

COUNTIES:
COUNTY HEALTH CENTER:
HEALTH CENTER:
ELECTIONS:
VOTES:

Persons receiving highest number of votes in election for county health center trustees are elected, whether their names appear on ballot or whether they are written in by voters. If elected person refuses to accept office, person with next greatest number of votes is not elected; rather, a vacancy exists which is filled by appointment.

December 27, 1962

OPINION No. 443

Honorable William C. Batson, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Mr. Batson:

Your opinion request of December 7, 1962 reads as follows:

"At the last election on November 6, 1962, a ballot was submitted to the voters to elect three trustees for the Board of Butler County Health Service; however, only one man filed his candidacy as required by Section 205.041 and only his name was put on the ballot. There were a number of lines submitted on the ballot in blank with squares at the side and some 125 names were written in of different people, and of course, there were a number of votes for the same persons and the remaining number needed could be selected from this write-in group; however, the question has arisen as to whether on this type of ballot the names written in in that manner can be elected members to the Board of Trustees.

"Our problem is 1) Under Section 205.041, does the County Court appoint the remaining 2 trustees as this Section reads because only one man filed for his candidacy and got his name on the official ballot or does the County Court take the 2 that received the most

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votes in order to fill the remaining offices? 2) If they take office from those names that were written in, if those receiving the greatest number of votes do not desire to take office, does the County Court then select the next names in line that receive the next greatest number of votes?"

As we read your request, we understand that the candidate whose name appeared on the ballot was one of three persons receiving the highest number of votes. Consequently, we will confine our consideration to the other two.

Subsection (1) of Section 205.041, RSMo 1959, reads:

"Each candidate for the office of health center trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. The announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term."

Subsection (2) of Section 205.041 then provides that the "county court shall prepare a ballot containing the names of all candidates who have announced for trustee"

However, we do not believe that the failure of a person to formally announce disqualifies him from subsequently being elected if he receives the required number of "write in" votes. Note the words of the opening sentence of Subsection (3) of Section 205.041:

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"(3) Such ballots shall be furnished to the election officials of each precinct in the county and shall be voted by the qualified voters therein in the same manner as other ballots are furnished and voted." (Emphasis supplied.)

To determine in what manner "other ballots are furnished and voted," we turn to Section 111.580, RSMo 1959. Subsection (2) thereof reads as follows:

"2. All candidates of the party whose circle is marked shall be counted as voted for excepting where squares are crossed preceding the names of the candidates in other columns. If two or more candidates for the same office are thus designated, neither shall be counted. If the cross (X) is not placed in the circle immediately below the party name at the head of the column, but does appear in the squares opposite the various candidates' names, then only these names shall be counted for, and none other. A cross (X) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (X) mark therein is irregular in form."

In an opinion of this office issued to Arthur U. Goodman, Jr., on September 23, 1944, it was held that under the foregoing subsection a "write in" vote could be cast notwithstanding the fact that there had been no nomination for the particular office in question. We forward a copy of that opinion together with an opinion issued to Emory L. Melton on September 28, 1948, which enunciated essentially the same rule.

We are of the opinion that, since the law relating to general elections obtains in elections of county health center trustees at least as to the procedure for marking ballots, "write in" votes are valid and that such trustees may be elected by them. We find no conflict between this holding and the provision in Subsection (1) of Section 205.041, to the effect that where a sufficient

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number of candidates fail to announce, the county court appoints trustees to fill the vacancies not sought by candidates who then hold office until the next general election. We believe this provision was intended to provide for a situation where there was not only an insufficient number of announced candidates, but also an absence of "write in" votes.

Failure to file as set out in Section 205.041 may prevent a candidate from having his name printed on the ballot, but it should not prevent the voters from exercising their choice as freely as possible. (See attached opinions.)

Your next question is directed to the contingency that the persons selected by "write in" votes may refuse to serve as trustees, and you ask whether the persons receiving the next highest number of votes would then be regarded as elected.

The answer to this question is negative. Subsection (3) of Section 205.041 states in part:

" * * * The candidates receiving the highest number of votes for the offices of trustee to be filled shall be declared elected by the county court which shall issue commissions to the elected trustees."

In State ex rel. Chilcutt v. Thatch (Mo. Sup., 1949), 221 S. W. 2d 172, an unsuccessful candidate in a general election sought to have himself declared elected upon the grounds that his opponent, who polled a majority of the votes in the general election, was not properly nominated. The question before the Supreme Court was whether the unsuccessful candidate could present a justiciable controversy so as to have the matter decided by declaratory judgment.

In holding that the unsuccessful candidate had no legally cognizable interest, the Court said, l. c. 174:

"Even if it were conceded, which Chilcutt does not concede (contending the contrary), that Chilcutt was not entitled to have his name on the ballot,

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it has long been the law in Missouri that even though a majority of the voters voting at an election vote for one not entitled to have his name printed on the ballot because of an irregularity in his nomination, the candidate who receives the next highest number of votes (less than a majority) in any event is not entitled to the office. To be entitled to the office a candidate must receive a majority or plurality, whichever the particular statute requires, of the entire number of votes cast. State ex rel. Attorney General v. Vail, 53 Mo. 97; Sheridan v. City of St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480; State ex rel. Neu v. Waechter, 332 Mo. 574, 58 S. W. 2d 971; State on inf. of McKittrick, Attorney General v. Cameron, 342 Mo. 830, 117 S. W. 2d 1078; Mansur v. Morris, 355 Mo. 424, 196 S. W. 2d 287. See also, 133 A.L.R. 333. As above noted, Pickel, not having received a majority of the votes at the general election, can not be issued the certificate of election. The Circuit Court in any event would not have had any jurisdiction to order the county clerk to issue to Pickel a certificate of election."

Hence, our conclusion must be that if the persons receiving the highest number of votes refuse to serve, vacancies exist which must be filled by the County Court as provided by Section 205.031(4):

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be

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filled by election of a trustee to serve during the remainder of the term of his predecessor."

CONCLUSION

It is the opinion of this office that the three persons receiving the highest number of votes in the election to fill three vacancies on the board of trustees of a county health center whether such votes are "write in" or whether the candidates' names were printed on the ballot, are the persons elected. In the event that any person so elected refuses to accept his office, his office shall be deemed vacant and the vacancy shall be filled as provided in Section 205.031(4).

This opinion, which I hereby approve, was prepared by my assistant Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS lc
2 enclosures