

VOLUME NO. 37

OPINION NO. 147

COUNTY COMMISSIONERS - Vacancies - term of appointee;
Procedure to nominate candidates in next general election;
REVISED CODES OF MONTANA, 1947 - Sections 16-903, 23-
2601(2), 23-2604, 23-3301, 23-3321(3), 23-3514.

- HELD: 1. The appointee to fill the vacancy in the office of Flathead County Commissioner will hold that office until the next general election, which is November 7, 1978.
2. The selection of candidates for the general election will be made by each political party according to section 23-3321(3), R.C.M. 1947, and pursuant to section 23-3514 write-in candidates may also seek the office of county commissioner.

30 May 1978

Patrick Springer, Esq.
Flathead County Attorney
Flathead County Courthouse
Kalispell, Montana 59901

Dear Mr. Springer:

You have requested my opinion concerning the filling of a vacancy in the office of county commissioner. The situation in Flathead County is that Russell H. Deist, a county commissioner, died on May 17, 1978, with approximately four and one half years of his term remaining. The District Court has not appointed a successor.

Two questions are presented by your request:

1. How long will the appointee hold office?
2. If an election for the office is held in 1978, how will candidates for the office be elected?

The first question is answered by section 16-903, R.C.M. 1947, which states:

Whenever a vacancy occurs in the board of county commissioners from a failure to elect or otherwise, the district judge or judges in whose district the vacancy occurs must fill the vacancy, and such appointee shall hold office until the next general election. (Emphasis added.)

A general election is defined as "an election held for the election of officers throughout the state at times specified by law." Section 23-2601(2), R.C.M. 1947. Section 23-2604, R.C.M. 1947, states:

A general biennial election shall be held throughout the state in every even-numbered year on the first Tuesday after the first Monday of November.

The next general election will be November 7, 1978.

Section 16-903 clearly provides that the appointee to Russell H. Deist's office will hold that office until the next general election, which is November 7, 1978. See also 36 OP. ATT'Y GEN. NO. 66 (1962).

The problem of nominating candidates for the next general election has been addressed with respect to a similar situation by the Montana Supreme Court and a previous Attorney General's opinion. In Laborde v. McGrath, 116 Mont. 283, 149 P.2d 913 (1944) a county treasurer had died approximately four years before the expiration of his term. The Constitution provided that the appointee should hold office until the next general election. The Court stated in Laborde at 293:

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 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. (Emphasis added.)

29 OP. ATT'Y GEN. NO. 46 at P. 108 (1962) applied this rationale to a situation where a county commissioner was not up for election in the forthcoming general election but died after the primary election. The Attorney General held that nominees for the vacancy could be selected according to methods provided by sections 23-801 and 23-804, R.C.M. 1947, which were by party convention or certificates of nomination.

The rationale of Laborde v. McGrath applies to the present situation. The appointment will be made at a time which makes it impossible for candidates to file and comply with the primary election and nomination statutes, sections 23-2301, et seq., R.C.M. 1947. Therefore, the selection of candidates pursuant to a primary election in accordance with section 23-3301 et seq., R.C.M. 1947, does not apply. In addition, sections 23-801 and 23-804, R.C.M. 1947, were repealed by Laws of Montana (1969), ch. 368, sec. 248, and the nominating procedures provided thereunder no longer exist.

The only alternative method of nominating candidates, which does not involve the primary election laws and the filing deadline thereunder is the procedure provided in section 23-3321, R.C.M. 1947, for filling vacancies in the office of a candidate before and after the primary.

Section 23-3321(3) provides:

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 elected 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.

(c) When the certificate is filed with the secretary of state accompanied by the proper filing fee he shall insert the name of the person nominated to fill the vacancy.

Since the office of county commissioner has become vacant with no opportunity to nominate candidates in the primary election, a vacancy in the office of the candidate for county commissioner has occurred after the primary and before the general election. All political parties are affected and are entitled to nominate a candidate pursuant to section 23-3321(3), R.C.M. 1947. In addition, anyone interested in the office may wage a write-in campaign as provided by law. Section 23-2514, R.C.M. 1947. The successful candidate will take office as soon as the election is certified and will serve as county commissioner for the remainder of Russell H. Deist's term.

THEREFORE, IT IS MY OPINION:

1. The appointee to fill the vacancy in the office of Flathead County Commissioner will hold that office until the next general election, which is November 7, 1978.
2. The selection of candidates for the general election will be made by each political party according to section 23-3321(3), R.C.M. 1947, and pursuant to section 23-3514 write-in candidates may also seek the office of county commissioner.

Very truly yours,

MIKE GREELY
Attorney General