

OPINION NO. 73-094**Syllabus:**

When no primary is held, because on the basis of declarations of candidacy filed there are no contested races, a board of elections should refuse to accept the filing of declarations of intent to be write-in candidates.

To: Donald L. Jones, Washington County Pros. Atty., Marietta, Ohio
By: William J. Brown, Attorney General, September 17, 1973

I have before me your request for my opinion which reads in pertinent part as follows:

The Washington County Board of Elections has asked me to request an opinion of the Attorney General in a letter as follows:

Marietta City has no Democrat Primary for May 8, 1973, by virtue of the fact that there were no contested races on the Democrat slate for the various offices. Thus no names of Democrat candidates appear on the ballots and machine strips. On the 20th day before the said election, four persons filed an intention to be a Democrat write-in candidate along with \$7.50 each filing fee. The filing fees were returned and the four persons were notified that no write-in space would be available to them.

The question raised is

1. Was the Washington County Board of Elections correct in refusing the filings of applications to be Democrat Councilmen at large write-in candidates by four persons for the May 8, 1973 election, there being no Democrat Primary in Marietta City this year.

The question appears to stem from an apparent inconsistency between Sections 3513.01 and 3513.02 which deal generally with what is a primary election and when the same is to be held, and Sections 3513.04 and 3513.041 which deal generally with proceedings for write-in candidates in a primary election.

R.C. 3513.01 provides for the holding of primary elections with an exception in the case of certain subdivisions having a population of less than two thousand persons. R.C. 3513.02

delineates specific circumstances in which primary elections shall not be held. This Section provides:

If, in any odd-numbered year, no valid declaration of candidacy is filed for nomination as a candidate of a political party for election to any of the offices to be voted for at the general election to be held in such year, or if the number of persons filing such declarations of candidacy for nominations as candidates of one political party for election to such offices does not exceed, as to any such office, the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to offices to be voted for at such general election and no primary ballots shall be provided for such party. * * *

The election officials whose duty it would have been to provide for and conduct the holding of such primary election, declare the results thereof, and issue certificates of nomination to the persons entitled thereto if such primary election had been held shall declare each of such persons to be nominated as of the date of the ninetieth day before the primary election, issue appropriate certificates of nomination to each of them, and certify their names to the proper election officials, in order that their names may be printed on the official ballots provided for use in the next succeeding general election in the same manner as though such primary election had been held and such persons had been nominated at such election.

This Section by its own language is unambiguous in directing that no primary election shall be held where the number of persons filing valid declarations of candidacy for nomination of a political party for a certain office does not exceed the number of nominations to which the party is entitled. See Opinion No. 410, Opinions of the Attorney General for 1949 at p. 148 in which my predecessor, without further comment, simply quoted from the Section in question and directed the issuance of certificates of nomination for those persons who did file declarations of candidacy, the number of such persons filing for any one office not exceeding the number of candidates which a political party was entitled to nominate for such office. The determination, then, of whether a primary election is to be held must be based on the number of valid declarations of candidacy which have been filed.

R.C. 3513.05 provides as follows for filing declarations of candidacy

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election shall not later than four p.m. of the ninetieth day before the day of such primary election, file a declaration of candidacy and petition and pay the fee required by section 3513.10 of the Revised Code. Such declaration of candidacy and all part-petitions shall be filed at the same time as one instrument.

* * * * *

Such declarations of candidacy were not filed by the four persons seeking to be write-in candidates. They are governed instead by R.C. 3513.041 which requires them to file a declaration of intent. That section reads as follows:

A write-in space shall be provided on the ballot for every office, but write-in votes shall not be counted for any candidate who has not filed a declaration of intent to be a write-in candidate pursuant to this section. A qualified person who has filed a declaration of intent may receive write-in votes at either a primary or general election. Any candidate, except one whose candidacy is to be submitted to electors throughout the entire state, shall file a declaration of intent to be a write-in candidate before four p.m. of the twentieth day preceding the election at which such candidacy is to be considered.

* * *

Since the language of R.C. 3513.02 clearly indicates that the decision whether to hold a primary election must be based on the declarations of candidacy, that determination would not be affected by the filing of declarations of intent pursuant to R.C. 3513.041. Furthermore, R.C. 3513.041 provides that a person who has filed a declaration of intent may receive write-in votes at either a primary or general election. If no election is held, this language would be inapplicable.

To require that a primary election be held in the instant fact situation would create a conflict with the clear directive in R.C. 3513.02 that no primary be held and that those persons who did file declarations of candidacy be certified as nominated as of the date of the ninetieth day before a primary election. R.C. 1.51 provides, in part, that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." Hence, R.C. 3513.041 should not be construed to require a primary election in such a case, in order to give full effect to R.C. 3513.02.

In addition, a construction requiring the election to be held would impose an unreasonable burden on the board of elections to have ballots printed and perform other duties necessary in preparing for the election, with as little as 20 days' notice before the election date. Such a construction would violate the rule that a just and reasonable result, feasible of execution, is intended in the enactment of a statute. R.C. 1.47.

In light of the above, I must conclude that, when no party primary is held, because on the basis of declarations of candidacy filed there are no contested races, a board of elections should refuse to accept the filing of declarations of intent to be write-in candidates.

The conclusion is not contrary to Syllabus 2 of Opinion No. 70-011, Opinions of the Attorney General for 1970, which states:

The office of member of the county central committee of a political party in Ohio, being a public office, must appear on the ballot even though no candidate has qualified to have his name printed on the ballot for the office, in order that votes cast for eligible write-in candidates may be counted.

The conclusion in that Opinion related to a situation where an election was being held, but no candidates were qualified to have their names put on the ballot for the specific office of member of the county central committee, none having filed declarations of candidacy. That fact situation is distinguished from the instant one because an election was being held, because other offices were contested. Thus, its holding does not apply to your question.

In specific answer to your question, it is my opinion and you are so advised, that the Washington County Board of Elections was correct in refusing to accept the filing of declarations of intent to be write-in candidates for the May 8, 1973 Democratic Primary, since pursuant to R.C. 3513.02 no Democratic Primary was being held that year.