 72-101 and would render idle and wholly ineffective the nominations for the office of railroad commissioner made and certified by both the Republican state party convention held in Helena on October 9th and the Democratic state party convention held in Great Falls on the same date.

“The electors of this state under the provisions of sec. 72-101 have the right to vote at the next general election to be held November 2, 1954, on the two candidates chosen by such political party conventions and by their votes to there **elect one member to fill out the unexpired term of John E. Henry, resigned.** [Emphasis supplied]

The office of railroad commissioner is one that is required to be filled by the voters at the general elections held biennially, and it is only when a vacancy occurs that a temporary appointment is authorized to stop the gap and permit the board to continue to function with three members until the electors are presented with their first opportunity to select the appointee's successor which opportunity is afforded under the law at the next general election held following the occurrence of the vacancy.

There would be no object in attempting to elect a person to the office of commissioner at any other time or place than at a general election for the reason that when a vacancy does occur it is promptly filled by temporary appointment of the governor. This appointee then holds the office until his duly elected successor has had an opportunity to qualify. There is and can be no special election to elect the appointee's successor under the provisions of R.C.M. 1947, sec. 72-101, for the result of a special election could oust the governor's appointee prior to the next general election held next after such appointee's appointment and qualification.

In the instant case the vacancy which occurred when Commissioner Henry resigned effective September 30, 1954, came more than two months after the holding of the statewide primary nominating election of July 20, 1954, but prior to the general election, making it utterly impossible for candidates for the office to comply with the primary nominating election law and making it necessary to resort to the more or less imperfect nominating procedure provided in Chapter 8 of Title 23, secs. 23-801 to 23-820, of the Revised Codes of Montana of 1947.

It is apparent that some of the provisions of the chapter are not only uncertain and conflicting but also impossible of application without destroying the right of the people to select their candidates for elective public offices by and through their duly and regularly constituted political party organizations and conventions and especially in an emergency such as is here presented.

Since the language of section 72-101, R.C.M. 1947, to which the court referred in the **Mitchell** case was carried forward unchanged in section 70-101, R.C.M. 1947, it would appear, by familiar principles of statutory construction, that the legislature intended to adopt the **Mitchell** rule and continue it in force. See **Vantura v. Liquor Control Board**, 113 Mont. 265, 124 P.2d 569; **Highway Commission v. Yost**, 142 Mont. 239, 384 P.2d 277.

Therefore, in reference to your first two questions, based upon the above-mentioned statutory authority and the **Mitchell** case, the office of public service commissioner which became vacant upon the death of Louis Boedecker after the primary election must be placed on the November 5, 1974 general election ballot. The successor to the governor's appointee will take office when elected and qualified and will serve out the unexpired term of Mr. Boedecker.

You have also asked my opinion as to the manner in which political party nominations should be made.

Montana's laws concerning party nominations by the primary election were originally enacted by initiative measure in 1912 and at the time of their repeal by the 1969 legislative assembly, they were substantially the same laws as when they were originally enacted. Our new election laws were passed by the 1969 legislative assembly. The statutes dealing with primary elections and nominations are contained in chapter 33 of Title 23, R.C.M. 1947, and are substantially similar to the pre-1969 election laws.

Section 23-801, R.C.M. 1947, which provided for an alternative method of nomination was repealed in 1969. Therefore, it is apparent that the intent of the legislature was to limit the procedure for nominating candidates under normal circumstances to that procedure found under the primary election law, Title 23, R.C.M. 1947. Section 23-3320, R.C.M. 1947, provides in pertinent part:

- (1) Every political party which received three per cent (3%) or more of the total vote cast for governor at the next preceding general election in the county, district, or state for which nominations are proposed to be made, **shall nominate its candidate for public office in the county, district or state under this act.** (Emphasis supplied)

The procedure for the nomination of candidates by primary election is clear; however, the death of Public Service Commissioner Louis Boedecker occurred on July 26, 1974, several weeks after the primary election date.

There are provisions in chapter 33, Title 23, R.C.M. 1947, that deal with vacancies. Section 23-3321, R.C.M. 1947, provides in pertinent part:

(2) If a vacancy occurs in the office of a candidate in case of death or removal from the state or district before the date of the primary, the vacancy shall be filled by the affected political party.

(3) When a vacancy occurs in the office of a candidate after the primary and before the general election in any district however constituted, the vacancy shall be filled as follows:

(a) The vacancy shall be filled by a committee of three (3) members selected from each county or district by the county central committees of the county or district of the affected political party.

(b) The secretary of the committee shall transmit a certificate to the secretary of state with the information contained on the original certificate plus the cause of the vacancy, the name of the person nominated, the office to be filled, and the name of the person for whom the nomination was made.

Section 23-3406, R.C.M. 1947, provides in pertinent part:

(1) Each political party shall have power to:

(h) Make nominations to fill vacancies occurring among its candidates nominated for offices to be filled by the state at large or by any district consisting of more than one (1) county where such vacancies are caused by death, resignation or removal from the electoral district.

However, since the above-mentioned sections deal with vacancies occurring in the office of a candidate, in my opinion the committee has no authority to make an original nomination. The statutory provisions only confer power to fill vacancies occurring among candidates nominated at the primary nominating election. **State ex rel. Smith v. Duncan**, 55 Mont. 376, 177 P. 248.

There is no specific provision for an **original** nomination of a candidate for a vacancy occurring between the primary and general elections. To hold that nominations must be made in accordance with Title 23, R.C.M. 1947, would in effect deny the people the right to make nominations for the candidates of their choice.

In **Mitchell**, the court held that since there had been no opportunity to nominate by direct primary, the party nominations should be made according to the customs of each political party. Section 23-3406, R.C.M. 1947, provides in part:

(1) Each political party shall have power to:

(a) Make its own rules and regulations;

(b) Provide for and select its own offices;

(c) Call conventions and provide for the number and qualifications of delegates:

- (i) Perform all other functions inherent in such an organization.

It is apparent that the above-mentioned statutory provision, standing alone, is uncertain in relation to the power of a political party to call a convention for the purpose of nominating a candidate for the general election. However, in light of the holding in **Mitchell**, and the emergency situation presented by the present circumstances, it is my opinion that political party nominations for the general election may be made in accordance with the customs of each political party.

You have also requested my opinion as to the manner in which other nominations, such as those of independent candidates or candidates of parties not eligible for the direct primary, should be made.

Section 23-3318, R.C.M. 1947, provides for nominations for public office by an individual or a political party that did not appear on the ballot in the last general election. While section 23-3318 is not specifically applicable to the case at hand, the provisions contained in subsections (1) through (4) appear to provide an appropriate means whereby an independent candidate could be placed on the ballot for the general election. Under the present circumstances, such a candidate or party should not be precluded from utilizing this section due to the time limitations set forth in subsection (5). The provisions of subsection (5) are inapplicable because the office within District 3 was not one designated for the general election at the normal closing date for filing certificates of nomination.

Therefore, in the absence of any specific statutory provision, it is my opinion that an individual or a political party that did not appear on the ballot in the last general election may utilize section 23-3318 (1-4), R.C.M. 1947, for nomination under the present circumstances.

You have also requested my opinion as to when certificates of nomination should be delivered to the secretary of state.

After consulting with the secretary of state, I have concluded that 5:00 p.m., September 18, 1974, is the final date that certificates of nomination can be accepted by the secretary of state and still allow time to have the ballots printed.

You have also requested my opinion as to whether the candidate must be nominated by representatives representing the entire state or the district selected by Mr. Boedecker under the new Public Service Commission law.

Mr. Boedecker was elected at a statewide election in November, 1972, to serve from the first Monday of January, 1973 to the first Monday of January, 1979.

Section 4 of Chapter 339, Laws of 1974, required the incumbent commissioner whose term of office extended beyond January 1, 1975 to designate the district he would serve by written designation filed with the secretary of state. On March 29, 1974, Commissioner Boedecker designated the third district as the district he would represent from and after January 1, 1975.

The legal situation presented appears to be this: that Mr. Boedecker would be a statewide elected Public Service Commissioner until the first Monday in January, 1975. After that date, he would be the Public Service Commissioner representing District 3. All future elections for this position would be confined to the nine counties comprising District 3.

The person to be elected to fill Mr. Boedecker's unexpired term will take office as soon as he qualifies after the election on November 5, 1974. He will thus serve a maximum of 61 days as a member of the three-member Public Service Commission representing the state at large. He will then serve the following four years as the district commissioner from District 3 as Mr. Boedecker would have done had he lived.

The language of section 4, Chapter 339, Laws of 1974, provides:

The incumbent commissioner whose present term of office extends beyond January 1, 1975, shall, within fifteen (15) days after the effective date of this act, designate the district he will serve by written declaration filed with the secretary of state and he shall serve as commissioner from such designated district to the expiration of such term.

These words could be construed to indicate that Commissioner Boedecker was the District 3 representative from the date of his designation of that district. Since the five-member Board was not then in existence and will not be until the first Monday in January, 1975, he would seem to have been in a position similar to that of a person who has been elected to an office but has not yet entered upon his term.

Since almost all of the time of the person elected to this office will be served as the District 3 representative, the equities would seem to indicate that he should be elected by the electors of District 3, thereby placing these electors upon an equal footing with those of every other district. Otherwise, the electors of all other districts will be permitted to name their own representative and also have a voice in the election of the representative of District 3.

Therefore, based upon the above statutory authority, it is my opinion that Mr. Boedecker's successor must be nominated by representatives representing his selected district under the new Public Service Commission law.

You have also requested my opinion as to whether Mr. Boedecker's successor should be elected by a district or a statewide vote.

For the same reasons given in response to your previous question, it is my opinion that Mr. Boedecker's successor must be elected by voters of his selected district under the new Public Service Commission law.

THEREFORE, IT IS MY OPINION:

1. The office of public service commissioner which became vacant upon the death of Louis Boedecker after the primary election must be placed on the November 5, 1974 general election ballot.

2. The elected successor to the office of public service commissioner will take office when elected and qualified and will serve out the unexpired term of Mr. Boedecker.

3. Political party nominations for the general election may be made in accordance with the customs of each political party.

4. Nominations for independent candidates or candidates of parties not eligible for the direct primary shall be made in accordance with section 23-3318 (1-4), R.C.M. 1947.

5. The time of 5:00 p.m., September 18, 1974, is the final date that certificates of nomination can be accepted by the secretary of state.

6. The successor to the office of public service commissioner must be nominated by representatives representing Mr. Boedecker's selected district under the new Public Service Commission law.

7. The successor to the office of public service commissioner must be elected by voters of Mr. Boedecker's selected district under the new Public Service Commission law.

Very truly yours,

ROBERT L. WOODAHL
Attorney General