

Opinion No. 64-64

May 14, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mrs. Alberta Miller, Secretary of State, State Capitol Building, Santa Fe, New Mexico

QUESTION

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If a political party to which the primary election laws apply did not have a candidate for a particular office at the primary election, may a political party committee select a nominee for the office after the primary election?

CONCLUSION

No.

OPINION

ANALYSIS

The same question here presented originally arose in the 1942 case of **State ex rel. Van Schoyck v. Board of County Commissioners of Lincoln County**, 46 N.M. 472, 131 P.2d 278. In that case no one filed a declaration of candidacy for the office of county clerk of Lincoln County, New Mexico on the Republican ticket, and thus the official Republican ballot for the direct primary election in the county did not contain the printed name of a candidate for that office. However, subsequent to the primary election the vacancy committee of the party selected a person as its nominee for county clerk. When the incumbent county clerk refused to accept the purported certificate of nomination issued to the person by the vacancy committee of the Republican County Central Committee, a mandamus action was brought seeking to require that the person's name be printed on the official ballot for the general election. The trial court found that there was no "vacancy" as contemplated by Section 3-11-24, N.M.S.A., 1953 Compilation, and ruled that the action by the vacancy committee was "null and void and of no effect." An appeal to the New Mexico Supreme Court followed.

At that time Section 3-11-24, *supra*, read as follows:

"If after a primary election for any cause 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 candidate for such office within twenty 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. . . ."

The person selected by the vacancy committee contended that the above language was broad enough to cover the case of a vacancy resulting from default in having a candidate run in the primary and, hence, no nomination therein. The contrary argument was that the statute presupposes a nomination in the primary election which, subsequent thereto, becomes vacant through death, resignation or removal from the county or state as the case might be.

In ruling against the person designated by the vacancy committee, the Court said that where there is no candidate in the primary election for a given office, the vacancy in the list of candidates for that office exists as well before as after the primary, and that the word "candidates" is synonymous with the word "nominees."

The Court pointed out that to rule in favor of the person selected by the vacancy committee would subvert the legislative intent, stating as follows:

"A political party whose leaders were so disposed might easily discourage the filing of candidacies in the primary as to all or the more important offices. Having thus occasioned a 'vacancy', the appropriate party committee, following the primary, could meet and select candidates to oppose those already selected by the other party or parties in the primary. Knowing who the opposing candidates were, the committee selection could be made after taking into consideration every factor, geographical and otherwise, calculated to poll the largest vote for such candidate in the general election."

The Court cited a number of cases from other jurisdictions to support its view "that the vacancy contemplated by the legislature in authorizing a party committee to fill it is one occurring after the primary in a nomination made at the primary."

In 1949 as an incident to the enactment of the pre-primary convention law, Section 3-11-24, supra, was amended to add the underlined portions as follows:

"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 of 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 candidate for such office within **twenty-five** 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. . . ." (Emphasis added).

As a result of the above amendment, another case arose wherein the Court was asked to hold that such amendment brought about a change in the meaning of Section 3-11-24, supra, as originally enacted and as construed in **State ex rel. Van Schoyck v. Board of County Commissioners of Lincoln County**, supra.

In **Granito v. Grace**, 56 N.M. 652, 248 P.2d 210, the second case, the facts were as follows. A person duly filed with the county clerk of Santa Fe County his declaration of candidacy for county school superintendent on the Democratic ticket and paid the required filing fee. Thereafter it developed he was not eligible to be a candidate. Accordingly, he was notified by the county clerk that his declaration of candidacy had been voided. No other person having filed for the office on the Democratic ticket, the name of no candidate for the office appeared on the Democratic ballot in the primary election.

Subsequent to the primary election, the Democratic County Executive Committee designated a person to fill the vacancy on the ballot as the Democratic candidate for the particular office and filed his name with the county clerk.

When the prospective candidate was advised by the county clerk that his name would not be placed on the ballot for use at the general election because the vacancy occurred prior and not subsequent to the primary election, a mandamus action was commenced in the Santa Fe District Court. The trial court found against the prospective candidate and an appeal was taken to the Supreme Court of New Mexico.

The Court held that the **Van Schoyck** case was correctly decided and that the language added by the 1949 amendment showed no legislative intention to accomplish a change. Rather, said the Court, the amendment was simply made to "bring various phases of the direct primary law into co-ordination with the pre-primary law then being enacted."

The Court quoted the reasons for its decision in the **Van Schoyck** case and stated that they were just as pertinent as at that time. It further said, "moreover, in amending the section in substantially the same language as that contained in the original enactment, it amounts to a continuation of the same statute and not a new enactment."

In 1955, Section 3-11-24, supra, was repealed along with the rest of the pre-primary convention law. Chapter 218, Laws 1955.

In 1963, when the pre-primary convention law was again enacted, it contained a section 24, compiled once again as Section 3-11-24, which is absolutely identical with the way the section read when **Granito v. Grace**, supra, was decided. Thus the decision in that case is still controlling, and there simply cannot be any doubt about it when the following language in that case is examined:

"Furthermore, in view of our construction of the statute in the Van Schoyck case and its substantial re-enactment in an amended form, the legislature may be regarded as adopting the construction we gave it."

The 1963 re-enactment of the section being **identical** to the section as it existed when the **Granito** case was decided, most certainly the legislature adopted the construction placed on the section in that case.