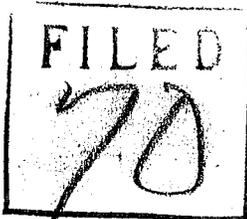


ELECTIONS: BALLOTS:  
COUNTY CLERKS:

Neither county clerk nor election officials have authority to remove candidate's name from primary election ballot once such ballot is finally printed. Notice of withdrawal of candidate received by county clerk too late to prevent candidate's name from appearing on printed ballot is ineffective.



July 29, 1954

Honorable John P. Peters  
Prosecuting Attorney  
Osage County  
Linn, Missouri

Dear Mr. Peters:

This is in response to your request for opinion dated July 27, 1954, which reads as follows:

"Under date July 23, our County Clerk Mr. Rudolph Nilges received the following telegram, from Secretary of State, Walter H. Toberman:

"Rudolph Nilges  
County Clerk,  
Linn, Missouri.

"Withdraw name of Francis E. Howard Ironton, Missouri as a candidate for representative in Congress, on the Republican ticket for the eighth Congressional district. Formal notice follows."

"Then on same date, formal notice was mailed to our Clerk, by Secretary of State, Toberman, authorizing him to withdraw the name of Mr. Howard, as a candidate for the office named, from the list of candidates, on the Republican ticket certified to him on May 3rd, 1954 stating that 'formal withdrawal' was certified, to his office on July 23rd, 1954.

Honorable John P. Peters

"The ballots were all printed, on the date these communications were received, some absentees had voted, others applied for and mailed out, including 'War ballots.'

"In your opinion, what is now the proper procedure, to be followed by our County Clerk, and or Judges of Election, as for instance, should the Clerk scratch out the name, cover it with a sticker, or leave this to the judges of election, or leave the ballots as they are, on the theory that Mr. Francis' withdrawal, has not been legally accomplished.

"A prompt reply will be much appreciated by our officers concerned."

Underlying your request is the basic question of the time limit in which a person who has filed a declaration of candidacy for the primary election may withdraw such candidacy.

We have previously held in an opinion rendered to the Honorable Lawson Romjue, Prosecuting Attorney of Macon County, under date of July 28th, 1954, copy enclosed, that Section 120.-230, RSMo Cum. Supp. 1953, has no reference to a withdrawal of a candidate who has filed a declaration of candidacy. That being so, there is no statute specifying the time within which such a candidate may effectively withdraw.

The time within which such a candidate may withdraw then must be determined from the statutory mechanics of the primary election process and the statutory authority and duties of those charged with various functions in carrying out this process.

Section 120.440, RSMo 1949, specifies that at least forty days before the August Primary, the county clerk shall cause sample ballots to be printed, specifying the manner thereof, and submit such ticket of each party to the county chairman thereof, mail a copy to each candidate, and post a copy in a conspicuous place in his office. On or before the tenth day preceding the primary he "shall correct any errors or omissions in the ballots and cause the same to be printed and distributed, as required by law in the case of ballots for the general election" with an exception as to the number of ballots to be furnished each precinct.

That the county clerk may correct errors in the sample ballot before it is finally printed is well-established. Mansur

Honorable John P. Peters

v. Morris, 355 Mo. 424, 196 S.W. 2d 287; State ex rel. Chilcutt v. Thatch, 359 Mo. 122, 221 S.W. 2d 172, 175. The kind of errors which the county clerk may correct was considered in the Mansur case and other cases cited therein with the conclusion that the word "error" was broader than mere "mistake" or "irregularity" and is not confined to mere clerical errors, such as misspelled names, etc. From these cases we believe it is clear that a county clerk can remove the name of a candidate from the sample ballot before the ballot is finally printed, because to include it thereon after a candidate has withdrawn would be erroneous.

With regard to the correction of errors on the sample ballot the duties of the county clerk are discretionary although not judicial. However, his only duty after the ballots are printed is to cause them to be delivered to the judges of the election of each election district by the sheriff of the county or his deputy (Section 111.480, RSMo 1949.) This duty would appear to be purely ministerial.

We find no law which would authorize the county clerk to obliterate or remove from the ballot by any method the name of any candidate, once the ballots have been finally printed. As stated above, once they have been printed his only duty is to see that they are properly delivered. Nor do the statutes grant any such authority to any other election official.

Therefore, because of the mechanics of the primary election process, and the duties of the county clerk and other election officials with regard to primary elections, we believe it is clear that a person who has filed a declaration of candidacy may withdraw his candidacy at any time before the ballots are finally printed provided notice of his withdrawal is received by the county clerk in sufficient time for the county clerk to prevent his name from appearing on the printed ballot, but not thereafter.

Therefore, the ballots in question should be delivered as printed without any obliteration of this candidate's name, because neither the county clerk nor any other election official has the authority to remove his name from the printed ballot, and he has not, therefore, validly effected a withdrawal.

#### CONCLUSION

It is the opinion of this office that once the primary election ballots are finally printed, neither the county clerk

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nor any other election official has the authority to remove the candidate's name therefrom, and that notice of withdrawal received by the county clerk too late to prevent this candidate's name from appearing on the printed ballot is ineffective. Under such circumstances the ballots should be delivered as printed without any obliteration, change or defacement in any manner by anyone.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John W. English.

Yours very truly,

JOHN M. DALTON  
Attorney General

JWI:vlw

Enclosure - Opn. Lawson Romjue  
7-28-54