

**OPINION  
60-196**

March 23, 1960 (OPINION)

MUNICIPAL GOVERNMENT

RE: Parks and Park Districts - Board of Park Commissioners - Vacancy

Re: Filling Vacancy on Board of Park Commissioners

This is in reply to your letter of March 21, 1960, in which you ask certain questions concerning the above matter.

You state the facts as follows:

The regular term of office of two members of the Board of Park Commissioners has expired. They have filed nominating petitions and are running for reelection. Four other candidates have also filed nominating petitions for election to the Board. A third member of the Board has now resigned effective April 1, 1960. There is not sufficient time to circulate and file nominating petitions for the third vacancy for the unexpired term before the regular municipal election, which will be held on April 5, 1960, as required by Sections 40-2113 and 40-2107."

You ask the opinion of this office as to the manner in which the third vacancy for the unexpired term now created by the resignation should be filled.

Section 40-4909 of the N.D.R.C. of 1943 provides:

VACANCIES; HOW FILLED; REMOVAL OF RESIDENCE CREATES VACANCY. Vacancies on the board of park commissioners shall be filled by the board until the next regular election of members thereof at which time such vacancies shall be filled by election for the unexpired term. The removal of his residence from the park district by a member of the board shall create a vacancy thereon."

Section 40-2107 of the N.D.R.C. of 1943 provides that a candidate for public office in an incorporated city or village may be nominated by filing with the city auditor, at least twenty days prior to the holding of the election, a petition signed by not less than ten percent of the qualified electors.

Section 40-2108 provides that the auditor of the city shall place only the names of the persons nominated upon the ballot.

Section 40-2102 of the 1957 Supplement to the N.D.R.C. of 1943 provides in part that ten days' notice of the time and place of the election and of the offices to be filled at such election shall be given by the city auditor by publication in the official newspaper of the city and by posting written or printed notices in three public places in the city.

We can find no case law in point on this subject in this state. However, in 67 C.J.S. OFFICERS, Section 55(b) p. 227, we find the following statement:

A prospective resignation, even though accepted, does not take effect until the day named; and, where an officer tenders his resignation before the time to hold an election, to take effect after such time, the office is not vacant, and no election to fill the office can be legally held."

In the facts which you presented in your letter, however, the resignation is to take effect April 1, 1960. The election is April 5, 1960. Therefore, at the time the city election is held the office in question will be vacant. Section 40-4909 quoted above provides for an appointment to fill a vacancy until the next regular election of members thereof at which time the vacancies are to be filled by election for the unexpired term. The next regular election after the vacancy occurs would, in this instance, be the election on April 5, 1960. It would appear to be a basic policy of the law to fill vacancies in an election as soon as practicable after the vacancy occurs.

It is therefore our opinion that although the office of Park Commissioner will not be vacant until April 1, 1960, the vacancy will exist on April 5, 1960 can be given in advance as required by statute. Once it is known that the vacancy will occur prior to the election, the usual election procedures can be followed although the vacancy does not occur at that instant but will exist at the time of the election.

You also ask the following question:

If the vacancy for the unexpired term can be filled by the election of any of the candidates now running for election, which of the candidates, depending on the various votes cast for each, would take the regular terms and which candidate would take the unexpired term?"

As concerns the question of which candidates shall fill the unexpired term, it would appear to depend upon the office for which the candidate has filed. If the candidate has filed for the regular term he would evidently not be eligible to have his vote counted for the unexpired term unless such votes were "write in" or "sticker" votes. If the candidate has filed for the unexpired term then, of course, his vote would be counted for the unexpired term. It would be necessary therefore to distinguish on the ballot (in this instance voting machines) between the regular terms and the unexpired term. We can find no law which would prohibit the use of "write-in" or "sticker" votes at a city election.

LESLIE R. BURGUM  
Attorney General