

4012

1. DECEASED COUNTY COMMISSIONER—DIED PRIOR TO TIME FOR FILING DECLARATIONS OF CANDIDACY—NO DECLARATION OF CANDIDACY FILED FOR UNEXPIRED TERM—NO PERSON NOMINATED BY WRITE-IN VOTES AT PRIMARY ELECTION—NO PROVISION IN LAW BY WHICH ANY PERSON MAY BE NOMINATED FOR OFFICE—NOVEMBER GENERAL ELECTION—BLANK SPACE SHOULD BE PROVIDED ON BALLOT—SECTIONS 3505.03, 3513.23 RC.
2. RESIGNATION—COUNTY COMMISSIONER—NEXT PRIMARY ELECTION—ONE POLITICAL PARTY NOMINATED CANDIDATE—OTHER POLITICAL PARTY FAILED TO NOMINATE CANDIDATE—NO OTHER PERSON MAY BE NOMINATED—NO BLANK SPACE MAY BE PROVIDED ON BALLOT—SECTIONS 3505.03, 3513.23 RC.

SYLLABUS :

1. Where a county commissioner dies prior to the time for filing declarations of candidacy and where no declaration of candidacy is filed for the unexpired term for such office and no person is nominated for such unexpired term at the primary election by receiving the number of write-in votes required by Section 3513.23, Revised Code, there is no provision of law by which any person may be nominated for such office, and the election for such office should be had at the November general election by providing a blank space on the ballot in accordance with the provisions of Section 3505.03, Revised Code.

2. Where a county commissioner resigns and where, at the next primary election, one political party succeeds in nominating a candidate for the unexpired term of such office in accordance with the provisions of Section 3513.23, Revised Code, and the other political party fails to nominate such a candidate, there is no provision of law by which any other person may be nominated for such office; under the provisions of Section 3505.03, Revised Code, there being a candidate nominated for the office, no blank space may be provided on the ballot at the November general election.

Columbus, Ohio, June 25, 1954

Hon Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir :

In your letter of recent date you requested my opinion as to the authority of a county party committee to select a candidate for certain unexpired terms to be voted on at the November, 1954 general election.

Your first question reads as follows:

“A county commissioner died prior to February 4 (last day for filing declarations or statements of candidacy) and no one having filed for this office, a blank space was provided on the primary ballots for the electorate to write in the name of their choice. No person in either party received the required number of votes for nomination. It is our thought that a blank space should be provided on the general election ballot for a write-in inasmuch as the words ‘vacancies occurring in party nominations,’ as used in Revised Code Section 3513.31, contemplates a prior party nomination and therefore the county central committee, or if authorized, the executive committee, would possess no authority to name a candidate for this office. (State, ex rel, Munnich v. Crabill, 22 OLA 646).”

The only authority of a party committee to select a candidate for a county office is that found in Section 3513.31, Revised Code. In so far as pertinent, this statute reads:

“ * * * If a person nominated in a primary election as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a county, withdraws as such candidate prior to the eightieth day before the day of such general election, the vacancy in the party nomination so created may be filled by the county central committee of the political party which made such nomination at said primary election, or by the county executive committee if so authorized, at a meeting called for such purpose. Such meeting shall be called by the chairman of such committee who shall give each member of the committee at least two days’ notice of the time, place, and purpose of the meeting. If a majority of the members of such committee are present at such meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such meeting shall certify in writing and under oath to the board of such county, not later than the seventy-sixth day before the day of such general election, the name of the person selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is certified.

“ * * * 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.

“ * * * If a person holding an elective office dies subsequently to the seventieth day before the day of a primary election and prior to the eightieth 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.”

From an examination of the language of the above statute, we find that the authority of a county party committee to select a candidate is limited to three situations: (a) where a person is nominated by a party at the primary election and thereafter withdraws prior to the eightieth day before the general election; (b) where a person is nominated by the party at the primary election and thereafter dies at such time as will permit the selection by the party committee to be filed with the election officials by four p.m. of the fifth day before the general election; and, (c) where a person holding an elective office for which a person may be elected at the next general election dies subsequently to the seventieth day before the day of the primary election and prior to the eightieth day before the day of the general election.

Obviously, (a) and (b), supra, have no application to the facts presented, nor does (c) have any application. While the county commissioner (1) was holding an elective office, and (2) did die, it is readily apparent that his death prior to February 4 did not take place “subsequently to the seventieth day before the day of the primary election,” but, instead, took place prior to such seventieth day.

The case of *State, ex rel. Munnich v. Crabill*, 22 O.L.A., 646, to which you refer, is a decision of the Court of Appeals of Clark County, which interpreted the provisions of Section 4785-94, General Code (the predecessor of Section 3513.31, Revised Code), at a time when it read that

“vacancies occurring in party nominations shall be filled by the executive committee of such party.” The court held that such language contemplated a prior party nomination and the party executive committee, therefore, had no right to fill up a ticket when no nomination was made at the primary election. Even if there could have been doubt as to the authority of the party committee, based on the language *then* employed, there could appear to be no doubt as to such authority under the language of the existing statute. Note that Section 3513.31, Revised Code, (a) refers to filling the “vacancy in the party nomination so created” and that “so created” necessarily refers to a vacancy created where “a person nominated in a primary election * * * withdraws as such candidate prior to the eightieth day before the day of the general election,” and (b) refers to “the vacancy so created,” thus referring to the vacancy created where “a person nominated in a primary election as a candidate for election at the next general election dies.” Of course, as heretofore pointed out, the power of the committee to select a candidate in case of the death of a person holding an elective office is not limited to a case where a person is nominated at the primary and thereafter dies, but is limited by statute to cases where such death takes place “subsequently to the seventieth day before the day of the primary election and prior to the eightieth day before the day of the next general election.”

Neither political party having succeeded in nominating a candidate at the May, 1954 primary election by casting the number of write-in votes required by Section 3513.23, Revised Code, and the statutes failing to authorize the party committee to select a candidate under such circumstances, I believe it clear that no candidate has been or can be nominated for the office. Thus, the provisions of the last paragraph of Section 3505.03, Revised Code, become applicable. This paragraph reads as follows:

“No blank spaces shall be provided on such ballot wherein an elector may write in the name of a person for whom he desires to vote, except that if no candidate has been nominated for an office or certified to fill a vacancy in a nomination for an office for which an election is to be held, blank spaces shall be provided under the title of said office equal in number to the number of persons to be elected to such office.”

I conclude, therefore, that under the facts presented a single blank space must be provided on the November, 1954 ballot under the title of

office of county commissioner, unexpired term, and that such unexpired term can only be filled by a write-in election at that time.

Your second question reads in part as follows:

“A county commissioner *resigned* after February 4, but prior to the time the ballots were printed, and in accordance with your Opinion No. 1241 of March 12, 1952, a blank space was provided on the primary ballots. One of the parties has a nominee due to write-in votes at the primary, whereas the other party did not have a candidate who received the 15% vote required in R. C. 3513.23. Since this previous opinion of your office was relative to a vacancy caused by the death of a person holding an elective office, we are in doubt as to whether it would also apply to a vacancy caused by resignation.”

In Opinion No. 1241, Opinions of the Attorney General for 1952, page 219, to which you refer, I held as indicated by the syllabus:

“1. If a person holding an elective office dies on the sixty-sixth day before the day of a primary election and the unexpired term is required by law to be filled at the next general election, the title of said office and the length of the unexpired term shall be printed on the primary election ballot.

“2. Such primary election ballot shall provide a blank space in which a voter may write the name of a person for whose nomination he desires to vote for said unexpired term.

“3. If the voters of a party fail to nominate a person to fill said unexpired term at the primary election, the appropriate committee of said party, acting pursuant to the provisions of Section 4785-94, General Code, may select a candidate for election for said unexpired term at the general election.”

That opinion involved a reconciliation of the provisions of Section 4785-94, General Code, Section 3513.31, Revised Code, which on the one hand authorized a party committee to select a candidate where a person holding an elective office *died* subsequently to the seventieth day before the day of the primary election and prior to the eightieth day before the day of the next general election, with the apparently conflicting provisions of Section 4785.67, General Code, Section 3513.01, Revised Code, which directed that a primary election be held for offices to be voted for at the next succeeding general election and the provisions of Section 4785-80, General Code, Section 3513.14, Revised Code, which provided, in effect, that the primary ballot should contain a blank space for a write-in in addi-

tion to containing the names of persons who had qualified as candidates for nomination by filing declarations of candidacy.

I quote from Opinion No. 1241, at pages 222 and 223:

“It is my opinion that this section does not present an irreconcilable conflict with the provisions of Sections 4785-67 and 4785-80, supra, providing for a write-in, and that those sections must be held to govern the procedure in this case. In the first place, those sections provide for a primary by mandatory language, using the word ‘shall,’ while Section 4785-94, supra, says only that a committee ‘may select a person.’ But such a selection before the primary would do away with the possibility of the write-in so clearly provided for by Section 4785-80.

“Furthermore, the primary purpose of Section 4785-94 seems clearly to be the protection of a party which loses its nominee by withdrawal after the primary has been held and it is too late to designate another by the ordinary procedure. That protection is not necessary in this case. Finally, the very wording of the statute says that the committee, ‘*acting as in the case of a vacancy in a party nomination,*’ may select a candidate. A committee clearly can not act to fill a vacancy until after the primary election has been held and for it to attempt to fill an anticipated vacancy and, thus, forestall a primary election is not warranted by the language of the statute. In this connection it should also be pointed out that vacancies are filled by action of the new committee elected at the primary election and organized immediately thereafter (Sections 4785-62 to 4785-65, General Code) and not by the old committee which would designate the nominee now.

“I should also point out that such an interpretation of the last paragraph of Section 4785-94 does not nullify it and render it meaningless. It still may play an important part in the designation of one or both of the party nominees. * * *

“It is entirely possible that either or both parties may fail to nominate a candidate for the short term under consideration by not casting for him the percentage of votes required by Section 4785-87, General Code. In such a case, the appropriate committee, acting under the provisions of Section 4785-94, ‘may select a person as the candidate of its party’ whose name will appear on the ballot at the general election.”

Under the facts which you now present, however, no such reconciliation of potentially conflicting statutes is necessary. Section 3513.31, Revised Code, does not authorize a party committee to select a candidate in case of the *resignation* of a person holding an elective office. Such authority

is limited to cases where the person holding the elective office *dies*, and even then is limited to cases where such death occurs subsequently to the seventieth day before the day of a primary election and prior to the eightieth day before the day of the next general election. The only authority of a party committee to take any action in case of any resignation is limited to the power to select a candidate in cases where "a person nominated in a primary election as a candidate for election at the next general election * * * withdraws as such candidate." I believe it clear, therefore, that Section 3513.31, Revised Code, has no application to the problem you present. The situation is exactly the same, therefore, as if the resignation of the public official pre-dated the date for filing declarations of candidacy and no person filed such declaration. Thus, persons may only be nominated by being written in on the primary ballot in accordance with the provisions of Section 3513.14, Revised Code, if they receive the 15% vote required by Section 3513.23, Revised Code.

It appears from your letter that only one person was so nominated. There being no statutory authorization for nominating any other candidate for this office, we again must look to the provisions of the last paragraph of Section 3505.03, Revised Code. For convenience this language is repeated:

"No blank spaces shall be provided on such ballot wherein an elector may write in the name of a person for whom he desires to vote, except that if no candidate has been nominated for an office or certified to fill a vacancy in a nomination for an office for which an election is to be held, blank spaces shall be provided under the title of said office equal in number to the number of persons to be elected to such office."

Under the facts you present a candidate has been nominated. The exception, therefore, is not applicable and the statute specifically provides in such cases that no blank space be provided on the ballot at the general election.

In conclusion, it is my opinion that:

1. Where a county commissioner dies prior to the time for filing declarations of candidacy and where no declaration of candidacy is filed for the unexpired term for such office and no person is nominated for such unexpired term at the primary election by receiving the number of write-in votes required by Section 3513.23, Revised Code, there is no provision of law by which any person may be nominated for such office, and

the election for such office should be had at the November general election by providing a blank space on the ballot in accordance with the provisions of Section 3505.03, Revised Code.

2. Where a county commissioner resigns and where, at the next primary election, one political party succeeds in nominating a candidate for the unexpired term of such office in accordance with the provisions of Section 3513.23, Revised Code, and the other political party fails to nominate such a candidate, there is no provision of law by which any other person may be nominated for such office; under the provisions of Section 3505.03, Revised Code, there being a candidate nominated for the office, no blank space may be provided on the ballot at the November general election.

Respectfully,

C. WILLIAM O'NEILL

Attorney General