

Opinion No. 68-79

August 6, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Richard H. Folmar Assistant Director Legislative Council Executive Legislative Building Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Can the state central committee of a political party fill the party vacancy on either the primary or general election ballot for the office of state board of education member, when such vacancy was caused by the death of the sole party member filing for that office?
2. If the answer to question 1 is "No", is there any method provided by law permitting the party to have a nominee for this office on the general election ballot?

CONCLUSIONS

1. No.
2. No.

OPINION

{*128} ANALYSIS

The Primary Election Code, Sections 3-11-1 through 3-11-35, N.M.S.A., 1953 Compilation (P.S.), contains no provision which would indicate any method by which to fill vacancies on the primary election ballot after the specified date of filing for candidacy. The Primary Election Code contemplates the appearance of a person's name on the primary {*129} ballot only if he files a declaration of candidacy during the time specified in Section 3-11-7.2, N.M.S.A., 1953 Compilation (P.S.). Therefore, it is the opinion of this office that the state central committee can not fill a vacancy in a position on the primary ballot caused by the death of a person who filed for such position at the appropriate time.

Section 3-11-24, N.M.S.A., 1953 Compilation (P.S.), provides as follows:

"3-11-24. Vacancy existing after primary -- Method of filling. -- If after a primary election for any cause, including cases where there was no candidate for nomination after designation by convention, in the primary election, there shall be a vacancy in the list of

candidates of a political party entitled to representation on the official ballot necessary to fill all the offices provided for by law at the ensuing general election, such vacancy may be filled by the political party committee of the state or county, as the case may be, by filing the name of its candidates for such office within twenty-five (25) days after such primary with the officer with whom nominating petitions are to be filed, and when so filed, the name shall be placed upon the official ballot for the ensuing general election as the party's candidate for such office. Any vacancy thereafter occurring may be filled in like manner by the party committee at any time before the official ballots are printed. If a vacancy occurs after the ballots are printed, the name of the person so selected as a candidate to fill such vacancy be placed on said ballot by pasting the printed name of such candidate whose vacancy he fills on the official ballot."

Although this statute appears to cover the situation presented in Question No. 1. *supra*, insofar as regards filling the vacancy on the general election ballot, the vacancy on the general election ballot, the Supreme Court of New Mexico, in **Granito v. Grace**, 56 N.M. 652, 248 P.2d 210 (1952), has not construed it to include this situation. Opinion of the Attorney General No. 64-64, dated May 14, 1964, relied on the **Granito** decision in concluding that where a party had no candidate in the primary, it could not have one in the general election. The reasoning used there continues to be viable, and the conclusion reached must be the same.

It should be noted in passing that the 1955 Legislature added a paragraph at the end of Section 3-11-24, *supra*, which reads as follows:

"In the event only one candidate has filed for the nomination for any office the candidate for which is to be nominated in accordance with the provisions of this act and he dies, then another candidate may be selected subsequent to the primary election and his name shall be placed upon the general election ballot in the same manner and as though the vacancy had occurred subsequent to the primary election." Laws 1955, Ch. 218, Sect. 19.

This provision no longer has any force however, since it was repealed in 1963. See Laws 1963, Chapter 317, Section 36. Furthermore, this repealer indicates a legislative intent with which this conclusion is in accord.

The conclusion to Question No. 2 is reached in the analysis of Question No. 1, and it is unnecessary to reiterate why such a vacancy can not be filled by any means.

By: Roy G. Hill

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