

1420

1. "WRITE-IN" VOTING IN OHIO—NOT ABOLISHED BY AMENDMENT OF SECTION 4785-144 G. C., 98 GENERAL ASSEMBLY.
2. "WRITE-IN" VOTES WHICH SHOW PERSONS LAST NAME—SUFFICIENCY QUESTION OF FACT WHEN PERSON IS ALSO CANDIDATE FOR ANOTHER OFFICE ON SAME BALLOT.

3. PERSON ELECTED TO OFFICE OF VILLAGE TREASURER—NOT DISQUALIFIED FROM HOLDING OFFICE BY REASON OF FACT HE SERVED AS A PRECINCT ELECTION OFFICER IN ELECTION AT TIME HE WAS ELECTED.

## SYLLABUS:

1. "Write-in" voting in Ohio has not been abolished by the amendment of Section 4785-144, General Code, which was enacted by the 98th General Assembly.

2. The question of whether or not "write-in" votes which show only a person's last name are sufficient to determine the voter's choice and to be counted is a question of fact when a person of the same last name is also a candidate for another office on the same ballot.

3. A person who was elected to the office of village treasurer is not disqualified from holding such office by reason of the fact that he served as a precinct election officer in the election at which he was elected.

Columbus, Ohio, January 25, 1950

Hon. Mathias H. Heck, Prosecuting Attorney  
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The first question I desire you to consider is as follows:

"Has the method of write-in voting for a candidate in the general elections been abolished by the amendment of Section 4785-144 by the 98th General Assembly?"

"On June 8th, 1948, the Supreme Court of Ohio decided the case *Wilson vs. Kennedy* reported in 151 O. S. p. 485 and in Ohio Law Reporter, June 20th, 1949, Vol. 39, No. 13, page 301.

"The sole issue in that case was the question decided by the lower court. The opinion of the lower court was as follows:

"Therefore, my conclusion is that the present election laws contain no provision for the write-in method of voting for a candidate in the general election, and none of the votes cast for the contestee for the office of prosecuting attorney in the general election held in Brown County, November 2nd, 1948 should have been counted by the board of elections."

"The Supreme Court reversed this ruling.

"The syllabus of the Wilson vs. Kennedy case is as follows:

"Under Section 4785-144 General Code (122 Ohio Laws 353) a name written on a ballot in a blank space provided therefor under the title of the office properly to be voted on at an election shall be counted as a vote for the person whose name is so written for election to the office indicated on the ballot immediately above such blank space.'

"The decision of the Supreme Court was concurred in by four judges, one judge not participating, and Judges Matthias and Taft dissenting. Matthias and Taft wrote a dissenting opinion, agreeing with the lower court that the election laws contain no provision for the write-in method of voting for a candidate at the general elections.

"The majority opinion of the Supreme Court was based on their construction of Section 4785-144 and paragraph 6 of Section 4785-161c G. C.

"In Section 4785-144 the Court based its decision on the following clause in that section.

"4785-144 No ballot shall be counted which bears any marks other than X marks placed thereon, or a name written therein by the voter, in a blank space provided therefor.'

"After this case was decided by the Supreme Court, the 98th General Assembly just adjourned, passed Senate Bill No. 206.

"In this bill some twenty-nine sections of the election code, including Section 4785-144 were amended. Section 3 of this Senate Bill 206 provides that the act shall become effective and be in force on and after the first day of January, 1950 except that Section 4785-144 of the General Code shall become effective November 1st, 1949.

"Therefore Section 4785-144 as amended was effective at the past election on November 8th, 1949.

"Section 4785-144 as amended reads as follows:

"Section 4785-144. No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice.'

"The sentence, 'or a name written therein by the voter, in a blank space provided therefor,' was deleted from the section, and

the section as amended contains no provision for the write-in method of voting.

“It seems impossible to read Section 4785-144 G. C., and the dissenting opinion of Judges in the Wilson vs. Kennedy case without concluding that the amendment is for the purpose of reversing the majority ruling of the judges in the Wilson vs. Kennedy case, and enacting as law the opinion of the dissenting judges in that case.

“That being the situation, then do the election laws as they now stand contain authority for the write-in method of voting for a candidate in the general elections.

“Question No. 2.

“In the incorporated village of Phillipsburg, Montgomery County, the voting machine was in use. For the office of Mayor, there was but one candidate’s name on the ballot to be voted for at the last regular election. His name is William W. T. William W. T. received eighty-three votes for the office of Mayor.

“For the office of Mayor of the village, seventy-six voters wrote in the name of Orville L., expressing their intention to vote for him as Mayor. His name was not on the ballot. Seven other voters wrote in the name of L. as their selection for Mayor, using just the surname, and omitting the name Orville.

“If these seven votes can be counted for Orville L., then the election between William W. T. and Orville L. for Mayor is a tie.

“On the same municipal ballot of the village, appeared the name of J. C. L. as candidate for member of council. J. C. L. and Orville L. are different persons. In view of the fact that the name of J. C. L. appeared on the ballot, can it be concluded that the seven voters writing in just the surname, L., intended to vote for Orville L. for Mayor and not J. C. L. for Mayor. There were six members to be elected for council, and none of the candidates had opposition. J. C. L. received one hundred and fifty six votes for member of council. There were no write-ins for council.

“Question No. 3.

“On the municipal ballot of the village of Phillipsburg, the name of Harold F. appeared as a candidate for treasurer of the village, without opposition, Mr. F. was elected treasurer.

“Mr. F. on the day of the election worked in the booth in his precinct in which he is to serve as an election officer. Can

Mr. F. qualify to serve as treasurer of the village under Section 4785-26 to which office he was elected."

An opinion numbered 1286 was issued by me on December 15, 1949, at the request of the Prosecuting Attorney of Crawford County. This opinion answered your first question in the negative. That is, "write-in" voting in Ohio has not been abolished by the amendment of Section 4785-144, General Code, enacted by the 98th General Assembly.

I believe the answer to your second question would be a matter of fact and not of law. That is, in view of my ruling of December 15, 1949, the seventy-six "write-in" votes Mr. L. received should be counted. The question of whether the seven votes of the persons who wrote in the last name L. are sufficient to determine the voters' choice is not one of law, but of fact and cannot be answered by me.

Section 4785-26, General Code, states in part as follows:

"All judges and clerks shall be qualified electors. No person who has been convicted of a crime, or who is unable to read and write the English language readily, or who is a candidate for an office to be voted for by the voters of his precinct in which he is to serve, shall serve as an election officer. \* \* \*"

Section 4785-16, General Code, provides as follows:

"No person shall serve as a member, clerk, deputy clerk, assistant clerk, or employe of the board of elections who is a candidate for an office to be filled at an election, except the office of delegate or alternate to a convention or a member of a party committee."

It should be noted that both these statutes prescribe the qualifications of election officials and do not say that a person shall be ineligible to hold the office to which he is elected. In the case of *State, ex rel. Keeler v. Wagar*, 19 O. C. C. 149 at page 151, it states as follows:

"\* \* \* One who is an elector, is entitled to hold office to which he is elected, unless the statute forbids.

"There must be a provision of the statute forbidding his holding the office. \* \* \*"

In Opinion No. 1992, Opinions of the Attorney General for 1933, Section 4785-16, General Code, was under consideration. There a person

was appointed Clerk of the Election Board in a certain precinct. He was elected as "write-in" candidate to serve on Rural School District Board. The syllabus of the case states as follows:

"Where a person who serves as a member, clerk, deputy clerk, assistant clerk, or employe of a board of elections is a candidate for office, and is elected to such office, that fact alone does not make such person ineligible to the office to which he was elected."

In Opinion No. 6568, Opinions of the Attorney General for 1943, this opinion was approved and followed. The syllabus provides as follows:

"A person who was elected to the office of councilman of a village is not disqualified from holding such office by reason of the fact that he served as a precinct election officer in the election at which he was elected. (Opinions of the Attorney General for 1933, No. 1902, page 1913, approved and followed.)"

Both of these opinions were based on the theory that Section 4785-16, General Code, provided only for the qualifications of an election official. It did not prohibit a person from accepting the job for which he was elected even though he served as an election official in violation of Section 4785-16, General Code. The wording of Section 4785-26, General Code, is in effect identical with Section 4785-16, General Code. There is no apparent reason for a different interpretation.

Therefore, it is my opinion that:

1. "Write-in" voting in Ohio has not been abolished by the amendment of Section 4785-144, General Code, which was enacted by the 98th General Assembly.

2. The question of whether or not "write-in" votes which show only a person's last name are sufficient to determine the voter's choice and to be counted is a question of fact when a person of the same last name is also a candidate for another office on the same ballot.

3. A person who was elected to the office of village treasurer is not disqualified from holding such office by reason of the fact that he served as a precinct election officer in the election at which he was elected.

Respectfully,

HERBERT S. DUFFY,

Attorney General.