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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

July 30, 1974

Opinion No. 74- 251

James G. Kahler
Rice County Attorney
119 1/2 W. Main St.
Lyons, Kansas 67554

Dear Mr. Kahler:

You inquire concerning the proper construction of that portion of K.S.A. 25-213 which provides thus:

"No person shall receive the nomination nor have his name printed on the ballot for the general election in any case where no nomination papers or declaration papers have been filed, unless he or she shall receive at least votes equal in number to ten percent (10%) of the total party vote of his or her party cast for governor in such state, county or district at the last general election of governor." [Emphasis supplied.]

You inquire specifically how the "party vote" for a candidate for governor is to be determined from the votes cast at a general election.

This portion of K.S.A. 25-213 was first enacted in 1909. See ch. 136, § 5, L. 1909. It initially provided thus:

"No person shall receive the nomination nor have his name printed on the general ballot in any case where no nomination papers have been filed, unless he shall receive at least votes equal in number to five per cent of the total party vote of his party cast for secretary of state in such state, county, district or city at the last general election."

Despite the long history of this provision, we find no reported decision of the Kansas Supreme Court dealing expressly with the

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phrase "party vote," nor do we find any opinion issued by previous Attorneys General in point.

In State ex rel. Graybill v. Tipton, 166 Kan. 145, 199 P.2d 463 (1948), the court considered a case in which the names of two persons, Kelly and Hardwicke, appeared as candidates for the Democratic nomination as county commissioner for the third commissioner district of Morton County. Kelly received the Democratic nomination. As the court stated, "enough Republican voters wrote in Hardwicke's name to give him the Republican nomination." The county clerk then refused to place Hardwicke's name on the general election ballot. The court ordered that she do so. The court did not discuss, however, the determination of the number of write-in votes sufficient to entitle Hardwicke to have his name appear on the general ballot, that question not, apparently, being in dispute.

In an opinion dated September 16, 1968, Attorney General Londerholm states that "the determination of the total party vote of the party cast for governor must be based on the general election held two years prior to the general election."

It has been the custom, we understand, to require, upon the authority of the quoted language, that a write-in candidate for nomination on, e.g., the Republican ballot, obtain votes equal in number to ten percent of the votes cast for the Republican candidate for governor at the last preceding general election.

The language of the statute gives no warrant for this practice. The 1909 Legislature specified that the minimum number of write-in votes necessary to entitle a candidate to have his name appear on the general ballot must be "equal . . . to five percent of the total party vote of his party cast for secretary of state . . . at the last general election." The Legislature did not specify merely a given percent of the "total vote," but five percent of the "party vote."

Yet, the vote for a candidate at the general election is not a "party vote" in any sense. The votes cast for a given candidate at the general election cannot legally be claimed to represent a "party vote," nor can those same votes be taken as a vote for a party. A "party vote" is determinable, of course, at the primary election, for there, the votes for the candidates for a given nomination are all votes of persons of declared party affiliation. The votes for a given candidate at the general election consists of votes of persons who have declared their party affiliation to any party, as well as of those who have no declared party affiliation. In short, it is not legally possible to determine a "party vote" for a candidate for governor at a general election.

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The statute is thus internally inconsistent and ambiguous. This section was doubtless enacted to require that a candidate who is sought to be nominated by write-in votes demonstrate a minimum of support in order that persons should not be nominated frivolously or accidentally, as it were, by isolated write-in votes which were cast for frivolous, humorous or even vindictive reasons. A "party vote" being legally indeterminable at the general election, the provision should be construed, if possible, in order to require, nonetheless, some minimum of write-in votes as a prerequisite to nomination, to the extent that traditional rules of statutory interpretation permit. "Where it reasonably appears what was the intent of the legislature, the statute will be construed so as to effect that intent, although contrary to the letter of the statute." Shellabarger v. Commissioners of Jackson County, 50 Kan. 138 (1893). In Hunziker v. School District No. 26, 153 Kan. 102, 109 P.2d 115 (1941), the court stated thus:

"It is a fundamental rule of statutory construction, to which all others are subordinate, that the purpose or intent of the legislature governs when that intent can be ascertained from the statute, even though words, phrases or clauses at some place in the statute must be omitted or inserted."

The language of the provision in question is emphatic that the number of votes necessary must be measured against the "total party vote of his or her party cast for governor" This being impossible to determine at the last general election, it is our view that resort must be had to the last preceding election at which a party vote was legally determinable, which is the last preceding primary election. Accordingly, it is our view that in order to have his or her name placed on a general ballot, a candidate who is sought to be nominated by write-in votes must receive votes equal in number to at least ten percent of the total number of votes cast for all candidates for governor of his or her party at the last preceding primary election.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm

cc: Elwill M. Shanahan
Secretary of State