

VOLUME NO. 36

Opinion No. 59

LEGISLATURE — Vacancies, appointment by county commissioners; OFFICERS AND OFFICES — Vacancies in the legislature, how filled; OFFICERS AND OFFICES — Vacancies in the legislature, qualifications of appointee, Article V, Section 45, 1889 Montana Constitution; Article V, Sections 4 and 7, Article VI, Section 5, 1972 Montana Constitution; Sections 16-2406, 43-202, 43-215, 59-301, 59-302, 59-604 and 70-101.

HELD: 1. An appointment made by county commissioners to fill an unexpired term of a legislator, under authority of section 43-215, R.C.M. 1947, is for the entire unexpired term.

2. An appointee to the legislative assembly must fulfill the requirements of section 59-301, R.C.M. 1947 and Article V, Section 4, 1972 Montana Constitution.

March 10, 1976

Mr. Ed Spannuth, Chairman
Board of County Commissioners
225 Bedford
Hamilton, MT 59840

Dear Mr. Spannuth:

You have requested my opinion concerning the appointment of a person to fill the vacancy created by the death of Senator Miles Romney of District No. 46. It is my understanding that the senate term of the late Senator Romney expires in 1978. You have specifically asked:

1. What would be the term of the new appointee?
2. Are there any restrictions as to the qualification of the appointee?

There are several statutes in Montana concerning the manner in which vacancies in the legislature should be filled. Due to the conflicting nature of these provisions, it is necessary to examine the legislative and constitutional history of the area.

The present Sections 59-604 and 43-202, R.C.M. 1947 deal with vacancies in the legislative assembly. Both statutes were enacted in 1895 and have remained substantially in their original form. The only change in either statute was a 1975 amendment to Section 43-202, *supra*, which added the language "until his successor is elected and qualified". These sections read as follows:

59-604. Whenever a vacancy, or failure to elect by reason of a tie occurs in either house of the legislative assembly, the governor must at once issue a writ of election to fill such vacancy.

43-202. The term of office of a senator is four years or until his successor is elected and qualified, and of a representative two years or until his successor is elected and qualified, and the term of service thereof shall begin on the first Monday of January next succeeding his

election, and if a senator or representative be elected to fill a vacancy his term of service shall begin on the next day after his election. (Emphasis supplied)

These sections were based upon Article V, Section 45 of the 1889 Montana Constitution which read as follows:

When vacancies occur in either house, the Governor or the person exercising the functions of the Governor shall issue writs of election to fill the same.

In 1932, Article V, Section 45 was amended to read as follows:

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 of the governor.

The reason for the amendment was to provide a means of filling a legislative seat if a legislator were to die during the legislative session. If this happened, there would not be sufficient time to call a special election. This situation did occur in **State ex rel. Cutts v. Hart**, 56 Mont. 571, 185 P. 769 (1919) where the court held the governor did not have the power to fill a vacancy by appointment.

Article V, Section 45 of the 1889 Constitution was repealed by Chapter 273, Laws 1965 and adopted at the general election of November 8, 1966, effective under governor's proclamation, December 6, 1966. The statutes which were based on Section 45, specifically Section 59-604, **supra**, were not repealed.

Chapter 179, Laws 1967 was adopted for the following stated legislative purpose:

Whereas, Section 45, Article V of the Montana Constitution which provides for the filling of vacancies in the legislative assembly has been repealed by an amendment to the Montana Constitution adopted by the electorate at the November 8, 1966 general election.

Chapter 179 created Section 43-215, R.C.M. 1947 which provides as follows:

When a vacancy occurs, in either house of the legislative assembly, the vacancy shall be filled by appointment by the board of county commissioners, or, in the event of the multi-county district, the boards of county commissioners comprising the district sitting as one appointing board. The chairman of the board of county commissioners of the county in which the person resided whose vacancy is to be filled shall call a meeting for the purpose of appointing the member of the legislative assembly, and he shall act as the presiding officer of the meeting.

The 1972 Montana Constitution in Article V, section 7 provides:

A vacancy in the legislature shall be filled by election for the unexpired term unless otherwise provided by law.

At the present time section 43-215, *supra*, does otherwise provide, and the Constitutional Convention notes annotated under section 7 state as follows:

New provision which would require filling vacancies by election if the present law requiring appointments is ever repealed.

The result of the above legislative action is that Montana has two statutes relating to vacancies in the legislature. Of course statutes relating to the same subject must be harmonized if possible to give effect to each. **State ex rel. Dick Irvin, Inc. v. Anderson**, 164 Mont. 513, 525 P.2d 564 (1974). In this situation, however, such harmony is impossible. Section 59-604, *supra*, calls for the governor to call for a special election when a vacancy occurs, and section 43-215, *supra*, requires the county commissioners to fill the vacancy by appointment.

It should be noted that section 59-604 was based on a now repealed section in the 1889 Constitution. Further, the legislature, in enacting section 43-215, *supra*, noted the repeal of Article V, Section 45 of the 1889 Constitution. It is a common rule of statutory construction that where earlier statutes are repugnant to later statute relating to the same general subject, the later statutes control. **State ex rel. Wiley v. District Court of Sixteenth Judicial District**, 118 Mont. 50, 164 P.2d 358 (1946). These rules of construction give effect to section 43-215, *supra*, and are further supported by the Constitutional Convention comment under Article V, Section 7 of the 1972 Constitution. This comment recognizes that present Montana law requires that vacancies in the legislative assembly be filled by appointment.

Having established that Section 43-215, *supra*, is the controlling statute, it remains to examine your first question which concerned how long the appointee shall hold office.

Generally constitutional and legislative provisions dealing with vacancies in state and county offices specify that the appointee shall hold office until the next general election. Article VI, Section 5, 1972 Montana Constitution (various state officers); Section 16-2406, R.C.M. 1947 (county officers); Section 70-101, R.C.M. 1947 (Public Service Commission). Section 43-215, however, is silent on the length of time the appointee shall hold office. Therefore, it becomes necessary to construe the language "vacancy shall be filled" in section 43-215, *supra*, and determine whether the appointment is until the next general election or for the remainder of the particular term.

State ex rel. Greene v. Anderson, 113 Mont. 582, 129 P.2d 874 (1942) dealt with a factual situation similar to the present one. There, a state senator died with two years remaining on his senate term. The court, in considering the length of the appointment, had reason to construe the language "vacancies shall be filled" found in Article V, Section 45 of the 1889 Montana Constitution. The court stated:

Furthermore, the expression "vacancies shall be filled" without any limitation of the words, certainly means to fill them completely;

The legislature and people did not choose to confine the provisions to interim vacancies, nor to limit it in any way; and we have no authority to add any limitations or exceptions which may seem to us desirable; having specifically and completely dealt with the contingency of legislative vacancies arising by death, and having chosen to have such vacancies filled exclusively and finally by appointment, they have left nothing to be done by legislative enactment or judicial interpretation.”

This question was specifically answered in 32 **Opinions of the Attorney General**, No. 19 where then Attorney General Anderson held:

Therefore it is my opinion that an appointment made by the county commissioners to fill a legislative vacancy pursuant to the provisions of section 43-215, R.C.M. 1947, is final and exclusive for the unexpired term of the originally elected member of the legislature.

From the above-cited statutory and judicial authority, it is clear that when a person is appointed by the county commissioners to fill an unexpired term of a legislator, the appointment is for the remainder of the unexpired term.

Your second question concerns whether there are any restrictions as to the appointee's qualifications.

Section 59-301, R.C.M. 1947 is pertinent to this area and reads as follows:

No person is eligible to hold civil office in this state, who at the time of his election or appointment is not of the age of eighteen (18) years or older and a citizen of this state.

It is clear that the provisions of section 59-301, *supra*, apply to an appointee to the legislature. Therefore the appointee must be at least eighteen years of age and a citizen of Montana.

Section 59-302, R.C.M. 1947 provides:

Provisions respecting disqualifications for particular offices are contained in the constitution and in the provisions of the codes concerning the various offices.

Title 43, Chapter 2, R.C.M. 1947, which concerns officers of the legislature, has no further qualifications. This leaves Article V, Section 4 of the 1972 Montana Constitution which reads as follows:

A candidate for the legislature shall be a resident of the state for at least one year next preceding the general election. For six months next preceding the general election, he shall be a resident of the county if it contains one or more districts or of the district if it contains all or parts of more than one county.

It should be noted that while Article V, Section 4 refers to “candidates for the legislature”; candidates has been defined as follows:

One who seeks or offers himself, or is put forward by others, for an office, privilege, or honor. **Starkweather v. Hoss**, 126 Or. 630, 270 P.768, 770 (1928); **State ex rel. Ranney v. Corey**, Ohio App., 47 N.E. 2d 799, 800 (1940).

Under this definition, a prospective appointee for the legislature would be considered a "candidate for the legislature" as provided for in Article V, Section 4, 1972 Montana Constitution. Although the residency requirements in Article V, Section 4 refer to the general election, logic dictates that candidates for appointment and candidates for election should be equally qualified. Therefore a candidate for appointment to the legislature must be a resident of the state for at least one year prior to appointment. Also, for six months next preceding the appointment he must be a resident of the county if it contains one or more districts or of the district if it contains all or parts of more than one county.

THEREFORE, IT IS MY OPINION:

1. An appointment made by county commissioners to fill an unexpired term of a legislator, under authority of section 43-215, R.C.M. 1947, is for the entire unexpired term.
2. An appointee to the legislative assembly must fulfill the requirements of section 59-301, R.C.M. 1947 and Article V, Section 4, 1972 Montana Constitution.

Very truly yours,

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