

2382

VACANCIES—NO AUTHORITY TO FILL VACANCIES CAUSED BY WITHDRAWAL OR DEATH OF PERSON—NOMINATED BY NOMINATING PETITION—SECTION 4785-94 GC—AMENDED SUBSTITUTE SB 269, 99 GA.

SYLLABUS:

Since the amendment of Section 4785-94, General Code, by Am. Sub. S. B. 269, 99th General Assembly, effective January 1, 1952, there is no authority by which vacancies caused by either withdrawal or the death of a person nominated by a nominating petition may be filled.

Columbus, Ohio, March 16, 1953

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion reading as follows:

“The Wood County Board of Elections has inquired of this office the procedure to be followed in filling vacancies occurring by reason of the death or withdrawal of an independent candidate.

“General Code Section 4785-94 deals with the filling of a

vacancy by withdrawal or death. This section sets out in the first five paragraphs the procedure to be followed when a party candidate withdraws. In the sixth paragraph of this section the following statement is contained :

‘If a person nominated in a primary election *or nominated by a nominating petition*, as a candidate for election at the next general election, *shall die*, the vacancy so created may be filled by the same committee in the same manner as provided in the five next preceding paragraphs for the filling of similar vacancies created by withdrawals. * * *

“Since this section mentions the death of a candidate filing by nominating petition, it is the thought of this office that perhaps the power is granted to fill such vacancy, but the mechanics for filling such vacancy are not contained in said section. We would therefore like to have your opinion as to whether vacancies, either by withdrawal or by death of an independent candidate, can be filled under the present provisions.”

Section 4785-94, General Code, as amended by the 99th General Assembly, effective January 1, 1952, 124 Ohio Laws, 673, reads as follows :

“If a person *nominated in a primary election* as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of the entire state, shall *withdraw* as such candidate prior to the eightieth day before the day of such general election, *the vacancy in the party nomination so created* may be filled by the state central committee of the *political party* which made such nomination at said primary election, at a meeting called for such purpose. Such meeting shall be called by the chairman of such committee, who shall give each member of the committee at least two days’ notice of the time, place and purpose of the meeting. If a majority of the members of such committee are present at such meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such meeting shall certify in writing and under oath to the secretary of state not later than the seventy-sixth day before the day of such general election, the name of the person so selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is so certified.

“If a person *nominated in a primary election* as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a district comprised of more than one county but less than all of the counties of the state, shall *withdraw* as such candidate prior to the eightieth day before the day of such general election, *the vacancy in the party nomination*

so created may be filled by a district committee of the *political party* which made such nomination at said primary election, at a meeting called for such purpose. Such district committee shall consist of the chairman and secretary of the county central committee of such political party in each county in such district. Such district committee shall be called by the chairman of the county central committee of such political party of the most populous county in such district, who shall give each member of such district committee at least two days' notice of the time, place and purpose of such meeting. If a majority of the members of such district committee are present at such district committee meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such meeting shall certify in writing and under oath to the board of elections of the most populous county in such district, not later than the seventy-sixth day before the day of such general election, the name of the person so selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is so certified.

“If a person *nominated in a primary election* as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a county, shall *withdraw* as such candidate prior to the eightieth day before the day of such general election, *the vacancy in the party nomination so created* may be filled by the county central committee of the *political party* which made such nomination at said primary election, at a meeting called for such purpose. Such meeting shall be called by the chairman of such committee who shall give each member of the committee at least two days' notice of the time, place and purpose of the meeting. If a majority of the members of such committee are present at such meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such meeting shall certify in writing and under oath to the board of elections of such county, not later than the seventy-sixth day before the day of such general election, the name of the person selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is so certified.

“If a person *nominated in a primary election* as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a district within a county, shall *withdraw* as such candidate prior to the eightieth day before the day of such general election, *the vacancy in the party nomination so created* may be filled by a district committee consisting of those members of the county central committee in such county of the *political party* which made such nomination at said primary election, who represent the precincts or the wards and townships

within such district, at a meeting called for such purpose. Such district committee meeting shall be called by the chairman of such county central committee who shall give each member of such district committee at least two days' notice of the time, place and purpose of such meeting. If a majority of the members of such district committee are present at such district committee meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such district committee meeting shall certify in writing and under oath to the board of elections of such county, not later than the seventy-sixth day before the day of such general election, the name of the person so selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is so certified.

"If a person *nominated in a primary election* as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a subdivision within a county, shall *withdraw* as such candidate prior to the eightieth day before the day of such general election, *the vacancy in the party nomination so created* may be filled by a subdivision committee consisting of those members of the county central committee in such county of the *political party* which made such nomination at said primary election, who represent the precincts or the wards and townships within such subdivision, at a meeting called for such purpose. Such subdivision committee meeting shall be called by the chairman of such county central committee who shall give each member of such subdivision committee at least two days' notice of the time, place and purpose of such meeting. If a majority of the members of such subdivision committee are present at such subdivision committee meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such subdivision committee meeting shall certify in writing and under oath to the board of elections of such county, not later than the seventy-sixth day before the day of such general election, the name of the person so selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is so certified.

"If a person nominated in a primary election or *nominated by a nominating petition*, as a candidate for election at the next general election, shall die, the vacancy so created may be filled by the *same committee* in the *same manner* as provided in the *five next preceding paragraphs for the filling of similar vacancies created by withdrawals*, excepting that the certification, when filling a vacancy created by death, may not be filed with the secretary of state, or with a board of elections of the most populous county of a district, or with the board of elections of a county in which the major portion of the population of a subdivision is located, later than 6:30 p.m. of the tenth day before the day of such

general election, or with any other county board of elections later than 6:30 p.m. of the fifth day before the day of such general election.

“If a person holding an elective office dies subsequently to the seventieth day before the day of a primary election and prior to the eightieth day before the day of the next general election, and if, under the laws of Ohio, a person may be elected at such general election to fill the unexpired term of the person who shall have died, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination, as in the first four paragraphs of this section provided for, may select a person as the candidate of its party for election for such unexpired term at such general election, and certify his name, and thereupon such name shall be printed as such candidate under proper titles and in the proper place on the proper ballots for use at such election.”
(Emphasis added.)

It will be noted that this section contains *no* provision authorizing the filling of a vacancy on a ballot caused by the *withdrawal* of a candidate nominated by petition and contains no language referring to such a situation. The only authorization to fill any vacancy caused by the withdrawal of a candidate is the authorization to the appropriate *party committee* to fill a vacancy caused by the withdrawal of a *party nominee*, nominated in a primary election. It therefore is quite clear that where a candidate nominated by petition, an independent candidate, *withdraws* prior to the election, there is no authority to replace him on the ballot by another nominee.

Prior to the amendment to Section 4785-94 by the 99th General Assembly, this section authorized such replacement. The section, as enacted by the 97th General Assembly, 122 Ohio Laws, 103, 122, contained a paragraph specifically authorizing the filling of vacancies caused by the withdrawal of persons nominated by petition. This paragraph read as follows:

“If a person nominated by petition as a candidate for election at the next general election shall withdraw as such candidate prior to the eightieth day before the day of such general election, the vacancy so created may be filled by the committee of five designated in such nominating petition to represent the candidate named therein. To fill such vacancy the members of such committee, or a majority of them, shall, not later than the seventy-sixth day before the day of such general election, file with the election officials with whom the petition nominating the person who has withdrawn was filed, a certificate signed and sworn to under oath by each of them, designating the person they select to fill such vacancy. Such certi-

fication must be accompanied by the written acceptance of such nomination by the person whose name is so certified."

This entire paragraph was eliminated by the amendment enacted by the 99th General Assembly, making it readily apparent that the present omission of any such provision is not a legislative inadvertence but, instead, is a deliberate and considered expression of legislative intent.

As you have pointed out, the sixth paragraph of the present section does make a reference to filling a vacancy caused by *death* of a candidate *nominated by petition*. It provides no special machinery for filling such vacancy, however, but merely states that such vacancy shall be filled "by the *same committee* in the *same manner* as provided in the five next preceding paragraphs for the filling of similar vacancies created by withdrawals." The language of this paragraph was not changed by the last amendment of this section. Prior to that time the paragraph under consideration immediately followed the language which formerly specifically authorized the committee of five designated in the nominating petition to fill vacancies caused by withdrawal of a candidate nominated by petition.

Since, prior to January 1, 1952, authority did exist for filling vacancies caused by the *withdrawal* of candidates *nominated by petition*, the language that vacancies caused by *death* of persons *nominated by petition* "may be filled by the same committee and in the same manner as provided in the five next preceding paragraphs for the filling of similar vacancies created by withdrawals," was of some force and effect. In view of the fact that since the last amendment became effective on January 1, 1952, there no longer is any authority to fill vacancies created by the *withdrawal* of candidates *nominated by petition*, it necessarily follows that there no longer is any authority to fill the vacancies caused by the *death* of candidates *nominated by petition*. Thus, it clearly appears that the words "or nominated by a nominating petition," as contained in the sixth paragraph of Section 4785-94, are now mere surplusage.

In specific answer to your question, it is my opinion that since the amendment of Section 4785-94, General Code, by the 99th General Assembly, effective January 1, 1952, there is no authority by which vacancies caused by either withdrawal or the death of a person nominated by a nominating petition may be filled.

Respectfully,

C. WILLIAM O'NEILL

Attorney General