December 2, 1993

OPINION NO. 93-052

The Honorable Stephen M. Stern
Jefferson County Prosecuting Attorney
Suite 1200
Bank One Building
Steubenville, Ohio 43952

Dear Prosecutor Stern:

You have requested an opinion on the following questions:[1]

1. May an individual seek the position of Township Trustee, a non-partisan office to be determined during the general election, while at the same time seek a county office such as county commissioner in the partisan primary of the same election year[?] If the individual wins the partisan primary, he would then appear twice on the general election ballot for two separate positions.

2. May an individual seek two county positions at the same time in the partisan primary election, *e.g.*, county commissioner and county auditor[?]

3. May an individual seek two county positions, one as a candidate for party nomination such as county commissioner and the other as an independent candidate for another office, such as county auditor, the latter elected position to be determined at the general election[?] If the individual wins the partisan primary election, can he appear on the general election ballot for two different positions, one as a party nominee and the other as an independent candidate[?]

Your first question concerns the potential candidacy of a particular individual for two elected positions at the same general election. The individual you describe plans to seek nomination as a party candidate for the position of county commissioner. You question whether the same individual

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[1] For purposes of this opinion it is assumed that all petitions filed are valid. *See State ex rel. Sweet v. Hancock County Board of Elections*, No. 5-93-43 (Ct. App. Hancock County Oct. 25, 1993).

may seek election to the office of township trustee during the general election held in the same year.

Scheme for Primary and General Elections

Article XVII, §1 of the Ohio Constitution, which prescribes the time for holding elections for various public offices, states, in pertinent part: "Elections for state and *county officers* shall be held on the first Tuesday after the first Monday in November in *even numbered* years; and all elections for *all other elective officers* shall be held on the first Tuesday after the first Monday in November in the *odd numbered* years." (Emphasis added.) *See also* R.C. 3501.02(C) and (D) (general elections for elective state and county officers shall be held in even-numbered years; elections for township officers are held in odd-numbered years). The time for holding primary elections is prescribed by R.C. 3513.01, which states, in pertinent part: "on the first Tuesday after the first Monday in May of each year, primary elections shall be held for the purpose of nominating persons as candidates of political parties for election to offices to be voted for at the next succeeding general election."

The position of county commissioner is a county office. *See State ex rel. DeChant v. Kelser*, 133 Ohio St. 429, 14 N.E.2d 350 (1938). Thus, a person seeking party nomination as a candidate for the position of county commissioner would do so at the primary election held in an even-numbered year, and, if successful, would seek election to that position in the general election held in that same even-numbered year. The position of township trustee, however, is a township office. *See generally* R.C. 505.01. Because elections for township offices are held only in odd-numbered years, a person would not compete for a township office and a county office during the same general election.

Simultaneous Candidacy for More than One County Office

Your second question asks whether a person may be a candidate for two county offices at the same primary election. In addressing a similar question, the court in *State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623, 628 (1955), *overruled on other grounds*, *State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982), stated:

> "As a general rule, anyone who has the qualifications to fill an office may be a candidate for election to that office. The Legislature may not prescribe qualifications for candidates which are not authorized by the Constitution. On the other hand, *one who would be ineligible to hold a public office has no right to be a candidate for election thereto, since his election would be a nullity*." (Quoting 18 Am. Jur. 260, §126. Emphasis added.)

The two positions about which you ask are that of county commissioner and county auditor. Concerning these positions, R.C. 319.07 sets forth the following prohibition: "*No* judge or clerk of a court, *county commissioner*, county recorder, county engineer, county treasurer, or sheriff *shall be eligible to the office of county auditor*." (Emphasis added.) Thus, by statute, the positions of county commissioner and county auditor are incompatible; no one may hold both offices at the same time.[2]

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[2] *See generally* 1949 Op. Att'y Gen. No. 963, p. 610 (syllabus, paragraph one) ("[t]he office of

Your question, however, specifically concerns an individual who seeks nomination as a party candidate for both positions at the *primary* election. It is, therefore, necessary to examine the manner in which a person becomes a candidate of a political party for election to office. In order to become a party candidate, one must file a declaration of candidacy, R.C. 3513.05, which contains certain information about the candidate, R.C. 3513.07. *See also* R.C. 3513.08 (additional information required of candidates for certain offices, including that of county commissioner). R.C. 3513.07, which prescribes the form of the declaration, requires the candidate to sign the declaration of candidacy under threat of penalty for falsification of information contained therein. *See generally State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960) (syllabus, paragraph four) ("[t]he affidavit of a candidate in his declaration of candidacy is required so that the person asked to sign the petition [of that candidate] may have the assurance under oath that the facts recited in the declaration of candidacy are true").

Included in the declaration of candidacy is the following statement: "I further declare that, *if elected* to said office or position, *I will qualify therefor*...." R.C. 3513.07 (emphasis added). As explained in 1948 Op. Att'y Gen. No. 2922, p. 129 at 132:

> [T]he candidate not only declares, under oath, that he desires to be a candidate for the office named in such declaration, but in addition thereto, under oath and in writing, declares that "if elected to said office he will qualify therefor."
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> It is certainly difficult to perceive how a person who is duly sworn can truthfully say that he desires to become a candidate for two different offices which are incompatible and that if elected to each, he will qualify for each. Obviously such declarations can not be carried out. I am unable to bring myself to the position that the General Assembly, when it enacted Section 4[87]5-71 [now R.C. 3513.07] and stated therein in express terms that a person declaring himself to be a candidate must state under oath that he desires to be a candidate and that if elected he will qualify for the office, intended thereby to permit such person so declaring himself either to withdraw his candidacy before election or refuse to qualify when and if elected.

Thus, an individual may not seek nomination as a party candidate for the offices of county commissioner and county auditor at the same primary election.

Your third question asks: "May an individual seek two county positions, one as a candidate

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county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment").

for party nomination such as county commissioner and the other as an independent candidate for another office, such as county auditor, the latter elected position to be determined at the general election." As discussed in answer to your second question, the positions of county auditor and county commissioner are incompatible. R.C. 319.07. Thus, if the individual you describe has filed a declaration of candidacy for the office of county commissioner, such declaration would preclude him from seeking election to another office, such as that of county auditor, which is incompatible with the office of county commissioner.

In addition, it is necessary to examine R.C. 3513.04, which states, in pertinent part: "No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in." The language of this portion of R.C. 3513.04 is clear, and does not, therefore, require interpretation. *See generally Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two) ("the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation"). R.C. 3513.04, thus, prohibits any person who seeks party nomination at a primary election by declaration of candidacy to then seek election at the following general election for *any* office, either by nominating petition or by write-in.

The provisions of R.C. 3513.04 have been interpreted numerous times as prohibiting a person who has sought party nomination at a primary election from becoming a candidate for any office at the following general election.[3] *See, e.g., State ex rel. Moss v. Franklin County Board of Elections*, 69 Ohio App. 2d 115, 122, 432 N.E.2d 210, 215 (Franklin County 1980) ("under Ohio Law, any person, regardless of his political affiliation, may become an independent candidate for election to office if he timely files the requisite nominating petition, with the exception of a person who sought party *nomination* as a candidate for office at the preceding primary election" (emphasis in original)); *Foster v. Cuyahoga County Board of Elections* 53 Ohio App. 2d 213, 227, 373 N.E.2d 1274, 1283 (Cuyahoga County 1977) ("R.C. 3513.04 does prohibit a person who sought party nomination at a primary election for a _federal_ office from becoming a candidate at the following general election for any office by nominating petition or by write-in"); 1963 Op. Att'y Gen. No. 478, p. 490 (syllabus) ("[R.C. 3513.04] prohibits a candidate who runs and loses in the primary election from running in the following general election for a different office on a non-partisan ticket"); 1958 Op. Att'y Gen. No. 2479, p. 469 (syllabus) ("[w]here an individual has unsuccessfully sought his party's nomination for the office of county commissioner in the May 1958 primary, the provisions of [R.C. 3513.04] forbid his candidacy in the 1958 general election for _any office_ whether a primary

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[3] Although not an issue in these cases, it is important to note that, in 1956-1957 Ohio Laws 741 (Am. H.B. 501, eff. Jan. 1, 1958), R.C. 3513.04 added the words "by declaration of candidacy" following the phrase, "[n]o person who seeks party nomination for an office or position at a primary election." This amendment appears to have limited the prohibition against running for office at the subsequent general election to those persons who sought party nomination for office by declaration of candidacy.

election is provided by law to choose candidates therefor or whether nomination is achieved only by petition as in the case of county judge elections as provided in [R.C. 1907.051]").

In answer to your third question, where a person has, by declaration of candidacy, become a party candidate for a county office at the primary election, he may not also seek election to a second county office as an independent candidate, by nominating petition or by write-in, at the following general election.

CONCLUSION

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. An individual may not seek, at the same primary election, nomination as a party candidate for both the offices of county commissioner and county auditor, because those offices are incompatible pursuant to R.C. 319.07.

2. A person who, by filing a valid declaration of candidacy, has become a party candidate for a county office at the primary election may not also seek election to a second county office as an independent candidate, by nominating petition or by write-in, at the following general election.

Respectfully,

LEE FISHER
Attorney General

December 2, 1993

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Jefferson County Prosecuting Attorney
Suite 1200
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Steubenville, Ohio 43952

SYLLABUS: 93-052

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