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COUNTY ENGINEER — DECLARATION OF CANDIDACY FOR OFFICE — ACCOMPANYING PETITION PRESENTED BY OR ON BEHALF OF PERSON IN ARMY OF UNITED STATES — MAY NOT LEGALLY BE REJECTED FOR FILING MERELY BECAUSE ORDER, SECRETARY OF WAR, PROHIBITS PERSON IN ARMY UNITED STATES FROM BECOMING CANDIDATE FOR PUBLIC OFFICE.

SYLLABUS:

A declaration of candidacy for the office of county engineer and an accompanying petition presented by or on behalf of a person in the Army of the United States may not legally be rejected for filing merely because an order of the Secretary of War prohibits a person in the Army of the United States from becoming a candidate for public office.

Columbus, Ohio, January 24, 1944

Hon. John M. Kiracofe, Prosecuting Attorney
Eaton, Ohio

Dear Sir:

You have requested my opinion as followse:

“The clerk of the Board of Elections of this county has requested that I obtain your opinion concerning the filing of a petition on the part of a candidate now in the armed service.

The County Engineer of our county is now in the armed service, having enlisted and received a commission, at the time of his entry into the service, as a first lieutenant and we have been informed that he has since advanced in rank and is now in foreign service. He has been in the service for more than a year.

The Clerk of the board has been informed that he now has a petition, not obtained from the board of elections, which will be circulated for him by one of his friends and then will be offered to the Clerk for filing so that he will be placed on the ticket as a candidate for office in the next primary.

Information has been received by us that the Secretary of War has ordered that no man in the service can be a candidate for public office.

The clerk is interested in knowing what disposition to make of this petition when it is offered him for filing. Shall he refuse to file it and shall the board refuse to place the name of the candidate on the primary ticket?"

You state in your letter that the Secretary of War has issued an order to the effect that no person in the Army of the United States may be a candidate for public office and you ask whether such order by the Secretary of War would be a proper reason for refusal on the part of the clerk of the board of elections to file a declaration of candidacy and accompanying petition where the candidate is a commissioned officer of the Army of the United States.

The second paragraph of Article VI of the Constitution of the United States provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

However, an order of the Secretary of War is not a law of the United States because Section 1 of Article I of the Constitution of the United States specifically provides that all legislative powers granted by such instrument shall be vested in the Congress. The situation then is entirely different from that which would arise if Congress had enacted a law providing that a person in the Army of the United States could not be a candidate for public office.

In Ohio, by reason of the provisions of Section 4 of Article XV of

the Constitution of the State of Ohio, no person may be elected or appointed to an office in this state unless possessed of the qualifications of an elector and Section I of Article V of such Constitution provides:

“Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.”

Your attention is also directed to Section 4785-30, General Code, which reads:

“No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, of the county for thirty days and of the voting precinct twenty-eight days next preceding the election at which he offers to vote, provided that any qualified elector who in good faith removes from one precinct to another precinct in the same county at any time subsequent to the twenty-eighth day preceding an election shall have the right to vote at such election in the precinct from which he moved wherein his voting residence had been legally established, and, provided further, that when only a portion of a precinct is included within the boundaries of a school district the board of elections may assign the electors residing in such portion of a precinct to the nearest precinct totally included within the boundaries of such school district for the purpose of voting at any special school election held in such school district. The board of elections shall notify all such electors so assigned, at least ten days prior to the holding of any such special school election, of the location of the polling place where they are entitled to vote at such special school election.”

Obviously, a resident of Ohio who joins the armed forces of the United States in time of war does not by such act lose his residence in Ohio. I assume, of course, that your county engineer possessed the requisite qualifications for his office at the time his term commenced, one of which was that he be an elector. Nothing appears in your letter to indicate that he has lost such qualifications and if he chooses to file a declaration of candidacy and petition in support thereof, there appears to be no legal reason justifying a refusal to accept same for filing. Such action by him may, of course, subject him to disciplinary action on the part of the military authorities of the United States, but this is a matter of no concern to your board of elections, as the matter of discipline of the armed forces of the United States is not within the

jurisdiction of the several states.

Specifically answering your question, I am of the opinion that a declaration of candidacy for the office of county engineer and an accompanying petition presented by or on behalf of a person in the Army of the United States may not legally be rejected for filing merely because an order of the Secretary of War prohibits a person in the Army of the United States from becoming a candidate for public office.

Respectfully,

THOMAS J. HERBERT
Attorney General