

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1551 was overruled in part by
1964 Op. Att'y Gen. No. 64-1261.

1551

BOARD OF ELECTIONS—THE ISSUING OF THE CERTIFICATE OF ELECTION—BOARD UNAWARE OF HIS PAST VOTING RECORD—VOTED AS A MEMBER OF A DIFFERENT PARTY RUNNING FOR ELECTION UNDER OTHER PARTY. §§3513.191, 3513.22, R.C.

SYLLABUS:

1. Section 3513.191, Revised Code, precludes a person from being a candidate for election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years.
2. Where such a person is accepted as a candidate for election at a party primary, the board of elections being unaware of his past voting record, and pursuant to Section 3513.22, Revised Code, the board of elections has declared that he has received the highest number of votes for the office, the board is required by said section to issue a certificate of election to such person.

Columbus, Ohio, July 14, 1960

Hon. J. B. Yanity, Jr., Prosecuting Attorney
Athens County, Athens, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Hon. E. B. Young, Chairman of the Athens County Board of Elections, has written me requesting an opinion on the following set of facts:

“A filed in regular form a petition for the office of Central Committeeman. A had, in fact, voted as a member of a different political party at a primary election within the next preceding four calendar years. This fact was unknown to the Board of Elections until after the election, and A received the highest number of votes at the election. Before issuance of the certificate of election by the Board of Elections A’s previous vote in the other party primary became known. The question is: Does the board of elections have to issue the certificate of election or does Revised Code Section 3513.191 prevent the board from issuing said certificate? If the board of elections must issue the certificate is it because of Revised Code 3513.06 which prescribes the time and procedure by which protests must be made?”

The question to be decided is whether the board of elections should issue a certificate of election to "A." In this regard, Section 3513.22, Revised Code, reads as follows:

"Not later than the fifth day after a primary election the board of elections shall begin to canvass the election returns from the precincts in which electors were entitled to vote at such election and shall continue such canvass daily until it is completed.

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"When the canvass of the election returns from all of the precincts in the county in which electors were entitled to vote at such election has been completed, the board shall determine and *declare the results* of the elections determined by the electors of such county or of a district or subdivision within such county. If more than the number of persons to be nominated for or elected to an office received the largest and an equal number of votes, the tie shall be resolved by lot by the chairman of the board in the presence of a majority of the members of the board. Such declaration shall be in writing and shall be signed by at least a majority of the members of the board. It shall bear the date of the day upon which it is made, and a copy thereof shall be posted by the board in a conspicuous place in its office. The board shall keep such copy posted for a period of at least five days.

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"Election officials, who are required to declare the results of primary elections, *shall issue to each person* declared nominated for or *elected to an office, an appropriate certificate of nomination or election,* * * * Certificates of nomination or election issued by boards to candidates * * * shall not be issued before the expiration of the time within which applications for recounts of votes may be filed or before recounts of votes, which have been applied for, are completed." (Emphasis added)

From the facts as given, the board of elections has evidently *declared* that "A" received the highest number of votes for the office. Under Section 3513.22, *supra*, therefore, the board has the duty to issue a certificate of election to "A". This appears to be the only construction possible since the section does not authorize the board to determine the qualifications of the candidate who has received the highest number of votes. In this regard, it was stated in *The State, ex rel., Ward v. Kennedy, Secy. of State*, 134 Ohio St., 348, (1939) at pages 350 and 351:

"Under Section 4785-86, General Code, it is the duty of the Secretary of State to place upon the official ballots for the general election the names of those candidates who received the highest

number of votes at the primary election. That section provides in part that the Secretary of State shall canvass all the votes cast for the candidates whose nominating petitions are filed with him 'and shall declare the result.' Also 'He shall, not less than forty days before the election, certify the same, together with a form of official ballot therefor, to the boards of elections in the several counties of the state.' No duty is specifically enjoined upon the Secretary of State to determine in this instance the legality of the votes cast in Trumbull county. Mandamus will not, therefore, lie to compel him to make that determination. *Selby, Auditor, v. State, ex rel. Smiley, 63 Ohio St., 541, 59 N.E., 218.*"

Section 4785-86, General Code, referred to in *State, ex rel., Ward, supra*, is now Section 3513.22, *supra*. Under this section the secretary of state has the duty to declare the results and issue certificates in state-wide elections just as a county board of elections has such duty in a county election such as here concerned.

In the case of *State, ex rel., Hehr v. Becry, 55 Ohio App., 243 (1936)*, the court stated at pages 243 and 244:

"Under the provisions of Section 4785-1 *et seq.*, and other sections of the General Code, no jurisdiction is vested either in the board of elections of a county or in the Secretary of State, as chief election officer of the state, to determine whether a person who has been nominated for an office under authority of Section 4785-87, General Code, and to whom a certificate of nomination has been issued by the board of elections, possesses the qualifications of a candidate for such office; and under the provisions of Sections 4785-86 and 4785-98, neither the board of elections nor the Secretary of State, until such time as a court of competent jurisdiction has held such person to be disqualified, has any authority in the preparation of the ballot to do otherwise than place the name of such person thereon as a candidate at the ensuing general election."

While this case dealt with the question of placing a candidate's name on the election ballot after certification of nomination was issued, the court held that the board of elections is required to follow the procedure of the statute and is not authorized to question the qualifications of the candidate.

Section 3513.191, Revised Code, to which you refer, reads as follows:

"No person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years."

Under the facts as given, "A" had voted as a member of a different political party at a primary election within the next preceding four calendar years and undoubtedly came within the restriction of Section 3513.191, *supra*, as to his candidacy. It will be noted, however, that this section states that no person shall be a *candidate*, etc.; not, no person shall be *elected*, etc. Thus, there is a definite question as to whether the section applies where the candidacy has not been challenged and the candidate receives the highest number of votes for the office.

Section 3513.05, Revised Code, provides a specific procedure for protesting a candidacy at a primary election, said section reading in part:

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"Protests against the candidacy of any person filing a declaration of candidacy for party nomination or for election to an office or position, as provided in this section, may be filed by any qualified elector who is a member of the same political party as the candidate, or by the controlling committee of such party. *Such protest must be in writing, and must be filed not later than four p.m. of the eightieth day before the day of the primary election.* Such protest shall be filed with the election officials with whom the declaration of candidacy and petition was filed. Upon the filing of such protest the election officials with whom it is filed shall promptly fix the time for hearing it, and shall forthwith mail notice of the filing of such protest and the time fixed for hearing it to the person whose candidacy is so protested. They shall also forthwith mail notice of the time fixed for such hearing to the person who filed the protest. At the time fixed such election officials shall hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which he seeks a party nomination or election to an office or position, or has not fully complied with sections 3513.01 to 3513.32, inclusive, of the Revised Code, his declaration of candidacy and petition shall be determined to be invalid and shall be rejected, otherwise it shall be determined to be valid. Such determination shall be final.

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(Emphasis added)

In addition to the elector's protest the board could, of course, reject a candidate's petition on its own volition for just cause.

"A's" candidacy not having been challenged by the board of elections or by a qualified elector, I have serious doubt whether his qualifications can

now be challenged in view of the fact that the specific procedure provided was not followed.

In making the above statement I might note that I am aware of the decision of *State, ex rel., Marzaris v. Gaylord*, 104 Ohio App., 418 (1957), in which the second headnote reads :

“An elector who voted in the Democratic primary election in 1953, did not vote in any primary election in 1954, and voted in the Republican primary elections in 1955, 1956 and 1957, is disqualified to be nominated as a candidate of the Republican Party by write-in votes cast for him in the primary election of 1957 notwithstanding he filed no declaration of candidacy and did nothing to promote or encourage such write-in vote.”

In the *Mazaris* case, *supra*, the board of elections had denied a certificate of nomination to a person who had received the highest number of votes for an office (write-in votes) because he did not qualify under Section 3513.191, Revised Code, and in a mandamus action the common pleas court and the court of appeals upheld the board. In this case, however, the court did not appear to consider the mandatory provisions of Section 3513.22, Revised Code, but evidently based its decision on the assumption that a violation of Section 3513.191, *supra*, totally disqualified a candidate from being elected to office.

As noted above, Section 3513.191, *supra*, refers to a person being a *candidate* at a party primary and does not specifically state that such a person is disqualified from holding the office. This is in contrast to the fact situation in *State, ex rel., Hehr v. Beery, supra*, where a person was nominated for the office of county engineer, but said person was not a professional engineer as required by statute. In that case, the person involved was not qualified to hold the office. In the instant case, the person involved was not qualified to be a candidate for the office, but no protest was made against his candidacy. Also, as seen earlier, the legislature has provided a specific procedure for a protest against a candidate, thereby at least implying that such procedure should be followed in any protest.

The provisions of Section 3513.06, Revised Code, might here be noted in this discussion. This section reads in part as follows :

“If any person desiring to become a candidate for public office has changed his name within ten years next preceding the filing of his declaration of candidacy, his declaration of candidacy and petition must both contain, immediately following his present

name, his former names. *Any person who has been elected under his changed name, without submission of his former name, shall be immediately suspended from the office and the office declared vacated, and shall be liable to the state for any salary he has received while holding such office.* The attorney general in the case of candidates for state offices, the prosecuting attorney of the most populous county in a district in the case of candidates for district offices, and the prosecuting attorney of the county in the case of all other candidates shall institute necessary action to enforce this section.

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(Emphasis added)

Here the legislature deemed it necessary to specifically provide for the situation where a candidate has been elected despite the fact that his declaration of candidacy was faulty. It might well be argued that, if the legislature intended that a person who had been elected despite the fact that he was unqualified to be a candidate under Section 3513.191, *supra*, should not be allowed to take office, it would have so provided—as it did in Section 3513.06, *supra*.

In any event, however, and as noted earlier, I do not believe that the board of elections has any authority to now consider the qualifications of “A”, but having declared the result of the election, is required by Section 3513.22, Revised Code, to issue a certificate of election.

Accordingly, it is my opinion and you are advised:

1. Section 3513.191, Revised Code, precludes a person from being a candidate for election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years.

2. Where such a person is accepted as a candidate for election at a party primary, the board of elections being unaware of his past voting record, and pursuant to Section 3513.22, Revised Code, the board of elections has declared that he has received the highest number of votes for the office, the board is required by said section to issue a certificate of election to such person.

Respectfully,

MARK McELROY

Attorney General