

**LETTER OPINION
2020-L-08**

October 13, 2020

The Honorable Alvin Jaeger
Secretary of State
600 East Boulevard Avenue, Dept. 108
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter asking about a situation where a qualified candidate for political office died after early voting was commenced and at a time when it is not possible to change the names or otherwise replace the candidate on the ballot prior to the general election. You ask the following:

I.

What the result or effect will be of the votes that are cast for the deceased candidate. In my opinion, our court follows the majority of states that use the “American” rule, where votes cast for the deceased candidate would be counted.

II.

Whether a candidate would be declared to have been elected if the deceased candidate receives a number of votes sufficient to elect the candidate and if so, whether a vacancy in the office will exist. It is my opinion that a candidate may be declared to have been elected in the event a sufficient number of votes were cast for the deceased candidate. Because a deceased candidate will be unable to discharge the duties of the office at the time specific to that position, the office would be deemed vacant.

III.

Finally, you ask what the process is to fill a vacancy, should one exist. The process to fill vacancies of a legislative office is provided in N.D.C.C. § 16.1-13-10.

ANALYSIS

It is my understanding that a candidate died on the twenty-ninth day prior to the election. The deceased candidate had previously won the primary nomination of his party in June and met the filing deadline to have his name placed on the ballot. Early voting for military and overseas voters began forty-six days prior to the election and early voting for other qualified electors began forty days prior to the election.¹

I.

You first ask what the result or effect will be of the votes that are cast for the deceased candidate. The death or disqualification of a candidate, unfortunately, occurs from time to time and has been addressed by the courts of this country several times throughout history. In a majority of states, the “American” rule is followed in the determination of whether votes cast for a deceased or disqualified candidate are to be counted. The “American” rule holds that 1) the purpose of an election is to carry out the will of the people; 2) votes for a deceased or disqualified candidate represent a choice by qualified voters among the options presented on the ballot; 3) to disregard such votes, especially when they constitute a majority or plurality of the voters, is to frustrate the popular will; so therefore 4) votes for deceased and disqualified candidates should be counted like any other votes, and if the “candidate” in question would have won the election, the result is a vacancy in the office.²

The “English” rule, by contrast, is that a candidate who has died is ineligible to serve and therefore a vote for a deceased candidate is a wasted vote and a nullity.³ The Pennsylvania Supreme Court described the “English” rule as follows:

It is “repugnant to the principle of majority rule, which is the cornerstone of orderly government. The principles of popular government require that votes cast for a dead man as a candidate for public office shall not be considered mere nullities, but that they shall be regarded as expressions by the voters that they prefer the office to be declared temporarily vacant until it can be filled in the manner prescribed by law rather than that a person

¹ Because the candidate died after the sixty-fourth day prior to the election, the provisions to fill a vacancy in N.D.C.C. § 16.1-11-18 do not apply.

² 1999 Wash. Op. Att’y Gen. 5. See generally *Evans v. State Election Board of Okla.*, 804 P.2d 1125 (Ok. 1990); *Banks v. Zippert*, 470 So. 2d 1147 (Ala. 1985); *West Virginia ex rel. Jackson v. County Court of McDowell Cty.*, 166 S.E.2d 554 (W.Va. 1969); *Tellez v. Superior Court In and For Pima Cty.*, 450 P.2d 106 (Ariz. 1969); *Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959).

³ 1999 Wash. Op. Att’y Gen.

whom they voted against and who represents opposing policies should fill it for a full term.”⁴

The North Dakota Supreme Court, in *Woll v. Jensen*, rejected the “English” rule saying, “where the disqualification is known, the party receiving the minority vote will be entitled to the office, and this on the theory that the voters have willfully thrown away their votes and that the office should not go begging on that account.”⁵

A 1999 Attorney General’s opinion from Washington State explained “the rationale for the ‘American’ rule is the desire to recognize political realities and to carry into effect the public will.” I agree with that opinion when it says:

An election is a choice among two or more known candidates in which the voters decide both which candidate they prefer and which candidates they do not prefer. Candidates decide whether to seek an office and voters decide how to vote based on an assessment of the range of candidates on the ballot. If one of the candidates dies, the choice available to the voters is suddenly altered.... Where [substituting another candidate] is not possible, leaving the deceased candidate’s name on the ballot allows the voters a choice they otherwise would not have. Some voters might prefer “someone else” over the remaining names on the ballot and would prefer to cast their votes for a vacancy. Counting the votes for the deceased candidate honors this choice and helps assure that the people will be governed by those who represent the popular will. Other solutions reduce the choice available to the voter and reduce the chance that the election results will actually reflect the public will.⁶

The North Dakota Supreme Court, in *Woll v. Jensen*, explained in a case where voters knew that one candidate did not meet the qualifications for the office, but won anyway, that the “American” rule seems to be that no intention to throw away the vote can be imputed, but that rather the vote for the disqualified candidate must be considered as a protest against the qualified person, and especially should this be the case where there are only two candidates.⁷

⁴ *Derringe v. Donovan*, 162 A. 439, 477 (Pa. 1932).

⁵ *Woll v. Jensen*, 36 N.D. 250, 162 N.W. 403, 404 (1917).

⁶ 199 Wash. Op. Att’y Gen. 5. See also *Merrill v. Dade Cty. Canvassing Bd.*, 300 So.2d 28, 30 (Fla. Dist. Ct. App. 1974) (In determining the results of an election as regards the other candidates who are qualified, the American rule does not treat the votes received by a deceased or disqualified candidate as void or thrown away, but as counted, even if the voters knew of the death or disqualification”).

⁷ *Woll*, 36 N.D. 250, 162 N.W. at 404.

To disregard the votes cast for a candidate would disenfranchise the voters of the state in violation of Art. 2 § 1 of the North Dakota Constitution.⁸ It is my opinion that the “American” rule has been adopted by a majority of the states, including North Dakota, and thus, the votes cast for the deceased candidate should be counted.

II.

You next ask whether a candidate may be declared to have been elected if the deceased candidate receives the number of votes sufficient to elect the candidate and, if so, whether a vacancy in the office will exist.

The “American” rule, as discussed above, provides a remedy in situations such as the one at hand, where a candidate dies or otherwise cannot fulfill the eligibility criteria for the particular office. The Oklahoma Supreme Court found that the constitutional requirement [to be a qualified elector of the respective district] did not void the votes for a deceased judicial candidate.⁹ The court explained that the constitutional eligibility requirement simply prevented a disqualified (or, in this case, deceased) candidate from taking office – not from remaining on the ballot.¹⁰ The deceased candidate fulfilled the constitutional requirements for candidacy from the time he was put on the ballot until his death.¹¹

After an election, the canvassing board “determines who has received the highest number of votes for a particular office”.¹² The candidate or candidates to be elected for each office receiving the highest number of votes must be duly elected to the office.¹³ This is a purely ministerial duty, and “the canvassing board has no authority to set itself up as judge of the qualifications of the candidates and issue a certificate to someone other than the highest vote-getter.”¹⁴

However, in the event a candidate dies or is otherwise unable serve, the duties of the respective office may not be discharged. At that point “[i]f any person elected to any state, district, county, or other political subdivision office fails to qualify and enter upon the duties

⁸ See *Evans*, 804 P.2d at 1131 (“[i]t would not serve any policy of the law to disenfranchise those voters by disregarding their will and holding their votes . . . null and void....”).

⁹ *Id.* at 1127.

¹⁰ *Id.*

¹¹ *Id.*

¹² N.D.A.G. 97-L-92. See N.D.C.C. ch. 16.1-15.

¹³ N.D.C.C. §§ 16.1-15-42 and 16.1-01-06.

¹⁴ N.D.A.G. 97-L-92 (citing *Stearns v. Twin Butte Pub. Sch. Dist. No. 1*, 185 N.W.2d 641, 644 (N.D. 1971)).

of such office within the time fixed by law, such office must be deemed vacant and must be filled by appointment as provided by law.”¹⁵

Thus, it is my opinion that pursuant to state law and the “American” rule, votes cast for a deceased candidate must be counted. In the event the deceased candidate receives the majority of the votes, the candidate is elected. However, if the prevailing candidate has died, the candidate is no longer qualified, and a vacancy would exist.

II.

The North Dakota State Constitution provides that “[t]he legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.”¹⁶ The legislative assembly has done so, and the process is set forth in N.D.C.C. § 16.1-13-10. Upon the application of state law and the “American” rule, it is my opinion that this would be the appropriate method to fill a vacancy.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁷

¹⁵ N.D.C.C. § 44-01-04. See also N.D.C.C. § 44-02-01(6) (“[a]n office becomes vacant if the incumbent shall . . . fail to qualify as provided by law, which includes taking the designated oath of office prescribed by law.”).

¹⁶ N.D. Const. art. IV, § 11.

¹⁷ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).