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A PERSON WHO SEEKS A PARTY NOMINATION FOR AN OFFICE OR POSITION AT A PRIMARY ELECTION BY DECLARATION OF CANDIDACY IS NOT ELIGIBLE TO BE CERTIFIED AS A CANDIDATE OF A POLITICAL PARTY AT THE FOLLOWING ELECTION. §§3513.04-3513.31, R.C..

SYLLABUS:

Under the provisions of Section 3513.04, Revised Code, a person who seeks a party nomination for an office or position at a primary election by declaration of candidacy is not eligible to be certified under Section 3513.31, Revised Code, as the candidate of a political party at the following general election to fill the unexpired term of a person who holds an elective office and who dies subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the day of the next general election.

Columbus, Ohio, October 26, 1960

Hon. Bernard T. McCann, Prosecuting Attorney
Jefferson County, Steubenville, Ohio

Dear Sir:

Your request for my opinion concerns an interpretation of Sections 3513.04 and 3513.31, Revised Code, and presents a general question as follows:

“Where a person seeks party nomination for an office or position at a primary election by declaration of candidacy is such person eligible to be certified as the candidate of a political party to be elected to the unexpired term of a deceased judge at the following general election?”

Section 3513.31, Revised Code, referred to in your request, reads in part:

“* * *

“If a person holding an elective office dies subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the day of the next general election, and if, under the laws of this state, a person may be elected at such general election to fill the unexpired term of the person who has died, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination, as provided in the first four paragraphs of this section, may select a person as the candidate of its party for election for such unexpired term at such general election, and certify his name. Thereupon such name shall be printed as such candidate under proper titles and in the proper place on the proper ballots for use at such election. In the event that a person has been nominated in a primary election, the authorized committee of that political party shall not select and certify a person as the candidate of such party.”

In the instant case a judge of the court of appeals died subsequent to the one-hundredth day before the day of the 1960 primary election and prior to the fortieth day before the day of the 1960 general election, and in accordance with Section 3513.31, *supra*, the appropriate committee of each political party certified a candidate for the unexpired term of the deceased judge. It appears, however, that one of the candidates so certified had been a candidate for office in the primary election by declaration of candidacy, and the question to be decided is whether such person, in view of the provisions of Section 3513.04, Revised Code, may now be a candidate for office in the general election. Said Section 3513.04 reads as follows:

“Candidates for party nominations to state, district, county, and municipal offices or positions, for which party nominations are provided by law, and for election as delegates or alternates to national party conventions, and for election as members of party controlling committees shall have their names printed on the official primary ballot by filing a declaration of candidacy and paying the required filing fee.

“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.” (Emphasis added)

The last paragraph of Section 3513.04, *supra*, appears to be clear as to the restriction against becoming a candidate at the following general

election by nominating petition or by write-in. Also, there can be no question that the office of judge of the court of appeals is an office within the purview of the section. Since "write-in" is not here concerned, it remains to be determined whether a certification by a political party under Section 3513.31, *supra*, constitutes a candidacy by nominating petition.

The procedure for certification under Section 3513.31, *supra*, is, of course, different from that where a candidate for office obtains the signatures of a certain number of electors to perfect his nomination for office. This does not, however, mean that the certification procedure may not be considered as nomination by petition. In designating a candidate for office under Section 3513.31, *supra*, the particular political party is certainly nominating said candidate. I have been unable to find any Ohio definition of the word "petition" as used in the constitutional provision here in question, or as used in Section 3513.04, *supra*; thus the ordinary and common meaning should be used in consideration of the instant question (10 Ohio Jurisprudence, 2d, Constitutional Law, Sec. 54, page 150).

Webster's International Dictionary defines the word "petition" as a "formal written request made to some official or organized body having authority to grant it." Words and Phrases, Volume 32a, page 3, contains many citations as to the general meaning of the word "petition." Generally speaking, these citations adopt a definition similar to that of Webster's Dictionary, the only exceptions being where the specific intent of a law shows otherwise.

On reviewing the language of Section 3513.31, *supra*, I am constrained to conclude that the procedure therein provided where the political party selects a person as its candidate and certifies his name to the board of elections to be placed on the ballot in the general election constitutes a petition within the general definition as noted above.

Strengthening my conclusion in this regard is the fact that Section 7 of Article V, Ohio Constitution, contains the following requirement:

"All nominations for elective state, district, county and municipal offices shall be made at direct primary elections *or by petition as provided by law.* * * *" (Emphasis added)

In view of this provision, it would appear that *any* nomination for office must be either by direct primary or by petition. There being no direct primary in the instant case, the nomination must necessarily be *by petition*

to come within the constitutional requirement. Thus, to state that the certification procedure of Section 3513.31, *supra*, does not constitute a nomination by petition would be tantamount to holding such procedure to be unconstitutional.

Regarding constitutionality, it is well settled that there is a presumption in favor of the constitutionality of statutes and in favor of such a construction of legislation as would render it valid (37 Ohio Jurisprudence, Section 344, page 624). Further in this regard it is stated in 37 Ohio Jurisprudence, Section 344, beginning on page 624:

“Where an act is fairly susceptible of two constructions, one of which will render it unconstitutional, the one which will sustain the constitutionality of the law should be adopted, even though such construction may not be the most obvious or natural one. Indeed, the very last construction which should be adopted is one which would make the statute conflict with the Constitution. In other words, every endeavor should be made to uphold the validity of a law rather than to destroy it.”

I might also note that in the case of *Lynch v. Chesney et al.*, Court of Appeals, Seventh District (1960), the constitutionality of the procedure provided by Section 3513.31, *supra*, was considered by the court and was upheld by said court. The brief of the Attorney General, representing the Secretary of State, in this case contained the following language regarding Section 3513.31, *supra*:

“However, relator states that said section is unconstitutional if it so applies. As stated earlier Article V, Section 7, of the Constitution is not self-executing. Said section requires that nominations be by petition as provided by law. The political party in order to consider the name of its nominee to be placed on the ballot pursuant to the provisions of Section 3513.31, Revised Code, must call a meeting of the county central committee who must give notice to each district committeeman of the time and place of meeting. The majority of members of the district committeemen must be present in order for a vote to be taken, and a majority of those present must agree on the person to be named as a nominee.

“The chairman and secretary of such meeting must certify the name of such nominee in writing and under oath to the proper board of elections within the prescribed time. Such certificate must be accompanied by a written acceptance of nomination by the person whose name is certified.

“The certificate thus filed with the board of elections amounts to and is a petition within the general meaning of that term.

Such written certificate (petition) being filed with an official board which has authority to act upon it, and being filed according to law, cannot be said to be in conflict with Article V, Section 7 of the Ohio Constitution. The making of such statutory requirement is clearly within the power of the legislature granted in Article V, Section 7, Ohio Constitution. The requirement itself, set forth in the last paragraph of Section 3513.31, Revised Code, when carried out, amounts to nominating by a 'petition according to law' within the provisions of Article V, Section 7, Ohio Constitution and is therefore valid."

Answering your specific question, therefore, it is my opinion and you are advised that under the provisions of Section 3513.04, Revised Code, a person who seeks a party nomination for an office or position at a primary election by declaration of candidacy is not eligible to be certified under Section 3513.31, Revised Code, as the candidate of a political party at the following general election to fill the unexpired term of a person who holds an elective office and who dies subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the day of the next general election.

Respectfully,

MARK McELROY

Attorney General