

June 17, 2008

INTEROFFICE MEMORANDUM

TO: Mike Coffman
Secretary of State

Bill Hobbs
Deputy Secretary of State

FROM: Maurice G. Knaizer
Deputy Attorney General
State Services Section

RE: Deadlines for Filling Vacancies in Section 1-4-1002, C.R.S. (2007)

I write in response to your request to confirm the verbal advice I provided last week concerning the deadlines for filling certain vacancies set forth in section 1-4-1002, C.R.S. (2007). This memorandum contains only my opinion and is not an official opinion of the Attorney General.

QUESTION PRESENTED FOR REVIEW AND CONCLUSION

Are the deadlines in § 1-4-1002, C.R.S. (2007) for filling vacancies caused by the withdrawal of a person designated by a party assembly as a candidate for nomination mandatory or subject to the substantial compliance test?

The deadlines for filling vacancies caused by the withdrawal of a person who has been designated by a party assembly are subject to the substantial compliance test.

ANALYSIS

The procedures for filling vacancies in designation or nomination by parties are set forth in § 1-4-1002, (2007). It provides, in pertinent part:

(1) Any vacancy in a party designation occurring after the party assembly at which the designation was made and no later than sixty-eight days before the primary election may be filled by the party assembly vacancy committee of the district, county, or state, depending upon the office for which the designation has occurred. A vacancy may be caused by the...withdrawal of any person designated by the assembly as a candidate for nomination.

....

(2) A vacancy in a party designation occurring during the sixty-seven days before the primary election or on the day of the primary election may be filled by the respective party assembly vacancy committee of the district, county, or state, depending upon the office for which the vacancy in designation or nomination has occurred. A vacancy may be caused by the... withdrawal of the person previously designated....

(5)(a) The persons designated to fill any vacancies in subsections (1) to (4.5) of this section shall file with the designated election official with whom the original certificate of petition was filed any certificate of designation or nomination to fill the vacancy and a written acceptance signed by the person designated or nominated no later than the close of business on the sixty-seventh day before the primary election or the sixty-ninth day before the general election, depending on when the vacancy occurred.....

Section 1-4-1002 establishes deadlines for filing documents designating persons to fill vacancies when the persons designated by the parties withdraw. You have asked whether the deadlines are subject to the strict compliance test or the substantial compliance test. For the following reasons, I conclude that the Secretary should accept such filings if the filings substantially comply with the deadlines.

In general, the question of whether deadlines in an election code are mandatory or directory is answered by the language of the statute and the context. *Cowie v. Means*, 39 Colo. 1, 12, 88 P. 485, 488 (Colo. 1907). In early cases, Colorado courts generally construed the law to require strict compliance with the requirements of the election code, including deadlines. *Id.* 39 Colo. at 14, 88 P. at 489.

In other election contexts, Colorado appellate courts have shifted from the strict compliance standard to the substantial compliance standard. Thus, in *Erickson v. Blair*, 670 P.2d 749 (Colo. 1983) the Colorado Supreme Court moved from the strict compliance standard to the substantial compliance standard in the context of absentee voting. The Court altered the standard “in light of the realities of modern life and the fundamental character of the right of suffrage.” *Id.* at 754. *See also, Board of County Comm’rs v. City and County of Denver*, 195 Colo. 211, 216, 565 P.2d 212, 216 (1977) (substantial compliance with requirement that annexation map accompany petition.)

The General Assembly incorporated the substantial compliance standard into the election code in 1996. It amended § 1-1-103 by adding subsection (3), which states:

Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies.

§ 1-1-103(3), C.R.S. (2007)

The Secretary of State has been a party to two cases involving ballot access in which district courts have applied the substantial compliance standard. In *Brown v. Davidson*, 04 CV 6907, the statute governing nominations of unaffiliated candidates stated that such candidates must submit a statement of intent and a filing fee “no later than one hundred twenty days before the general election.” Brown failed to meet that deadline. The Secretary, adopting the strict compliance test, refused to accept the statement of intent. Brown filed a complaint with the district court. The district court held that the Secretary should have applied the substantial compliance test in circumstances involving ballot access by a candidate. The Secretary appealed to the Colorado Supreme Court. The Court refused jurisdiction. I have attached a copy of the district court opinion.

In 1996, a judge on the Denver District Court reached a similar conclusion in *Colo. Democratic Party, et al. v. Buckley*, 1996 CV 3159. There, the Democratic Party and two of its candidates failed to file certificates of designation on behalf of Doug Linkhart and Gloria Leyba with the Secretary of State by the statutory deadline. The Secretary applied the strict compliance standard and rejected the filings. The party and the candidates appealed. The district court held that the statutes were procedural and strict compliance was not required.¹

Based upon the expansion of the substantial compliance standard under Colorado Supreme Court jurisprudence, the adoption of the substantial compliance standard by the legislature, and the rulings in the *Brown* and *Colorado Democratic Party* cases, I conclude that the Secretary must apply the substantial compliance standard for filings made pursuant to § 1-4-1002.²

¹ The law was subsequently amended to state that “late filing of the certificate of designation shall not deprive candidates of their candidacy.” Section 1-4-604(5), C.R.S. (2007).

² This memorandum does not address the applicability of the substantial compliance test to matters other than the deadlines imposed in § 1-4-1002.

