

VOLUME NO. 35**Opinion No. 98**

ELECTIONS — Local government study commission, write-in votes; ELECTIONS — Voting, write-in votes; COUNTIES — Local government study commission, elections. Sections 16-5107, 23-3506, 23-3514, 23-3606 and 93-401-16, R.C.M. 1947.

HELD: An individual may be elected to a position on a local government study commission by write-in votes when the individual's name is written in and the ballot properly marked. The person receiving the largest number of votes shall be elected.

October 23, 1974

Mr. Harold E. Gerke, Chairman
Commission on Local Government
Room 348, State Capitol
Helena, Montana 59601

Dear Mr. Gerke:

You have requested my opinion on the following question:

May an individual be elected to a position on a local government study commission by write-in votes?

The legislature provided for the election of local government study commission members pursuant to section 16-5107, Revised Codes of Montana, 1947, which provides in pertinent part:

(1) study commissioners shall be elected at the general election, Tuesday, November 5, 1974. There shall be placed on the ballot the names of study commission candidates who shall have been nominated in the manner provided in this section. ...

Subsequent subsections prescribe the manner in which a study commission candidate was to be nominated. There are no provisions which address themselves to the eligibility of write-in candidates other than section 16-5107 (10), R.C.M. 1947, which provides in part:

... Except as otherwise provided in this act, each election conducted under this act **shall be governed by the election laws of the state of Montana.** ... (Emphasis supplied)

The election laws of Montana are codified in Title 23, Revised Codes of Montana, 1947. Section 23-3514 (1), R.C.M. 1947, provides:

(1) Below the names of candidates for each office there must be enough blank spaces to contain as many written names of candidates as there are persons to be elected.

Section 23-3506 (2), R.C.M. 1947, provides:

(2) An elector may write or paste on his ballot the name of any person for whom he desires to vote for any office, but must mark it as provided in section 23-3606. When the ballot is marked in this manner, it must be counted the same as though the name is printed upon the ballot and marked by the voter; ...

Section 23-3606 (4), R.C.M. 1947, provides:

(4) The elector may write in the blank spaces, or paste over any other name, the name of any person for whom he wishes to vote, and vote for that person by marking an "X" before the name.

In 35 **Opinions of the Attorney General**, No. 87, I held that a mark other than an "X" within the square before a candidate's name may be used to express an elector's choice on an election ballot if his intention is clear to the election officers.

Whether one may be elected to a position on a local government study commission by write-in votes involves an interpretation of the specific statute (section 16-5107, R.C.M. 1947) in relation to the general election laws of the state of Montana.

In **State ex rel. McHale v. Ayers**, 111 Mont. 1, 105 P.2d 686 (1940), the Montana supreme court was called upon to interpret a similar conflict between the Non-Partisan Judiciary Act, chapter 74, Revised Codes of 1935, and the general election laws. In **McHale**, there was only one candidate who had filed a petition for nomination as prescribed by the Non-Partisan Judiciary Act, and he was the only candidate whose name had been printed upon the ballot. However, the name of Seldon S. Frisbee had been hand-written upon the ballot by some 201 electors as a write-in candidate for the office. The relator claimed that the votes that had been cast for Mr. Frisbee were illegal and invalid for the reason that Mr. Frisbee had not filed a petition for nomination as required by the Non-Partisan Judiciary Act and therefore was not legally a candidate for nomination; his name was not printed upon the judicial primary ballot or entitled to be printed thereon; and that the ballots that were cast for him should not have been counted.

The Non-Partisan Judiciary Act embraced section 812.1, Chapter 74, Revised Codes of 1935, which provided that candidates for judicial office "shall be nominated and elected in accordance with the provisions of this Act and in no other manner."

The court held in part:

We think it was not the intention of the legislature to so restrict the electors. The Act is silent as to, but does not prohibit, the right of an elector to write on the ballot the name of and to vote for a qualified person for nomination or election to judicial office, as electors may do as to other candidates under the general primary and election laws.

The Non-Partisan Judiciary Act and the election laws for primary and general elections are **in pari materia** and must be construed together with reference to the whole subject matter and made to harmonize, if this can be consistently done. It is a general rule of law that all acts relating to the same subject, or having the same general purpose as the statute being construed, should be read in connection with such statute.

It is the judgment of the court that the provisions of ... [the Non-Partisan Judiciary Act] clearly **incorporate by general reference those provisions of the general primary law relating to the right of electors to write in and vote for qualified persons** for nomination to the judicial offices, and, therefore, eliminate any inconsistency between the Non-Partisan Judiciary Act and the General Primary Law, so far as the question under consideration is concerned. (Emphasis supplied) **McHale** at pps. 4 & 5.

In construing a statute, the intention of the legislature is always to be pursued if possible [Section 93-401-16, R.C.M. 1947; **State ex rel. Krona v. Holmes**, 114 Mont. 372, 376, 136 P.2d 220 (1943)], and in determining legislative intent, one must first resort to the plain meaning of the words used. **State ex rel. Cashmore v. Anderson**, 160 Mont. 175, 184, 500 P.2d 921, 924 (1972).

The legislature prescribed specific procedures for the nomination of local government study commission candidates and it is readily apparent that only those candidates who complied with the requirements of section 16-5107, R.C.M. 1947, shall have their names placed on the ballot. However, section 16-5107 is silent as to, but does not prohibit, the right of an elector to write on the ballot the name of a qualified person for election to the local government study commission.

Subsection (10) of section 16-5107, R.C.M. 1947, clearly states that, "except as otherwise provided in this act, each election conducted under this act shall be governed by the election laws of the state of Montana."

Subsection (11) of section 16-5107, R.C.M. 1947, provides in part:

If the number of municipal study commissioners elected at the **November 5, 1974** election is not equal to the number of

commissioners required to be selected, the mayor with the confirmation of the municipal council or commission shall appoint, on or before November 16, 1974, the additional commissioner or commissioners. ... (Emphasis supplied)

The same provision is repeated for county study commissioners with appropriate changes in the appointing authority.

The legislature provided for appointment of local government study commissioners if less than the number required to be selected were elected at the November 5, 1974 election. However, the appointive power prescribed by the above-mentioned statutory provision does not preclude the right of voters to elect candidates by write-in votes.

Based upon a clear reading of the applicable statutory provisions and case law as well as the absence of any provision relating to write-in votes in section 16-5107, R.C.M. 1947, it is my opinion that the provisions of section 16-5107, R.C.M. 1947, do not preclude write-in voting for local government study commissioners and that the general election laws are controlling on the question of the validity of write-in votes.

In responding to your question, a collateral issue has arisen that must be considered. If an individual may be elected to a position on a local government study commission by write-in votes, it is conceivable that one could be elected with a single vote since there are no constitutional or statutory provisions which require that a write-in candidate receive a minimum number or percentage of the vote in order to be elected. The only pertinent provision regarding this issue is Article IV, section 5, Montana Constitution, 1972, which provides:

In all elections held by the people, the person or persons receiving the largest number of votes shall be declared elected.

It is readily apparent that a person must receive a plurality of the votes cast for the particular office to be elected. There is no requirement whatsoever that a certain minimum number of votes must be received in order to be elected, only that a plurality be received.

However, as indicated in **Binns v. Hite**, 37 Cal. Rptr. 323, 389 P.2d 947 (1964), the legislature may regulate voter write-in procedures absent any constitutional prohibition to the contrary. Our legislature did not choose to do so and absent such legislative directives, a simple plurality would suffice to elect a person to a local government study commission.

THEREFORE, IT IS MY OPINION:

An individual may be elected to a position on a local government study commission by write-in votes where the individual's name is written in and the ballot properly marked. The person or persons receiving the largest number of votes shall be elected.

Very truly yours,
ROBERT L. WOODAHL
Attorney General