

## Opinion No. 50-5305

July 7, 1950

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Paul Tackett District Attorney Albuquerque, New Mexico

{\*160} I am in receipt of your inquiry of June 28, 1950 regarding the question as to who is the proper candidate for Justice of the Peace in Precinct No. 17, Bernalillo County.

As I understand the situation, W. T. Harris died a few days prior to the primary, but nevertheless received the greatest number of votes. The problem is one that is new to New Mexico and none of our election laws cover this particular situation.

I read with a great deal of interest the memorandum submitted by W. Peter McAtee and while it was interesting, it is my opinion that it does not state the proper applicable rules of law. As stated in 133 A.L.R. at page 319, the general rule is that when a deceased person receives the highest number of votes at a primary election, the next highest candidate is not entitled to the office. {\*161} The reasons behind this are excellently stated in the case of Saunders v. Haynes, 13 Cal. 145 where the Court said:

"An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But, if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."

The foregoing legal principles represent almost the universal weight of authority.

It is my opinion that the vacancy should be filled by certification to the county clerk and the secretary of state of a person designated by the county central committee of the political party that nominated W. T. Harris. It is believed that the analogous applications of Sections 56-303 and 56-817 would govern in this situation.