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COUNTY ENGINEER—ELIGIBILITY FOR NOMINATION AS PARTY CANDIDATE—MATTER FOR JUDICIAL RATHER THAN ADMINISTRATIVE DETERMINATION—BOARD OF ELECTIONS WITHOUT AUTHORITY TO MAKE DETERMINATION—MAY NOT OMIT FROM BALLOT IN GENERAL ELECTION NAME OF INDIVIDUAL WHO RECEIVED HIGHEST NUMBER OF VOTES FOR OFFICE IN PARTY PRIMARY—SECTION 315.02 RC.

SYLLABUS:

The eligibility of an individual, under the provisions of Section 315.02, Revised Code, for nomination as a party candidate for the office of county engineer is a matter for judicial rather than administrative determination and a board of elections is without authority to make such determination by omitting from the ballot in the general election the name of an individual receiving the highest number of votes for such office in a party primary.

Columbus, Ohio, May 18, 1956

Hon. John F. DeMuth, Prosecuting Attorney  
Paulding County, Paulding, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"At yesterday's primary election in this county Clayton Chorpensing received a sufficient number of write-in votes on the Republican ticket for the office of County Engineer. This day Charles H. Dunakin, Democratic nominee for County Engineer, filed a written protest with the County Board of Elections, a copy of which protest I enclose herewith. You will notice the protest is against the acceptance of a filing fee, the submitting of the candidate's name to the Secretary of State, the issuance of a Certificate of Nomination, and the placing of the candidate's name on the ballots for general election. You will also notice that the protest states that the write-in candidate, Clayton Chorpensing, is not a licensed professional engineer and a licensed surveyor licensed to practice in the State of Ohio and that he is ineligible under the provisions of Section 315.02 of the Revised Code of Ohio.

"I should like to have your opinion on the following question: 'Has a County Board of Elections any power or authority to challenge or investigate the qualifications of a candidate for the office of County Engineer when such candidate has received a sufficient number of write-in votes for such office?'"

In a recent letter to the Secretary of State, a copy of which has been supplied to me, I note the following statement:

"For your further information it is my understanding that the write-in candidate has made application for a professional engineer's and surveyor's license and it is possible that these licenses will be issued to him before general election. If such is the fact what, if any, bearing would this have on this matter?"

In *State, ex rel. Kirk, v. Wheatley*, 133 Ohio St., 164, the syllabus reads in part:

"3. The provisions of Section 2783, General Code, are mandatory, and one who is not a registered professional engineer and registered surveyor licensed to practice in the state of Ohio is not eligible as a candidate for the office of county engineer or

to be elected or appointed thereto unless he shall have previously served as county engineer immediately prior to his election.”

In the opinion in that case it was said by Judge Matthias, p. 168:

“\* \* \* Wheatley was not granted a license as a surveyor until subsequent to the election, and did not pass an examination as a professional engineer until subsequent to the institution of this proceeding. It is quite manifest, therefore, that *at the time of the election* Wheatley had not met the mandatory requirements of the statute and was not eligible as a candidate for the office of county engineer, and could not be legally elected or appointed thereto.” (Emphasis added.)

Because Judge Matthias’ statement refers only to eligibility at the time of the election, making no mention of eligibility at the time of nomination, that case can be distinguished from the instant case. However, the prohibition in Section 2783, General Code, now Section 315.02, Revised Code, was held to apply to primary elections also in *State, ex rel. Ranney, v. Corey*, 37 Ohio Law Abs., 442, the term “candidate” as used in the statute being held to include a candidate for party nomination in a primary election.

Section 3513.10, Revised Code, provides in part:

“\* \* \* Candidates whose names are written in on the ballot, as provided in section 3513.23 of the Revised Code, *and who are nominated*, shall pay the same fee as candidates who declare their candidacy. \* \* \*” (Emphasis added.)

In Section 3513.22, Revised Code, there is the following provision:

“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, \* \* \*” (Emphasis added.)

This section further provides:

“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. \* \* \*”

“The board shall thereupon promptly certify abstracts of the results of such elections within its county upon such forms as the secretary of state prescribes. One certified copy of each

abstract shall be kept in the office of the board, and *one certified copy of each abstract shall promptly be sent to the secretary of state.* \* \* \*”  
(Emphasis added.)

In *State, ex rel. Cox, v. Riffle*, 132 Ohio St., 546, the syllabus reads in part:

“2. Where a candidate for county engineer, ineligible to election under section 2783, General Code, received the highest number of votes, receives a commission, qualifies, takes possession, enters upon and performs the duties of the office, such facts alone will not invest him with the title to the office where the right thereto does not exist.”

In the opinion in this case it was said by Judge Myers, p. 550:

“\* \* \* The respondent, not having been elected, was not in a position to qualify. While *it was the duty of the board of elections to certify the returns to the Secretary of State*, such action could not bestow a title to the office where right thereto did not exist. ‘A certificate of election is not conclusive and does not carry with it any permanent right to the office in question.’ 22 Ruling Case Law, 436. See also *Prince v. Skillin*, 71 Me., 361, 36 Am. Rep., 325. Likewise the issuance of the commission by the Governor, the giving of bond, taking possession of the office and performing the duties thereof—all these circumstances do not invest a person with title to an office where the right thereto does not exist. \* \* \*”  
(Emphasis added.)

Judge Myers’ statement is clearly indicative of the view that in cases of asserted ineligibility of a candidate for the office of county engineer the board of elections is without power or authority to resolve the legal question involved, but should proceed to certify the results of the balloting. This view is strongly supported, moreover, by the following language in the *per curiam* decision in *State, ex rel. Hehr, v. Beery*, 55 Ohio App. 243, 244, 245:

“Under the allegations of the petition in this case, which are admitted by the demurrer, the respondent Harvey does not possess the qualifications of a candidate for county engineer prescribed by Section 2783, General Code, and the petition for this reason, and the other reasons hereinbefore mentioned, states a cause of action entitling the relator to a writ of mandamus as prayed for. The demurrer of the respondents will for this reason be overruled, and, the respondents in open court having stated that they do not care to plead further, judgment will be entered in favor of the relator, making permanent the alternative writ of

mandamus heretofore issued herein. *But as the duty of the respondents to omit the name of the candidate from the ballot did not become fixed until this court in this action determined such candidate to be disqualified, and as the respondents were not, when this suit was begun, in default in the performance of their duty of omitting such name from the ballot, the costs of this action will be assessed against the relator. State, ex rel. Hiatt, v. Court of Common Pleas of Hardin County, 102 Ohio St., 40, 130 N.E., 36.*" (Emphasis added.)

Moreover, in the Ranney case, *supra*, 37 Ohio Law Abs., 442, it was said by Doyle, J.:

"We construe the word 'candidate' as used in this statute, as applicable to the case before us, to mean one who seeks the nomination of his political party at a primary election. And, this being so, it is necessary that such candidate possess the statutory qualifications of the office which he seeks, at the time designated by law as the latest moment for the filing of such declaration.

"No power is vested in the board of elections of a county, nor in the secretary of state, to determine whether a person who files a declaration of candidacy for a primary election possesses the necessary qualifications of a candidate for such office.

"See, *State ex rel. Hehr, v. Beery, et al., etc.*, 55 O. A. 243.

"And it is the duty of election officials to place the name of those whose petitions are in the prescribed form, properly attested and filed in accordance with the provisions of the statutes, upon a ballot to be used for voting at the primary election, unless prohibited by order of a court of competent jurisdiction."

It would thus appear that any decision as to the ineligibility of a candidate for county engineer, whether at a general or a primary election, is a matter for judicial rather than administrative determination.

From this it follows that the board in the case at hand, as provided in Section 3513.22, Revised Code, should (1) canvass the returns and declare the results of the balloting, and (2) certify abstracts of such results; and because such declaration of the results is in legal effect a declaration of nomination, the individual here in question should be deemed by the board to be the nominee for the office in question, and should proceed accordingly as provided in pertinent laws relating to primary nominations.

In specific answer to your inquiry, therefore, it is my opinion that the eligibility of an individual, under the provisions of Section 315.02, Re-

vised Code, for nomination as a party candidate for the office of county engineer is a matter for judicial rather than administrative determination and a board of elections is without authority to make such determination by omitting from the ballot in the general election the name of an individual receiving the highest number of votes for such office in a party primary.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General