

**STATE OF
COLORADO
Department of State**

1700 Broadway
Suite 250
Denver, CO 80290



Bernie Buescher
Secretary of State

J. Wayne Munster
Acting Director, Elections
Division

August 12, 2009

Ryan Call
1660 Wynkoop Street, Ste. 900
Denver, CO 80202

Re: Questions Regarding House District 51 Vacancy

Mr. Call:

Our office has received your letter dated August 7, 2009, in which you requested clarification of political party vacancy committee laws and how they apply to one of the announced candidates seeking appointment to fill a vacancy in House District 51. Although this office feels it would be inappropriate to provide advisory opinions based on hypothetical situations or to make a predetermination of eligibility of a particular candidate, it may help to understand the procedures followed by this office when reviewing vacancy appointments to office.

As outlined in section 1-12-203(3)(a), C.R.S., the vacancy committee “shall certify the selection to the secretary of state within thirty days from the date the vacancy occurs”, which entails filing a “designation of nomination by vacancy committee” form and “acceptance of nomination by vacancy committee and declaration of qualifications” form. Once these documents have been filed with our office, we will review them to ensure that each section has been filled out completely, that the candidate has signed the acceptance form to attest to meeting the qualifications for office, and that both the designation and acceptance forms are notarized. Additionally, our office will review the selected person’s voter registration record to confirm that their party affiliation, date of affiliation, and physical address match the acceptance form. After this review and “no sooner than two days after receiving the certification from the vacancy committee” (section 1-12-203(3)(b), C.R.S.), our office will certify the selected person to the appropriate house of the general assembly.

Please note that, in submitting an acceptance of nomination declaration to the Secretary of State, the person selected by the vacancy committee certifies under oath that he or she meets the qualification to hold the vacant office. With respect to a residency qualification, the person making that oath is the person most knowledgeable about their residency, and that person is legally responsible for the truthfulness of their oath. Thus, the Secretary of State will rarely, if ever, question the truthfulness of such an oath.

In response to your last question regarding qualifications for filling a vacancy in legislative office, section 1-12-203, C.R.S., requires that the individual appointed by a vacancy committee must possess the constitutional qualifications for a member of the general assembly. The

constitutional qualification concerning residency is established in Article V, section 4 of the Colorado Constitution, which provides that no person shall be a representative or senator “who shall not for at least twelve months next preceding his election, have resided within the territory included in the limits of the district in which he shall be chosen.”

Based upon our review of relevant constitutional, statutory, and case law, and after consulting with the attorney general’s office in accordance with section 1-1-107(1)(c), C.R.S, we believe that an individual appointed to fill a vacancy in the general assembly must have resided within the district for at least twelve months prior to his or her appointment by the vacancy committee. Although Article V, section 4 of the Colorado Constitution uses the term “election”, the term must be construed broadly to include selection by a vacancy committee.

Dated this 12th Day of August, 2009.

/s/ J. Wayne Munster

J. Wayne Munster

Acting Director, Elections Division



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August 7, 2009

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The Honorable Bernie Buescher
Colorado Secretary of State
9900 Main Street, Suite 303
Fairfax, Virginia 22031

RE: Request for Advisory Opinion, House District 51 Vacancy Committee

Dear Secretary Buescher,

The undersigned serves as legal counsel to the Colorado Republican Party. Compliance with applicable provisions of Colorado law is of the utmost importance to the Colorado Republican Party, its associated local political party committees, and its candidates – particularly with respect to the laws governing the selection and eligibility of candidates for public office.

One of the announced candidates seeking to be selected and designated by the Vacancy Committee of the 51st Representative District Republican Central Committee to fill the vacancy occasioned by the resignation of Representative Don Marostica is Kevin McNaught. Mr. McNaught is currently registered to vote and has declared his legal residence to be in Larimer County at 1885 Dove Creek, Loveland, Colorado 80538, within the boundaries of House District 51. His prior declared legal residence and voter registration was at 3402 Florida Drive, Loveland, Colorado 80538, also within the boundaries of House District 51. Mr. McNaught's Voter ID is 1631723, he has been affiliated with the Republican Party on the records of the Clerk and Recorder since July 15, 2002, and his date of birth is May 18, 1962.

The Colorado Republican Party seeks clarification from the Secretary of State's Office concerning the law governing political party vacancy committees, and how the Secretary of State would interpret and apply the law and governing regulations in connection with the present matter.

Question 1: Based on information currently available to the Colorado Secretary of State's Office, if Kevan McNaught were to be selected and certified by the Vacancy Committee of the 51st Representative District Republican Central Committee to fill the vacancy occasioned by the resignation of Representative Don Marostica at a properly called meeting of the Vacancy Committee with sufficient quorum on August 13, 2009, would the Secretary of State certify the selection and appointment thereof



to the Clerk of the Colorado House of Representatives pursuant to C.R.S. § 1-12-203(3)(b)?

Question 2: In the event the certification by the Vacancy Committee of the 51st Representative District Republican Central Committee or the certification by the Secretary of State of the Vacancy Committee's selection were to be subsequently challenged by an eligible elector of the political subdivision on the basis of the candidate's qualification, pursuant to C.R.S. § 1-4-501(3) and other applicable provisions of Colorado law, is it the position of the Secretary of State that, pursuant to C.R.S. § 1-12-203(3), the Governor is empowered to fill the vacancy by appointment *only if* the appropriate political party vacancy committee failed to certify a selection within thirty days from the date of the vacancy? In other words, if the candidate selected and certified by the Vacancy Committee and the Colorado Secretary of State were subsequently challenged as to eligibility, and if a Court having final jurisdiction to rule on the merits of the question of eligibility was to subsequently determine that the candidate designated and certified lacks the requisite qualifications for public office, does a new vacancy exist as of the time the Court rules the candidate ineligible, and would the Vacancy Committee of the 51st Representative District Republican Central Committee then have an additional thirty days to fill the vacancy pursuant to Section 1-12-203, Colorado Revised Statutes?

Question 3: Upon what statutory or legal authority does the Secretary of State rely to conclude that a selection, designation, appointment, and/or certification by political party vacancy committee constitutes an "election" within the meaning of COLO. CONST. Article V, Section 4, and Section 1-4-501(1), Colorado Revised Statutes?

Thank you in advance for your prompt response to these questions. If you have any additional questions or wish clarification to or additional information concerning any of the above questions, please contact me in our Denver offices at 720.904.6000.

Very truly yours,

HALE FRIESEN LLP



Ryan R. Call, Esq.