



Montana Legislative Services Division

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STATE ADMINISTRATION

Exhibit No. 8
Date 1/16/09
Bill No. SB124

January 16, 2009

TO: Sen. Jim Shockley, Chairman, Senate State Administration Committee
Members of the Senate State Administration Committee
FROM: Dave Bohyer *Dave B*
RE: SB 124 - an act clarifying that the death of a candidate creates an error or omission on a printed absentee ballot; requiring that absentee ballots cast for a deceased candidate be counted for the deceased candidate

In the context of SB 124, the Senate State Administration Committee has requested information regarding: (1) whether a candidate who dies prior to the general election must be replaced on the ballot; and (2) if, in fact, a candidate who dies prior to the general election must be replaced on the ballot, what is the time line for replacing the candidate. Please accept this memorandum as my initial response.

In General

Section 13-10-327, MCA, sets out the process for dealing with, in the context of an election, a vacancy created after the primary and prior to general election. (Copy of full text attached.) Section 13-10-327(1) states in pertinent part:

... if a party candidate dies or withdraws after the primary and before the general election, the affected political party shall appoint someone to replace the candidate...

Therefore, the answer to the Committee's first question -- If a candidate dies prior to the general election must the candidate be replaced on the ballot? -- is "yes".

The method of "appointing" a candidate to replace the deceased candidate is left to the political party of the deceased candidate, either the state party rules or the rules of the county central committee. (See 13-10-327(1)(a) through (1)(c).)

Time Line

Action by Political Party Required

If the candidate dies 85 days or more prior to the general election, a replacement candidate must be named at least 76 days prior to the general election. (See 13-10-327(2).) If the candidate dies less than 85 days prior to the general election, "...the affected political party shall appoint a candidate within 5 days after being notified of the vacancy". (13-10-327(2).)

Subsequent to appointing the replacement candidate, the appointing committee, i.e., the state central committee or the county or counties' central committee(s), are required to notify the appropriate election administrator(s) or, in the case of statewide or district offices, the secretary of state. (Section 13-10-327(3).) The statute does not specify a time frame within which or deadline by which the state central committee or the county or counties' central committee(s), as applicable, must notify the election administrator(s) or secretary of state, as applicable.

Action by Appointee-Candidate Required

The statutory provisions also require the person appointed to fill the vacancy to "...send a signed and acknowledged acceptance of the appointment and the filing fee for the office" to the appropriate election administrator(s) or secretary of state. (Section 13-10-327(3).) The statute does not specify a time frame within which or deadline by which the appointee must notify the election administrator(s) or secretary of state, as applicable.

Action by Election Administrator or Secretary of State Required

When the election administrator(s) or secretary of state has received proper notification from the state central committee or the county central committee or committees of the appointee named to fill the vacancy *and* the signed and

acknowledged acceptance of the appointment and filing fee from the appointee, the election administrator(s) or secretary of state shall certify the name of the appointee for the ballot. (Section 13-10-327(4).) The statute does not specify a time frame within which or deadline by which the election administrator(s) or secretary of state, as applicable, must certify the name of the appointee for the ballot.

Action Required in Regard to Ballot

Once the appointee-candidate has been certified for the ballot, the election administrator, subject to section 13-12-204, MCA, may:

- (1) correct the ballot in a manner consistent with rules adopted under 13-12-202. The rules adopted under 13-12-202 are "statewide uniform rules that prescribe the ballot form for each type of ballot used in this state.
- (2) have the entire ballot redone; or
- (3) have a separate ballot prepared only for the office for which the new candidate is a candidate.

Respectfully submitted.

Section 13-10-327, MCA

3-10-327. Vacancy after primary and prior to general election. (1) Except as provided in 13-10-328 for a vacancy in the candidacy of either governor or lieutenant governor caused by the death of a candidate, if a party candidate dies or withdraws after the primary and before the general election, the affected political party shall appoint someone to replace the candidate in one of the following ways:

(a) For offices to be filled by the state at large, the state central committee shall make the appointment as provided by the rules of the party.

(b) For offices to be filled in districts including more than one county, a committee appointed by the county central committees of all counties in the district shall make the appointment. Procedures for the appointment of the committee and making the appointment must be provided in party rules.

(c) For offices to be filled in counties, municipalities, or districts wholly within a county, the appointment must be made under rules adopted by the county central committee.

(2) Except as provided in this section, appointments to fill vacancies must be made no later than 76 days before the election. A candidate may not officially withdraw 85 days or less before a general election. However, if a candidate for partisan office dies less than 85 days before the general election, the affected political party shall appoint a candidate within 5 days after being notified of the vacancy. One of the procedures provided in 13-12-204 must be used to place the name of the appointee on the ballot if necessary.

(3) The appointing committee shall send a certificate to the officer with whom a declaration for nomination for the office would be filed, with the information required on a declaration for nomination and the name of the candidate for whom the appointee is to be substituted. The appointee shall send a signed and acknowledged acceptance of the appointment and the filing fee for the office.

(4) The officer receiving the certificate of appointment, accompanied by a statement of acceptance and the filing fee, shall certify the name of the appointee for the ballot.

APPENDIX A

Annotations to 13-10-327, MCA

NOTE: The case cited below and the two Attorney General Opinions cited below were decided and written prior to 1997, which is when the current process was enacted for filling a candidate vacancy in an election.

Case Notes:

Votes for Deceased Candidate -- Election of Write-In Candidate: A candidate for reelection to a county office died 24 days before the election. His death was known generally to electors but his name was placed on the ballot. A majority voted for him supposing to retain his widow who had been appointed to fill the vacancy until the next general election. The Supreme Court ruled that a write-in candidate receiving the highest vote cast for any living person was entitled to a Writ of Mandate to compel the County Canvassing Board to reconvene and cause certificate of election to be issued to him. State ex rel. Wolff v. Geurkink, 111 M 417, 109 P2d 1094 (1941).

Attorney General Opinions:

Filling Vacant Office: When the office of County Commissioner has become vacant with no opportunity to nominate candidates in the primary election, the selection of candidates for the general election will be made by each political party according to 13-10-327; and, pursuant to 13-12-208 (now repealed), write-in candidates may also seek the office. The appointee to fill the immediate vacancy will hold that office until the next general election. 37 A.G. Op. 147 (1978).

Vacancies -- How Filled: The office of a Public Service Commissioner who dies after the primary election date must be placed on the general election ballot. The elected successor will take office when elected and qualified and will serve out the unexpired term. Political party nominations for the general election may be made in accordance with the customs of each political party. Nominations for independent candidates or candidates of parties not eligible for the direct primary must be made in accordance with Title 13, ch. 10, part 5. 35 A.G. Op. 95 (1974).