

**OPINION
70-152**

September 10, 1970 (OPINION)

Mr. M. C. Hiaasen

State's Attorney

Benson County

RE: Elections - Vacancy on General Election Ballot - Nomination Decl

This is in response to your letter in which you state the following:

"One Joe Chaske of Fort Totten, North Dakota filed petitions to get on the ballot for sheriff. After the ballot was printed, he called at the Benson County Farmers Press office and stated he was no longer a candidate for sheriff. I am enclosing the writeup by the Benson County Farmers Press stating that Mr. Chaske was no longer a candidate.

There was only one candidate, that is Mr. Gordon Burdick, besides Mr. Chaske's name on the ballot.

Mr. Chaske received 216 votes and one write-in candidate received 156 votes in addition to Mr. Burdick's votes.

In view of the fact that Mr. Chaske was not longer a candidate, although on the ballot, and also the fact that he has declined the nomination, what happens to the write-in candidate? The write-in candidate, Mr. Gary Tvinnereim, received 156 votes and thus had enough votes to get on the ballot if Mr. Chaske's had not been there."

Your letter does not indicate whether or not Mr. Joe Chaske has declined the nomination. A statement to the press does not constitute a declination of the office. The refusal to accept nomination should be made to the officer who issues the certificate of nomination. In this respect, it should be noted that section 16-15-05 provides that if a nominee declines to accept a nomination and does so in writing within 35 days before the election, such nomination shall be void. The person declining the nomination must inform in writing the officer with whom the certificate of nomination is filed. This apparently, based on your letter, has not yet been done.

If, however, Mr. Chaske notifies the county auditor in writing that he declines to accept the nomination, then a vacancy on the no-party ballot would exist. A vacancy is filled pursuant to the provisions of section 16-08-07. This section among other things provides that a vacancy exists when a candidate nominated at the primary election shall die, resign, or otherwise become disqualified to have his name printed on the ballot at the general election.

The same section also provides that the vacancy can be filled by filing a petition with signatures of qualified electors equal in

number to at least 2 percent of the total vote cast for governor at the most recent general election in the state or district at which the office of governor was voted upon. Such petition must be filed at least 35 days prior to the general election and before 4 o'clock on the thirty-fifth day. The form of the petition shall be substantially the same as set out in section 16-04-04.

The write-in candidate which received 156 votes would not be entitled to the nomination in the event that Mr. Chaske declines the nomination. The statute has spelled out the manner in which vacancies are to be filled, and those provisions would control.

The North Dakota Supreme Court in re Murray, 145 N.W.2d., 899, had under consideration a contest under the provisions of law in which the contestant claimed that if his proposition is valid he should have the nomination. The contestant was third highest on the ballot. The court in substance said that a candidate who receives the third highest number of votes in a no-party primary election would not be entitled to the nomination even if the nominations of the first and second highest vote getters were set aside for any legal reason.

The Court further said that if a vacancy occurred as a result of the contest, such vacancy would be filled pursuant to the provisions of section 16-08-07. Under the rule of law announced by the Supreme Court the write-in candidate who received 156 votes would not be entitled to a place on the ballot at the general election if Mr. Joe Chaske declines the nomination.

If the nomination is declined by Mr. Chaske, the third highest could become a nominee only by following the procedures outlined in section 16-08-07 or for that matter, any other person satisfying the provisions of section 16-08-07 could be nominated.

HELGI JOHANNESON

Attorney General