

November 12, 1992

Ms. Kay Sather
Benewah County Clerk/Auditor
County of Benewah
St. Maries, ID 83861

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Ms. Sather:

By letter dated November 4, 1992, you requested an opinion regarding the general election held last Tuesday, November 3, 1992, in Benewah County. According to your letter, the only candidate for the office of Benewah County Prosecuting Attorney, Jack Britton, officially withdrew from the race on October 1, 1992. You have provided this office a copy of Mr. Britton's letter in which he states:

This letter is to inform you that I hereby withdraw from the election as Republican Nominee for the office of Prosecuting Attorney for the County of Benewah. The reason I am withdrawing from the election is that I have decided to make Boise, Idaho my permanent place of residence and therefore no longer legally qualify for the Office of Prosecuting Attorney of Benewah County.

Please ensure that my name is removed from the November Ballot. Your assistance in this matter is greatly appreciated.

Mr. Britton's letter withdrawing from the race arrived subsequent to the printing of the general election ballot; and, on the advice of the county's attorney, the ballots were not reprinted nor was Mr. Britton's name stricken from the ballot.

On October 28, 1992, David Rogers filed a declaration of intent to be a write-in candidate for the office of Benewah County Prosecuting Attorney. In last Tuesday's election, Jack Britton received 1,313 votes for prosecuting attorney, and David Rogers received 251 write-in votes. In light of the circumstances, your question is who should be declared the duly elected Prosecuting Attorney for Benewah County.

The Canvass of the Election Results

As a prefatory comment, the board of county commissioners, in its capacity as the board of canvassers for Benewah County, must certify the votes as cast and counted on

election day. The election canvass as described in Idaho Code § 34-1206 is ministerial in nature and is not the proper forum in which to determine a candidate's eligibility. Similarly, Idaho Code § 34-1209 provides:

Immediately after the general election canvass, the county clerk shall issue a certificate of election to the county candidates who received the highest number of votes for that particular office and they shall be considered duly elected to assume the duties of the office for the next ensuing term.

Thus, Mr. Britton should be declared the duly elected Prosecuting Attorney for Benewah County. The fact that Mr. Britton was not a candidate for that office at the time of the election raises other issues.

The Validity of the Election Outcome and Status of the Runner-Up

Initially, it must be determined whether Jack Britton's name should have appeared on the general election ballot. It is the opinion of this office that since Mr. Britton withdrew by letter on October 1, 1992, his name should not have appeared on the ballot. Idaho Code § 34-717 provides for the withdrawal of candidates prior to the election. This provision states in part:

A candidate for nomination or candidate for election to an office may withdraw from the election by filing a notarized statement of withdrawal with the officer with whom his declaration of candidacy was filed. The statement must contain all information necessary to identify the candidate and the office sought and the reason for withdrawal. A candidate may not withdraw later than thirty (30) days before an election. Filing fees paid by the candidate shall not be refunded.

The last day to withdraw from the 1992 general election was October 5, 1992. Thus, Jack Britton was within the statutory timeframe for withdrawing from the race.

Idaho Code § 34-912 provides for correcting ballots due to vacancies or withdrawals after the ballots have been printed. This provision states:

When any vacancy occurs after the printing of the ballots and is filled as provided by law, the county clerk shall thereupon have printed a sufficient number of stickers containing the name of the candidate designated to fill the vacancy and shall deliver them to the judge of elections of the precincts interested therein.

The distributing clerk shall affix such stickers on the ballot before it is given to the elector. The sticker shall be placed over the name of the previous candidate. If the vacancy occurs after the deadline for filling the same, the distributing clerk shall cross the name of such candidate off the ballot and no votes shall be cast for the candidate. The county clerk shall notify the precincts of this authorization as soon as a vacancy occurs.

In this instance, the vacancy could have been filled by the Benewah County Republican Central Committee. However, since this did not occur, Mr. Britton's name should have been crossed off the ballot. Jack Britton had the statutory right to withdraw from the race (which he exercised in his letter of withdrawal of October 1, 1992) as well as have his name crossed off the ballot.

The next question is whether the error in having Mr. Britton's name remain on the ballot entitles David Rogers to be declared the elected Prosecuting Attorney for Benewah County. It is the opinion of this office that Mr. Rogers has no claim to the office simply because he ran second to an ineligible candidate. There is a large body of law to support this opinion. It is stated in 29 C.J.S. Elections § 243:

Votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away but are to be counted in determining the result of the election as regards the other candidates. Accordingly, the general rule is that the fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected. In such case the electors have failed to make a choice and the election is a nullity.

Idaho adheres to this same rule. Idaho Code § 34-2024 provides that if a person is declared ineligible to hold office as the result of an election contest, "the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

Statutory Remedies

The fact that Mr. Rogers is not presently entitled to be declared the elected Prosecuting Attorney for Benewah County does not leave him without remedy. Since Jack Britton's name should not have appeared on the ballot, there is an issue as to whether the election in that race is valid. The determination of that issue is for a state district court. Idaho Code § 34-2001 sets forth grounds to contest an election. Relevant to this situation, Idaho Code § 34-2001 provides:

The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested:

....

2. When the incumbent was not eligible to the office at the time of the election.

For purposes of this section, once the board of county commissioners has canvassed the election results and declared Jack Britton elected, Jack Britton would be considered the "incumbent." Idaho Code § 34-2002. At that point, any elector in the county could challenge the election. Idaho Code § 34-2007.

If the challenge is brought and it is determined by the district court that Jack Britton was ineligible to be elected, Idaho Code § 34-2024 provides:

When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void.

(Emphasis added.) Then, if the court declares the election void as to the contested race, the court in its discretion can either order a new election or have the position filled as a vacancy pursuant to chap. 9, title 59, Idaho Code. *See* Idaho Code § 34-2021.

If the election is not contested, the office would have to be declared vacant pursuant to Idaho Code § 59-901. This provision states in relevant part:

Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office as follows:

....

(5) His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected.

At this point, the vacancy would be filled by the board of county commissioners pursuant to Idaho Code § 59-906. Should this occur, the commission should be mindful of Idaho Code § 59-907 which provides:

In the event a vacancy exists and there is no resident attorney in the county who is willing or qualified to perform the functions of prosecuting attorney as set forth in chap. 26, title 31, Idaho Code, the board of county commissioners may appoint and/or contract with an attorney from outside the county to perform the duties of prosecuting attorney for the balance of the unexpired term or such shorter period as the board of county commissioners shall determine.

Since David Rogers expressed interest in the position and presumably continues to want to serve, he has a statutory priority over attorneys from outside the county to fill the position of Benewah County Prosecuting Attorney.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General