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#94057
NO.
STATE OF NEBRASKA
OFFICIAL
JUL 25 1994
DEPT. OF JUSTICE

DATE: July 22, 1994

SUBJECT: Under the pertinent Nebraska statutes, may a candidate for a nonpolitical office who was defeated in the primary election be placed on the general election ballot by petition in the event of the death of one of the successful candidates from the primary?

REQUESTED BY: Allen J. Beermann
Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

One of the candidates nominated in the May, 1994, primary election for a natural resources district board was killed in an accident in June. As a result, there is a vacancy on the ballot for that nonpolitical office. Another individual who was also a candidate for that same position and who was defeated in the May primary election is now interested in circulating a petition to place his name on the general election ballot for the natural resources district post. You have some concerns under the pertinent Nebraska statutes as to whether such a petition process by the defeated candidate is permissible. Therefore, you have asked us "may any person qualified for the office file by petition to fill the vacancy on the non political [sic] ballot including the candidate defeated in the May 1994 primary?"

You have cited several applicable portions of the Nebraska statutes. ***Neb. Rev. Stat.*** *§* 32-516 (1988) provides, as is pertinent here:

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> No candidate defeated at the primary election shall be permitted to file by petition in the general election next following and this provision shall include candidates in counties and cities as well as candidates for nonpolitical offices.

In addition, however, ***Neb. Rev. Stat.*** **§** 32-537 (Cum. Supp. 1992) provides, again as is pertinent:

> (2) If, after a primary election, there is a vacancy, through any cause whatsoever, upon the nonpolitical ballot for any office, such vacancy may be filled by filing petitions with the Secretary of State, county clerk, or election commissioner no later than seventy days prior to the general election, . . .
>
> (3) . . . Once the petition process is commenced to fill a vacancy on the ballot, . . . all candidates filing petitions no later than seventy days prior to the general election shall have their name placed on the ballot . . .
>
> (4) . . . A vacancy shall be deemed to exist when (a) any person ceases for any reason to be a candidate for the office for which he or she was nominated in the primary . . .

The potential contrary results from these two statutes led to your opinion request.

We have found no Nebraska cases which deal directly with the interaction of these statutes. However, the case of ***State ex rel. Driscoll v. Swanson***, 127 Neb. 715, 256 N.W. 872 (1934) offers some guidance. In that case, a candidate defeated in the primary for the office of Secretary of State wished to petition onto the general election ballot for the office of State Auditor. The applicable statutes provided that "no person who has been a candidate for an office at a primary shall be a candidate by petition or certificate of nomination for the office for which he was defeated, at the next general election" and "[n]o candidate defeated at the primary election shall be permitted to file by petition in the general election next following." The candidate argued that the first, specific statute controlled, and that he was prohibited from running by petition only for the office of Secretary of State. However, the court indicated that there was no conflict between those statutes, and that the second provision was supplementary to and an extension of the first. As a result, the candidate in question could not petition onto the ballot for the office of State Auditor.

The court in the *Driscoll* case stated several rules of statutory construction which have some application to the present situation. "The court will not read into a statute restrictions or exceptions not made by the legislature." *Id.* at 718, 256 N.W. at 873. "In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *Id.* at 718, 256 N.W. at 873. "Statutes upon the same subject are to be harmonized, if possible, by a fair and liberal construction that will give effect to both." *Id.* at 718, 256 N.W. at 873. "A statute will not be placed in antagonism with another unless they are so repugnant and inconsistent that one cannot stand unless the other fails." *Id.* at 718, 256 N.W. at 873. "Conflicts between statutes will never be considered to exist unless such was the manifest purpose and object of the legislature forced on the court by unambiguous language." *Id.* at 718, 256 N.W. at 873.

When the statutes at issue in this instance are considered in light of the rules set out in the *Driscoll* case, we believe that Section 32-516 is controlling, and that the defeated natural resources district candidate may not petition onto the ballot. Under such an analysis, Section 32-516 becomes a complete bar on defeated candidates petitioning onto the ballot, while Section 32-537 is read as a procedural statute which describes, in general terms, the process for filling vacancies on the ballot after the primary. Such a construction avoids creation of a conflict between the statutes, and gives effect to both. Such a construction also is in keeping with the purpose of Section 32-516, which the Nebraska Supreme Court described as follows (with respect to an earlier version of that section):

> The Legislature considered it an evil for one who had unsuccessfully submitted his candidacy at the primary to be allowed to be nominated later as a candidate for the same or for another office, and again to be permitted to have his name printed upon official ballots at the expense of the public.

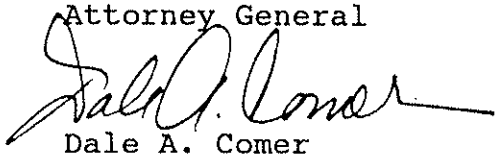
State ex rel. O'Sullivan v. Swanson, 127 Neb. 806, 809, 257 N.W. 255, 256 (1934).

Therefore, it seems to us that the candidate who was defeated in the primary election for the position on the natural resources district board may not petition to fill the vacancy caused by the death of the successful candidate. However, that individual may

still conduct a write-in campaign for that office, and be elected as a write-in candidate.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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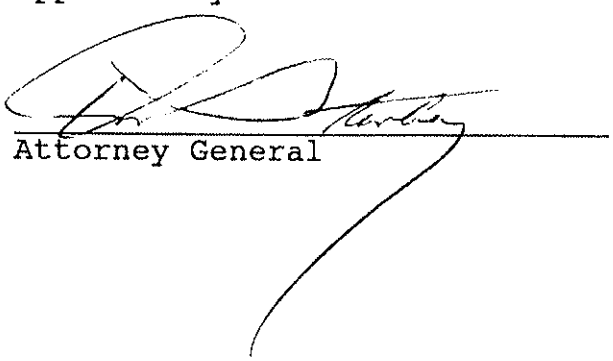

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