

OPINION
62-33

March 23, 1962 (OPINION)

CITIES AND VILLAGES

RE: Elections Vacancy on Ballot

This is in reply to your request for an opinion on the following set of facts:

The City of Jamestown is operating under the Council form of government. The regular election is to be held on April 2, 1962. At this election one of the aldermen whose term was up for election, filed a petition for the office in the regular manner. He was the only candidate that filed for the office. He has now died. The question is how may this office be filled?

The time for election is determined by section 40-21-02 and is set for the first Monday in April - in this instance, April second. We find the general provision in section 40-21-13 that municipal elections are to be governed by the election laws pertaining to counties. This section is construed to mean, unless otherwise provided for in the laws pertaining to municipal governments. Nominations for the office to be filled are controlled by section 40-21-07. This section in substance, provides that the candidate seeking the office may be nominated by filing at least twenty days prior to the election, a petition signed by not less than ten percent of the qualified electors residing within the ward or precinct in and for which such officer is to be elected. It further provides that in no case shall more than three hundred signatures be required.

The death of the alderman seeking reelection created a vacancy. Section 40-08-08, which pertains to vacancies, is not of any real value in this instance for reason that the office was to be filled at this coming election. In this respect, this section has little application. Referring to the "vacancy" as found here, we are unable to find any specific statute which sets out the manner in which the name of a candidate may be placed on the ballot under circumstances like this.

Section 16-08-07 in referring to a vacancy on a nonparty ballot for a county office, provides that the vacancy on the ballot may be filled by filing with the county auditor, a written petition stating that the petitioner is desirous to become a candidate to office for which the vacancy exists. The petition for the nomination of a person to fill the vacancy on the ballot is to be signed by qualified electors equal to thirty percent of the total vote cast for Governor at the preceding general election. Thus, if this section were applicable, as might be indicated by the provisions of section 40-21-12, the time element would not permit the filing of such petition.

In reviewing the various election laws that might have application, we come to the conclusion that there is no method provided whereby

the name of some other candidate may be substituted in lieu of the name of the candidate who has died. This brings us to two alternatives (1) that the election at this time would not fill the vacancy and that the council could fill such vacancy until the next city election, at which the unexpired term would be filled, providing the electorate did not petition for a special election within fifteen days; the other (2) alternative is that the electorate may write in the names of individuals.

On first impression, it might appear as if stickers could be used in this instance, but upon examination of section 16-04-28, it is observed that stickers are authorized for nomination. This section does not provide that stickers may be used for an election as distinguished from a nomination. Section 16-05-08 as pertaining to stickers is not applicable. However, writing in the name of candidates seems to be the prerogative of any voter. I am unable to find any authority which under our election laws holds that a write-in vote may not be counted if legible and otherwise in the proper place.

Being mindful of the purpose of election laws, it would appear that the choice, of filling a vacancy should be left to the electorate whenever possible, and as such, the second alternative stated above must be given preference. This immediately raises another question. How many write-in votes must a person receive in order to be declared elected?

In referring to the general provisions of election laws, we find that sections 16-01-06 and 40-21-17 simply provide that unless otherwise expressly provided by law, the person receiving the highest number of votes for any office should be deemed to have been elected to that office. However, this section, in an instance like this, must be construed together with other provisions relating to elections for municipalities. It would be a rather unusual situation that a person can be elected with a lesser number of votes than is required on a petition to have the name placed in nomination. It would only seem logical that the person, in order to be declared elected, must have received at least the same number of votes as the number of signatures required on the petition to have his name placed in nomination. Assuming this to be on legal foundation, the vote required would have to equal ten percent of the qualified electors residing within the ward or precinct for which such officer is to be elected. If no write-in candidate receives votes equal to ten percent of the electors, the office is not filled by election. In other words, it would constitute no election for that office. The city council then may fill such office under the provisions of section 40-08-08 and such office would be held until the next city election, at which time the unexpired term would be filled. There is no provision for striking the name except under section 16-05-08, which is not applicable in this instance.

It is, therefore, our opinion that the office of alderman may be filled by an election by using write-in votes, provided a write-in candidate receives the highest vote and at least a vote equal to ten percent of the electorate residing in the ward or precinct, or receives three hundred or more votes. It is our further opinion that if no write-in candidate receives the aforesaid required number of

votes, the office is not deemed to have been filled by election and the city council may then fill the vacancy as provided for under section 40-08-08.

LESLIE R. BURGUM

Attorney General