

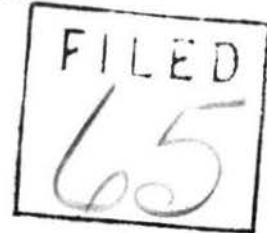
ELECTIONS:

PRIMARY:

Candidate for Representative in Congress may withdraw even though his name has been certified out to the several County Clerks. Pederson permitted to withdraw as candidate for Congress.

July 8, 1938.

Hon. Charles E. Murrell, Jr.,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.



Dear Sir:

This is to acknowledge receipt of your letter of July 6th in which you request the opinion of this department on the question therein submitted. Your letter is as follows:

"Enclosed find a copy of the notice received by the County Clerk of Adair County, Missouri, from Fred Pederson who is a candidate for Representative from the First Congressional District of Missouri, which district includes Adair County, Missouri, to the effect that he is withdrawing from the ballot. The County Clerk of Adair County, Missouri, wishes to know if this notice is sufficient. I have attempted to investigate the matter but can not find anything on it and, therefore, I am unable to give the opinion myself. The Clerk would also like to know if it is proper for him to remove the candidate's name from the official notice and ballot upon this notice? I would appreciate a reply from you at your earliest convenience."

Attached to your letter of request is the following affidavit, which we assume has been filed with the several County Clerks in the counties in the First Congressional District of Missouri:

"NOTICE TO CLERK OF THE COUNTY COURT
NOT TO INCLUDE NAME OF CANDIDATE IN PUBLICA-
TION OR ON OFFICIAL BALLOT.

To the Clerk of the County Court of
Adair County, Missouri:

Notice is hereby given you that the undersigned, a resident and qualified elector of the County of Grundy and State of Missouri, with post office address at Trenton, Missouri, having announced myself a candidate for the office of Representative in Congress from the First Congressional District of Missouri on the Democratic Ticket, to be voted for at the primary election to be held on the first Tuesday in August, 1938, did thereafter by declaration in writing signed and executed with the formality prescribed for the execution of an instrument affecting real estate to entitle it to record, renounce my said declaration and revoke the same and the authority therein given to have my name printed upon the official ballot at such primary election and did by said instrument in writing declare that I have withdrawn my name as such candidate and do not desire the same be placed upon the ballot at such primary election; and you are notified that I will not accept the nomination and my name should not be included in the publication to be made by you or upon the official ballot and you are further notified that a similar notice is being given the Clerk of the County Court of each of the counties in the First Congressional District of Missouri.

Fred Pederson."

Sworn to before a Notary Public on June 28, 1938.

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Under the provisions of Section 10260, R. S. Mo. 1929, it is provided that all declaration papers shall be filed as follows:

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state."

Section 10261 provides:

"At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

It is our information that the Secretary of State performed his duties under this section and certified to the several County Clerks in the counties comprising the First Congressional District the name of Fred Pederson as a candidate for Congress in that district, the said Pederson having theretofore duly filed his declaration papers with the Secretary of State more than sixty days before the primary election to be held August 2, 1938. After the name of Pederson had been certified by the Secretary of State aforesaid, the affidavits above were filed with the several County Clerks in the counties comprising the above Congressional District.

The question to be determined by your letter of request and other requests received involving the same question is whether or not the various County Clerks in the First Congressional District are authorized and empowered to withdraw the name of Fred Pederson as such candidate and not include his name in the publication to be made and not to include his name on the official ballot to be printed and used in the August primary.

Section 10251, R. S. Mo. 1929, Article 4, Chapter 61, provides that

"the secretary of state shall not certify the name of a candidate whose certificate of nomination shall have been filed in his office, who shall have notified him in writing, signed and executed with the formalities prescribed for the execution of an instrument affecting real estate to entitle it to record, that he will not accept the nomination contained in the certificate of nomination. The clerk of the county court shall not include in the publication to be made according to section 10249 the name of any candidate whose certificate of nomination shall have been filed in his office who shall have notified him in like manner that he will not accept the nomination. The names of such candidates shall not be included in the names of the candidates to be printed in the ballots as hereinafter provided."

The sworn statement of Pederson has followed the provisions of this section of the statute in preparing his withdrawal.

A similar situation to the instant case arose in California in the case of Bordwell v. Williams, 159 Pac. 889, L. R. A., 1917A, p. 996, where a candidate had filed nomination papers for the office of United States Senator in the requisite form, and in addition thereto, as required by statute, the candidate had filed with the Secretary of State his affidavit stating, in addition to the other matters required, that, if nominated, he would accept such nomination and not withdraw, and that he would qualify as such officer if nominated and elected. The Secretary of State thereupon certified the name of the candidate to the County Clerks in the several counties, directing said officers to print on the primary ballot the name of the candidate as a candidate for the Republican nomination for the office of United States Senator. This case is well reasoned and clearly applicable to the case in hand, and we quote from the headnotes:

"A candidate whose name has been duly certified for a place on the ballot at a primary election, and who has signed the statutory affidavit that, if nominated, he would accept such nomination and not withdraw, is not precluded from withdrawing his name before the primary election, although the statute provides that the names of all persons for whom nomination papers have been filed, as certified by the secretary of state, shall be printed on the ballots."

Under Section 10257, R. S. Mo. 1929, a candidate in filing his declaration of candidacy states:

"I further declare that if nominated and elected to such office, I will qualify,"

and it is noted that in the declaration filed by the candidate in the California case he makes the additional statement that he will not withdraw, and yet in that case the Supreme Court of California held that the candidate had a right to withdraw his name and decline to be a candidate.

In the case of State ex rel. Neu v. Waechter, et al., 332 Mo. 574, 58 S. W. (2d) 971, 1. c. 974, in construing Section 10441, Article 13, Chapter 61, R. S. Mo. 1929, relative to primary elections in cities of four hundred thousand, said the following:

"The board contends he could not withdraw in view of the last two provisions of section 10441 which are that 'all declaration papers shall be filed with the board of election commissioners of such city, and such declaration papers shall not be withdrawn'; and that 'the names of candidates who so declare shall be printed on the official primary ballot.' It will be observed the statute merely says such declaration papers shall not be withdrawn; it does not say the declarant cannot abandon his candidacy. It then goes on to provide the names of candidates

who so declare shall be printed on the official primary ballot.

"In our opinion, a construction of this statute which would make it mean that a candidacy once declared by the filing of papers can never be recalled, and that the name of the candidate must be printed on the ballot, is so violent and unreasonable that it ought not to be adopted if any other construction is possible. It would mean the names of deceased declarants, those who had moved out of the city or state and admittedly become ineligible, or those who would refuse to continue in the race if nominated, nevertheless must be voted upon by the people. And in cases where a deceased or ineligible declarant received the highest number of votes it would nullify the whole primary election. 20 C. J. sec. 267, p. 207; Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480. * * *

"Section 10251, R. S. 1929 (Mo. St. Ann. sec. 10251), expressly provides the secretary of state and county clerks shall not certify and publish, respectively, the names of declarants who shall notify them in writing, etc., that they will not accept nomination to the offices for which they have been certified. In other words, the general primary law by the section last cited in terms authorizes the withdrawal of primary candidacies."

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Since Mr. Pederson declares under oath that he does not desire to have his name placed upon the ballot at such primary election and that he would not accept the nomination, and clearly renounces his candidacy for Congress in that district, we are of the opinion that his wishes in this matter should be acceded to by the several County Clerks with whom said affidavit has been filed. We can see no valid reason why a person who is not in fact a candidate for nomination should have his name placed upon the ballot against his will, although he may have previously filed as a candidate for office. It is a right which he clearly has and it cannot be taken away from him except by some positive statute. It would be a vain and useless thing for the voters to nominate a person who has declared that he will not accept the nomination by a solemn instrument of writing.

CONCLUSION:

It is therefore our opinion that the several County Clerks with whom the foregoing affidavit has been filed are authorized and empowered to withdraw Pederson's name as a candidate for Congress in the First Congressional District and not publish his name in the primary notice as required by Section 10262, R. S. Mo. 1929, and not print his name in the official primary ballot for the August, 1938, primary.

Respectfully submitted,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

CRH:HR