

OPINION NO. 69-080

Syllabus:

If for any reason a political party candidate for public office withdraws, dies, or is incapacitated to hold office at any time, not excluded by the time limits specified in Section 3513.31, Revised Code, such candidate vacancy may be filled pursuant to such section.

To: Ted W. Brown, Secretary of State, Columbus, Ohio

By: Paul W. Brown, Attorney General, July 3, 1969

Your request for my opinion reads in pertinent part as follows:

"Can the vacancy created by the death of a candidate who filed a declaration of candidacy for nomination as a candidate for a political party be filled by said political party after the May primary date in accordance with the provisions of Section 3513.31 of the Revised Code when said candidate died in April, prior to the date when a primary election would have been held by his political party, although in fact, no such primary election was held due to a lack of contest for the nomination as Republican party candidates to any elective office? We will appreciate your advice on this question so that we can relay the answer to the Belmont County Board of Elections."

The per curiam opinion in The State, ex rel. Gottlieb v. Sulligan, et al., 175 Ohio St. 238 (1963), along with two reasonable assumptions, is, in my opinion, completely dispositive of your question. Random statements of the court are as follows:

"The sole issue in this case is whether a person selected as a party candidate for an office in a primary election who withdraws his candidacy for that office is eligible for selection as a party candidate by the party committee to fill a vacancy in the nomination for another office created by the withdrawal of the candidate originally nominated."

"The determination of this question rests on the construction of Section 3513.04, Revised Code, which reads in part as follows:

"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 write-in."

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'* * * an examination of this section reveals that by its very terms its operation is confined to those situations where a candidate seeks a place on the ballot either by a write-in vote or by nominating petition. No reference is made to the present situation whereby a candidate is selected by a party committee under the provisions of Section 3513.31, Revised Code. Thus, there is no direct prohibition of respondent Flask's candidacy by this section unless, as urged by relator, selection by party committee is equivalent to selection by nominating petition.

"* * * * * * * *

"Inasmuch as Section 3513.04, Revised Code, specifically refers to a 'nominating petition,' it is necessary to determine the meaning of this phrase under the Ohio statutes. An examination of the election laws indicates that the phrase, 'nominating petition,' has a specific meaning. Under our statutes the candidates for public office may gain nomination by two methods: One, by filing a declaration of candidacy accompanied by a petition entitling one to be a participant in the direct party primary wherein candidates from all political parties seek their nomination; or, two, by what is designated as a nominating petition, the method by which the independent candidate may seek his place on the elective ballot. (See Section 3513.252, Revised Code.) In other words, the nominating petition is the method by which the independent candidate seeks his place on the elective ballot. Clearly a selection by a party committee of a party candidate to fill a vacancy on the ballot would not fall within the meaning of a nominating petition. The purpose of Section 3513.31, Revised Code, is to replace a duly nominated party candidate, who, because of death or withdrawal, has created a vacancy in the party ticket. The selection is of a party candidate and not an independent candidate and thus does not constitute a nominating petition or a petition in any sense.

"The purpose of Section 3513.04, Revised Code, clearly is to prevent a disappointed party candidate who has failed to be selected as a nominee in the primary from again trying to be placed on the elective ballot by entering the arena as an independent candidate.

"The operation of Section 3513.04, Revised Code, is confined to a nominating petition within the meaning of such term as used in the Ohio statutes and does not re-

late to persons selected by a party committee under the terms of Section 3513.31, Revised Code.

"* * * * *"

Section 3513.31, Revised Code, relating to the selection of candidates to fill vacancies, is therefore, valid, and a selection thereunder does not constitute a selection by nominating petition. Therefore, inasmuch as Section 3513.04, Revised Code, confines its prohibitions to those seeking candidacy or election by write-in votes or nominating petition, it does not apply to a candidate selected by party committee under the provisions of Section 3513.31, Revised Code."

(Emphasis added.)

My first assumption, if one is indeed necessary, is that if for any reason a political party candidate for public office withdraws, dies, or is incapacitated to hold office at any time, not excluded by the time limits specified in Section 3513.31, Revised Code, such candidate vacancy may be filled pursuant to such section, which provides in pertinent part as follows:

"If a person nominated in a primary election as a candidate for election at the next general election dies, the vacancy so created may be filled by the same committee in the same manner as provided in the first five paragraphs of this section for the filling of similar vacancies created by withdrawals, except that the certification when filling a vacancy created by death, may not be filed with the secretary of state, or with a board of the most populous county of a district, or with the board of a county in which the major portion of the population of a subdivision is located, later than four p.m. of the tenth day before the day of such general election, or with any other board later than four p.m. of the fifth day before the day of such general election."

My second assumption is that when a person has filed a declaration for candidacy and is nominated pursuant to Section 3513.02, Revised Code, it is tantamount to having been nominated at a primary election for the purposes of Section 3513.31, Revised Code.

It is, therefore, my opinion, and you are advised that when a vacancy is created by the death of a candidate who filed a declaration of candidacy for nomination as a candidate for a political party, it may be filled by said political party after the May primary date in accordance with the provisions of Section 3513.31 of the Revised Code, when said candidate died in April, prior to the date when a primary election would have been held by his political party, although in fact, no such primary election was held due to a lack of contest for the nomination as Republican party candidates to any elective office.