

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board to the expenditure has been obtained as required by Section 12 of House Bill No. 502 of the 87th General Assembly. In addition you have submitted a contract bond, upon which the Globe Indemnity Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2696.

VACANCY—CONGRESSIONAL NOMINEE—MAY BE FILLED BY DISTRICT COMMITTEE—NAME OF CANDIDATE TO BE PLACED ON BALLOT BY PRINTING OR PASTING.

**SYLLABUS:**

1. *In the case of a vacancy in a congressional nomination the congressional district committee, which, by the terms of Section 4960, General Code, is composed of the chairmen of the county central committees of the several counties composing such congressional district, may lawfully fill the vacancy in the manner provided in Section 5011, General Code.*

2. *In case such vacancy is thus properly filled, it is the duty of the board of deputy state supervisors of elections to place the name of such nominee upon the ballots by printing new ballots, printing the name of the candidate in the space provided therefor on ballots already printed, or by inserting his name by the use of adhesive slips or pasters.*

COLUMBUS, OHIO, October 11, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

“The Board of Deputy State Supervisors of Elections of Athens County have submitted a request for an opinion as to whether the vacancy caused by the withdrawal of a candidate for Congress may be filled now, and what would be the proper procedure.

We enclose their letter, together with the certificate which they have referred to us for consideration.

If the nominee presented in the certificate is to be recognized as a candidate, can stickers be used in placing his name upon the ballots? You understand the ballots in the tenth district have been printed and the space allotted to the candidate for Congress on the Democratic ticket is left blank.”

The letter referred to and enclosed with your communication is one from Mr. D. J., clerk of the Board of Deputy State Supervisors of Elections of Athens County, and reads as follows:

"Please find enclosed what purports to be a resolution of the democratic central committees of the Tenth Congressional District attempting to fill a vacancy for candidate for Congress on the democratic ticket.

As you know, absent voters ballots are now printed and being voted. Is it not too late for our Board to take cognizance of this certificate?

This vacancy has been created by the withdrawal of Mr. L. J. E., of Nelsonville, who filed his petition as a candidate and was nominated at the August primary.

Please return the resolution and, of course, it is needless for me to suggest that a prompt answer is not only desired but is imperative."

Also accompanying both letters, and to which reference is made, is a copy of the so-called resolution or certificate signed by the chairman and state central committeeman of the tenth congressional district, and also by the secretary, as follows:

"ATHENS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE

Athens, Ohio, October 3, 1928.

To the Board of Deputy State Supervisors of Elections of Athens County, Ohio.

This is to certify that C. E. P., of Nelsonville, Ohio, was unanimously chosen at a legally constituted meeting composed of the chairman of the Democratic Central Committees of Athens, Jackson, Vinton, Gallia, Meigs and Lawrence Counties to fill the vacancy caused by the withdrawal of L. J. E., as a candidate for Congress in the 10th Congressional District of Ohio. Said meeting convened at Athens, Ohio, on this 3rd day of October, 1928.

We hereby certify the foregoing to be a correct transcript of the proceedings of the above meeting.

M. S. C., Chairman and State Central Committeeman of the 10th Congressional District.

R. H. B., Sec'y."

Section 4989, contained in the chapter of the General Code, entitled "Primary Elections," provides:

"In case of a vacancy or vacancies in the list of nominations occurring by death or otherwise, after the result has been declared, such vacancy or vacancies shall be filled by the proper controlling committee of the party in which such vacancy, or vacancies, occur, and the names of the candidates, delegates or committeemen, as the case may be, selected by such committee shall, in the case of officers, the nomination papers for which have to be filed with the state supervisor of elections, be reported to such state supervisor and, in the case of other offices, shall be reported to the proper board or boards of deputy state supervisors, and such state supervisor or board, or boards, shall cause such name or names to be placed on the official ballots, lists or rolls."

Section 4989 was first enacted on April 28, 1908, as Section 34 of "An Act—To regulate the conduct of primary elections." (99 v. 214, 222) and was amended to read as it now reads on April 17, 1913 (103 v. 476, 486).

Section 4989 must be read in connection with Section 5013, General Code, which reads:

"The power to fill vacancies on a party ticket shall be vested in the central committee of such party or in case of a vacancy occurring in a list of candidates nominated by petition in the committee named in such petition."

Section 5013 was first enacted on April 23, 1898, in an act entitled "An Act—To provide for the filling of vacancies on political party tickets when no provision has been made by the nominating convention." (93 v. 224.) As enacted on that date the section read:

"That when a political party in its nominating convention fails to appoint a committee for the purpose of filling vacancies on the party ticket, the power to fill such vacancies shall be and hereby is vested in the county executive committee of said political party."

The act was codified in the Revised Statutes as Section 2966-24a among the sections relating to "Nominations by Petition." On April 10, 1913, the section was amended to read as it now reads in "An Act—To amend Sections 4992, 4996, 4999, 5004, 5006, 5007, 5009, 5012 and 5013 of the General Code, relating to nomination by petition." (103 v. 843.)

Notwithstanding the fact that this section is codified in the General Code in the chapter and among the sections making provision for the nomination of candidates by petition, there can be no question but that it was the intention of the Legislature to vest in the proper controlling or central committee of a political party the power to fill vacancies on a party ticket. Such was the original purpose of Section 5013 and from the plain provisions of this section, as well as of Section 4989, it seems to me quite plain that the proper controlling committee of a party is vested with power to fill vacancies, caused by death, withdrawal, or otherwise, on the party ticket.

Section 4960 of the General Code, as amended on April 21, 1927 (112 v. 176), provides as follows:

"The controlling committees of each voluntary political party or organization shall be a state central committee, consisting of two members, one of whom shall be a man and one of whom shall be a woman, from each congressional district in the state; a *district committee for each district in the state, including congressional districts, which shall consist of the chairman of the county central committees of the several counties composing such district*; a county central committee, consisting of one member from each precinct, in the county, or of one member from each ward and township in the county as the outgoing committee may determine, and the members of the central committee chosen from a city shall constitute a city committee. All of the members of such committee shall be chosen by direct vote at the primary held in the even numbered years. Candidates for election as state central committeemen may be nominated in the same manner as is herein provided for the nomination at primaries of candidates for district offices and candidates for election as members of the county central committee may be nominated in the manner provided in Section 4969 of the General Code. Existing state, district, county and city committees shall continue to act and be recognized as such, until their successors are chosen as herein provided. Where a judicial subdivision

or district or congressional district is included within a county, the members of the county central committee who are residents of such district shall also act as the judicial or congressional committee."

It will be observed that the above section provides for "a district committee for each district in the state, including congressional districts, which shall consist of the chairman (chairmen) of the county central committees in the several counties composing such district."

Under the provisions of Sections 4989 and 5013 above quoted, it would seem clear that the congressional district committee created by Section 4960, General Code, is empowered to fill a vacancy on a party ticket, occasioned by death or otherwise, for the office of Representative in Congress.

It will be observed that there is no limitation in either Section 4989 or Section 5013 with reference to the time when a vacancy on a party ticket may be filled by the controlling committee of such party. Nor do I find any such limitation in any other section of the Code, unless Section 5010, General Code, be applicable, which is at least questionable. This section reads:

"If a person nominated as herein provided die, withdraw, or decline the nomination, or if a certificate of nomination is insufficient or imperfect, the vacancy thus occasioned, may be filled or the defect corrected in the manner required for original nominations. Such nomination to fill a vacancy, or corrected certificate must be certified to the secretary of state at least thirty days or to the board of deputy state supervisors at least twenty-five days previous to the day of election. If, when the original nomination was certified, there was certified a committee authorized to represent the party, as herein provided, it may fill such vacancy."

Section 5010 was originally enacted on May 1, 1891, as Section 13 of an act in part entitled: "An Act—To provide for the mode of conducting elections, \* \* \*." (88 v. 449.)

Sections 4993, 5003, 5004, 5005 and 5011 respectively read in part as follows:

Section 4993. "Each certificate of nomination shall state such facts as are in this chapter required for its acceptance and be signed by the proper officers of such convention, caucus, meeting, primary election or committee, who shall add to their signatures their places of residence and post office addresses and make oath before an officer qualified to administer it that the facts stated in the certificate are true to the best of their knowledge and belief. A certificate of the oath shall be annexed to the certificate of nomination."

Section 5003. "Besides containing the names of candidates, all certificates of nomination and nomination papers shall specify as to each candidate:

1. The office for which he is nominated;
2. The party or political principle which he represents, expressed in not more than three words;
3. His place of residence, with street and number thereon, if any.

In nominations by petition, the certificate may designate instead of a party or political principle any name or title which the signers may select. Candidates nominated by petition without distinctive appellations shall be certified as independent candidates. \* \* \*"

Section 5004. "Certificates of nomination and nomination papers of candidates shall be filed as follows:

\* \* \*

For offices to be filled by the electors of a district, or subdivision of a district, composed of two or more counties, with the chief deputy state supervisor of the county in the district, or subdivision, containing the greatest number of inhabitants, as ascertained by the last federal census, not less than sixty days previous to the day of election.

\* \* \*"

Section 5005. "When so filed, certificates of nomination and nomination papers shall be preserved and be open, under proper regulations, to public inspection. If in apparent conformity with the provisions of this chapter, they shall be deemed to be valid unless objection thereto is duly made in writing within five days after the filing thereof."

Section 5011. "When a committee so authorized fills any such vacancy, the chairman and secretary thereof shall thereupon make and file with the proper officer a certificate, setting forth the cause of the vacancy, the name of the person nominated, the office for which nominated, the name of the person for whom the new nominee is to be substituted and such other information as is required to be given in an original certificate of nomination.

The certificate so made shall be executed, acknowledged and sworn to in the manner prescribed for the original certificate of nomination, and, upon being filed with the secretary of state at least thirty days, or with the board of deputy state supervisors of elections at least twenty-five days, before the day of election, shall have the same force and effect as an original certificate of nomination."

These sections were all originally enacted as parts of Sections 12 and 13 of the act of May 1, 1891 (88 v. 449, 455), and all of such sections have been amended one or more times at later dates.

In view of the context of these several sections as they now appear in the General Code, and especially in view of the fact that Section 5013 was, as above pointed out amended in 1913 in the act to amend the sections of the General Code set forth in the title of such act "relating to nomination by petition", I am inclined to the view that the provisions of all of the sections above quoted govern, in case of a nomination to fill a vacancy on a party ticket by the controlling committee of such party, where such provisions are applicable. This conclusion is supported by the fact that in the act of 1913 the Legislature recognized the section number given to Section 5013 by the Codifying Commission and gave such section as amended the same number.

In the instant case, in view of your statement that "the ballots in the tenth district have been printed and the space allotted to the candidate for Congress on the Democratic ticket \* \* \* left blank", the question is presented as to whether or not the candidate selected by the congressional district committee and his party are entitled to have the name of such candidate on the ballot. I note in this connection that while your letter states that "the ballots in the tenth district have been printed", the letter which you enclose from the clerk of the board of deputy state supervisors of elections of Athens County only states that "*absent voter's ballots* are now printed and being voted".

In view of the statement of the clerk in question, I assume that the absent voter's ballots have been printed in pursuance to the express direction of Section 5025-1, General Code, which provides as follows:

“Ballots for the use of absent voters for the several precincts of the state and for every election held therein shall be prepared in accordance with law as are the regular voter’s ballots in the same form and on paper of the same quality, and in addition to the number of ballots provided by law for the use of the voters in the several voting precincts of the state, there shall be such an additional number of such absent voter’s ballots printed as the county boards of deputy state supervisors of election shall determine to be necessary for use in the several precincts of their respective counties. *These ballots shall be so printed and along with all other absent voter’s supplies shall be prepared for use not less than thirty days before the date of the election at which the same are to be used.*” (Italics the writer’s.)

It will be observed that this section relates to absent voter’s ballots only and it is my opinion that for this reason, as well as for other reasons unnecessary to be set forth herein, the provisions of this section cannot in any wise affect the conclusion reached in this opinion. Not the least of the considerations prompting me to this view is the fact that if it were to be held that the name of a candidate duly nominated according to law could not be placed upon the ballot later than thirty days prior to the election, in order that such absent voter’s ballots as may be cast from twenty-five to thirty days before the election might contain the name of such candidate, the practical result would be that because of a few absent voters, such candidate and the party represented by him would be deprived of the right to have the candidate’s name on the ballot. Moreover, such a construction would have the further effect of restraining, at least to some extent, a full and free expression on the part of the electors, because of the difficulty in advising the voters of the fact that a candidate had been nominated and instructing them with reference to writing the name on the ballot.

Section 5016 and 5017, General Code, provide as follows:

Section 5016. “Except as in this chapter provided, *the names of all candidates to be voted for on the first Tuesday after the first Monday in November shall be placed upon the same ballot.*” (Italics the writer’s.)

Section 5017. “Every ballot intended for the use of electors, printed in accordance with the provisions of this chapter, *shall contain the names of all the candidates whose nominations for any office specified in the ballot have been duly made and not withdrawn in accordance herewith, arranged in tickets or lists under the respective party or political or other designation certified; except that at the elections when presidential electors are to be voted for the names of all candidates for presidential electors shall be printed on a separate ballot.*

On the separate ballot for presidential electors the secretary of state shall place the names of the candidates for president and vice-president on the proper ticket, immediately following the name of the party, and immediately preceding the names of the presidential electors.” (Italics the writer’s.)

Unless the printing of the absent voter’s ballots, as stated in the letter from the clerk of the Athens County board, or the printing of the ballots, as stated in your communication, has served to terminate the power of the proper committee to fill the vacancy in question, the candidate here involved having been duly nominated by the proper committee in accordance with the provisions of Section 5013, by the plain terms of the two sections last above quoted, as well as Section 4989, has the right to have his name on the ballots. The party making the nomination is also entitled to have the name of its candidate on the ballots, and the electors of the district should be

given the fullest opportunity not only to choose between the candidates of the various political parties, but to express their determination upon the issues presented by the platform of the parties as well. For these reasons, it is my opinion that the printing of the absent voter's ballots, or of all the ballots, as early as they were printed in the instant case cannot destroy the right of the proper committee to fill the vacancy here under consideration and cannot deprive the candidate chosen, or his party, of the right to have the candidate's name on the ballots. Nor should such printing in any wise be permitted to curb the fullest expression of the voters as to their choice with reference to the candidates nominated.

Whether or not Section 5010 is here applicable, it is unnecessary to determine. It is clear that such section authorizes a committee chosen for that purpose, in case a nomination be made by petition, to fill a vacancy at any time "at least twenty-five days previous to the election." Certainly if a committee named on a nomination petition may fill a vacancy twenty-five days previous to the election, it would seem to have been the intention of the Legislature that a party controlling committee might likewise fill a vacancy within the same time limit, especially since the Legislature, as hereinbefore pointed out, did not place any limitation as to time in either Section 4989, Section 5013 or elsewhere.

I conclude, therefore, that the congressional district committee had the power to fill the vacancy in question and that the name of the candidate selected by such committee should appear on the ballots.

You ask if "stickers" may "be used in placing the name of the candidate selected upon the ballots." The only specific authorization for using adhesive slips or pasters, as they are denominated in the Code, is contained in Section 5012, General Code, which reads as follows:

"A vacancy caused by the death of a candidate which occurs after the printing of the ballots may be filled by filing the proper certificate with the secretary of state at least ten days, and with the deputy state supervisors at least five days, before the day of election.

The name, office, and party of the candidate so nominated shall be printed on adhesive slips or pasters by the board of deputy state supervisors, and shall be delivered to the judges of election in each precinct before the opening of the polls and by them pasted in the proper place on the ballot before it is handed the elector."

You will observe that this section by its plain terms relates to a vacancy "caused by the *death* of a candidate which occurs *after* the printing of the ballots." In this case the vacancy was not occasioned by death and occurred before the printing of the ballots. However, I do not feel that the absence of express statutory authority would prevent the use of adhesive slips or pasters. If the ballots for the district in question have been printed, it is obvious that considerable expense would be occasioned by reprinting such ballots. The object of holding an election is of course to afford to the electors an opportunity freely to express their choice on the candidates and questions submitted to them. There is no statute prohibiting the use of pasters, and if such pasters are prepared and by this means voters are given an opportunity to express their will, it is my opinion that such a procedure would not be held to be unlawful.

I have not commented on the failure of the certificate in question expressly to state the party which the candidate in question represents and to give the place of residence of the candidate by street and number, if any, or upon the failure of the certifying officers to swear to such certificate, for the reason that I am informed that the certificate will be at once amended, or a new one filed, complying in all particulars with Sections 4993 and 5011, General Code.

In view of the foregoing, and in specific answer to your questions, it is my opinion that the vacancy referred to in your letter may be filled by the congressional district committee of the tenth district, and that it is the duty of the board of deputy state supervisors of elections of the several counties in the district to place the name of the candidate selected by such committee upon the ballots, either by causing said ballots to be reprinted, by printing the name of the candidate in the space provided therefor on the ballots already printed, or by inserting the name of such candidate by the use of adhesive slips or pasters.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

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2697.

VACATION—PAY FOR VACATION IN ANNUAL SALARY OF EMPLOYEE OF BOARD OF EDUCATION—MAY BE ADDITIONALLY COMPENSATED IF EMPLOYED AS SCHOOL LIBRARIAN DURING SAID VACATION PERIOD.

*SYLLABUS:*

*An employe of the board of education, whose duties are to act as librarian for school libraries and who is employed on an annual salary, with the understanding that he is to have one month's vacation with pay, may, during his vacation period, be legally employed by the board of education, or board of trustees of a school library and paid for services performed during that time.*

COLUMBUS, OHIO, October 11, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your communication requesting my opinion in answer to the following question:

“When employes of a Board of Education, whose duties are to act as librarians for school libraries are employed at an annual salary, with the understanding that they are to have one month's vacation with pay—may such employes be legally compensated in addition to their salary for services performed during the period of their vacation?”

I assume that the contract of employment to which your letter refers was entered into under Section 7631, General Code, which provides:

“The board of education of any school district may provide for the establishment, control and maintenance of a school library or libraries for the purpose of providing school library service to the pupils under its jurisdiction, or may contract with any public library board, association, or other organization operating a public library in a community, to furnish such school library service, the board of education paying all or part of the expense thereof, including the salaries of school librarians, as and for compensation for the service rendered.”

Your attention is also directed to Sections 7635 and 7637, General Code, which read as follows: