SCHOOLS:
BALLOTS:
COUNTY BOARD OF EDUCATION:
ELECTIONS:

A qualified voter has the right to cast a write-in ballot in the election under Section 165.657(4), RSMo 1963 Supp., of members of the county board of education of second, third, and fourth class counties, and that such ballots, if otherwise proper, must be counted for the persons written thereon.

July 16, 1964

Opinion No. 162

FILED
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Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Mr. Paden:

This opinion is issued in response to your request of April 8, 1964, for an official opinion of this office. You inquire whether write-in ballots can be legally cast and counted in the election of members of the county board of education of second, third, and fourth class counties.

Section 165.657 (4), RSMo 1963 Supp., provides:

> "There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the state of Missouri, a resident householder of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts."

[Note: After July 1, 1965, Section 165.657(4) will be renumbered as Section 162.111 (1).]

We think the recent case of Kasten v. Guth, Mo., 375 SW2d 110, and the early case of Bowers v. Smith, 111 Mo. 45 are directly in point.

The appellant in Kasten v. Guth, supra, was a write-in candidate for county superintendent of schools. The respondent contended that appellant was not eligible to be voted for at the election because he had not filed a declaration of candidacy as required by Section 167.020, RSMo 1959. This statute provides that persons desiring to be a candidate for county superintendent must file a written declaration of candidacy forty-five days before the election. The trial court sustained respondents motion to dismiss. The Supreme Court reversed stating that there was no express provision that no person should be voted for whose name does not appear upon the printed ballot and that construction of Section 167.020 as such a statutory prohibition would be against the established public policy of this state. The court further stated such a statutory prohibition might be unconstitutional. The court held that Section 167.020 does not restrict the voters choice to the candidates printed on the ballot but the voter may vote for a person of his own selection by the write-in method.

This same argument raised under the county superintendent election statute in Kasten was raised under the general election laws in Bowers v. Smith, supra. Under the Australian Ballot Law as enacted in Missouri only those candidates who comply with the nominating process are entitled to have their name printed on the official ballot. Laws 1889, p. 108 § 17; Section 111.420, RSMo 1959. There is no express provision limiting the voter's choice to the names printed on the ballot. The Supreme Court said in Bowers l.c. 52:

> "By our constitution general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. 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 which we are here considering, Section 165.657(4), also provides that nominations shall be filed thirty days before the election. Also there is no express provision restricting the voter's choice to the candidates on the printed ballot. Since the relevant provisions of Section 165.657(4) are parallel to the statutes considered in Kasten and Bowers, supra, we reach the same conclusion; namely, that the nomination provided by Section 165.657(4) is not a condition precedent to election and members of county boards of education of second, third, and fourth class counties may be voted for by the write-in method.

Subparagraph 2 of Section 111.580(1), RSMo 1959, sets forth the procedure for preparing a write-in ballot in general elections. Your letter notes the possible line of reasoning that since Section 111.580 does not apply to school elections (Section 111.625), then write-in ballots cannot be cast in the election of the county board of education. This reasoning has been frequently considered by those concerned with school elections, however, it is fallacious. This argument was unsucessfully advanced by the respondent's brief in Kasten v. Guth, supra.

Section 111.580 merely defines the method of preparing a write-in ballot in certain elections. The source of the right to cast a write-in ballot is not Section 111.580 nor any other statute. The applicability or inapplicability of Section 111.580 to an election, indeed the total non-existence of Section 111.580 would in no way affect the existence of this right. The general election statutes considered in Bowers v. Smith, supra, did not contain any write-in procedure comparable to Section 111.580. See: Laws 1889, p. 105 et seq. § 25. The sole effect of the inapplicability of Section 111.580 is that the method of preparation of write-in ballots in such elections is not controlled by the provisions of that statute.

We are of the opinion that in Missouri the right to write one's choice upon his ballot is fundamental to government by majority will. This right is reflected in our public policy, exists without statutory implementation and indeed may exist in the face of an attempted statutory prohibition.

Honorable Robert B. Paden

Historically, ballots prepared by the voter's hand predate use of ballots printed at public expense. Prior to the Australian Ballot System all ballots were, in a manner of speaking, "write-in" ballots. Nance v. Kearbey, Mo., 158 S.W. 629, 632.

It is significant that in both the Bowers and Kasten cases the Supreme Court assumed the existence of the right to write one's choice of candidates on the ballot and approached the issues from the point of view of whether this right was abrogated by the statutes in question. Holding that the statute did not restrict this right the court said in Kasten, l.c. 114:

> "Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail."

We are of the opinion that the voter's right to freely choose elected public officials by writing upon his ballot the person of his own selection applies to popular elections of county board of education members.

CONCLUSION

Therefore, it is the opinion of this office that a qualified voter has the right to cast a write-in ballot in the election under Section 165.657(4), RSMo 1963 Supp., for members of the county board of education of second, third, and fourth class counties, and that such ballots, if otherwise proper, must be counted for the persons written thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Very truly yours,

Thomas F. Eagleton

THOMAS F. EAGLETON
Attorney General