

COPY

GENERAL ELECTION: Where political party fails to nominate a person for County Surveyor, County Clerk shall provide proper space on the ballot for voters to write in name of person they desire to be elected for such office.

September 23, 1944



Honorable Arthur U. Goodman, Jr.,
Prosecuting Attorney,
Dunklin County,
Kennett, Missouri.

Dear Sir:

We are in receipt of your letter of September 18, 1944, wherein you request an opinion from this department, which request reads as follows:

"In the General Election held in November, 1940, Chas. C. Redman, Jr. was duly elected on the Democratic ticket as Surveyor of Dunklin County; and he thereafter qualified as such. In December of 1940, being an officer in the National Guard, he was mustered into the Army, has been there ever since, and is now a Lieutenant Colonel. He did not file as a candidate in the Democratic primary this year, as Army regulations prevented his doing so, as he was not trying to avoid the payment of a filing fee. Quite a number of his friends wrote his name in on the Democratic ticket as the candidate for County Surveyor, but under your opinion of some time ago the County Clerk is not printing his name on the ballots as Democratic nominee for County Surveyor. There is no Republican candidate for County Surveyor. I understand the ballots will not contain a space for or mention of a candidate for County Surveyor. If the Republicans write in a few votes for some Republican for County Surveyor will he thereby become elected? Will 'write-in' votes be counted as valid votes in the General election of November, 1944?"

We call attention to Section 11595, Revised Statutes of Missouri, 1939. This is a very lengthy section setting forth the form of the ballot and how it shall be prepared. We do not quote the whole of this section, but particularly call attention to the following wording contained therein:

" * * * * Three-eighths of an inch below the name of each candidate shall be printed a horizontal hair line extending across the ballot in such manner that names on all the lists of candidates for like offices shall appear between the same horizontal lines: * * * *."

Section 11595 also sets forth a form to be followed in preparing the ballot, and particularly shows the hair line set out above.

Next, we call attention to Section 11603, Revised Statutes of Missouri, 1939. This section has to do with how the voters shall vote the ballot prepared in accordance with Section 11595, supra. We find this wording contained in Section 11603:

"* * * * If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle. * * * *"

In your opinion request you state that there has been no candidate duly nominated for the office of County Surveyor by either party in your county. The situation then will be that your ballot will proceed as though one had been nominated, however there will be no name to the right of the box on either the Democratic or Republican ticket. Underneath, where there is usually the name of the nominated candidate, there shall also appear the hair line as provided in the two sections, supra.

It is our view that the voters, both Republicans and Democrats, will unquestionably have the right to write in the name of whomever they see fit for the office of County Surveyor, and it shall be the duty of the election judges to count and tally the names so written in as they would for the other persons whose names usually appear on the ballot. Whichever person procures the highest number of votes shall be declared elected to the office of County Surveyor of Dunklin County.

To sustain our position we call attention to the case of Bowers vs. Smith, 111 Mo. 45, 1.c. 52, wherein the court said:

" * * * * The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.

"The statute recognizes this right by requiring sufficient blank space for such writing, next to the printed names of candidates for each office. Revised Statutes, 1889, sec. 4773."

The history of Section 11595 shows that this is the same section and that the different amendments of the section since 1889 have not changed this portion of the section referred to in the Bowers case, supra.

Again quoting from the dissenting opinion in the case, we call your attention to the following:

"But it is argued that the constitution secures to every voter the right to cast his ballot for whom he pleases. Certainly this is not denied, and, in order that he may not be restricted simply to those candidates whose names are printed on the official ballot, it is expressly provided

in section 4773 that 'at the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as there are offices to be filled.' We agree with counsel for appellee that if this new election law of May 16, 1889, should restrict the election to the names printed on the official ballot, and made no provision for his substituting any name he chose for any office to be chosen it would be unconstitutional. On the contrary, it has expressly guarded against that in section 4773 by leaving space for him to write the names of as many candidates as there are offices to be filled."

CONCLUSION

It is the opinion of this department that in view of the fact that no person has been nominated for the office of County Surveyor in Dunklin County to be elected in the 1944 General Election, it is the duty of the County Clerk, in preparing the official ballot to be used by the voters at said General Election, to see that the ballot contains a space for the office of County Surveyor on all party tickets contained on said ballot; that opposite the box on said ticket no printed name shall appear, and that underneath said space where a name would appear if a person had been nominated there shall also appear a hair line.

Further, the voters of Dunklin County will thereby be enabled to express their desires as to who shall be elected to the office of County Surveyor of Dunklin County, and such names so written in by the voters shall be counted and tallied as other persons whose names appear on said ballot as nominees to the several offices to which they aspire.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General