

OPINION NO. 1512

Syllabus:

1. Members of a commission selected to frame a municipal charter as provided by Section 8, Article XVIII, of the Ohio Constitution are not municipal officers, and candidates for election to such commission are not candidates for nomination for an elective municipal office within the meaning of Section 7, Article V, Ohio Constitution, and there is no requirement in law that such candidates file petitions in accordance with Sections 3513.251 and 3513.252, Revised Code.

2. The ordinance adopted by the legislative authority of a municipal corporation under the authority of Section 8, Article XVIII, Ohio Constitution, may prescribe the method of selection of candidates to be elected to the commission to frame a charter.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, November 2, 1964

Your request for my opinion reads:

"This office and our several Boards of Elections are experiencing numerous problems with respect to the proper method of conducting elections for members of charter commissions for municipal corporations. The method of setting up ballots has occasionally been disputed, but we are particularly concerned with the method of nominating candidates for charter commissions.

"Two theories have been offered as to the proper method:

"(1) That members of municipal charter commissions are municipal officers like any others and that therefore their nominations are accomplished by reference to procedures prescribed in Chapter 3513 of the Revised Code and specifically Section 3513.252. It is objected, however, that this statute requires such candidates to obtain an unreasonably large number of signatures on their petitions, and it is suggested that the General Assembly never intended this statute to apply to these officers.

"(2) That Article XVIII, Section 8 of the Constitution requires the council of the municipal corporation involved to provide by ordinance for submission of the question of whether or not a commission shall be chosen and that such requirement extends to providing the method for electing the members of such commission, including the method of nominating candidates therefor. Under this interpretation of the Constitution, the council could prescribe the form of nominating petition, fix the number of signatures required thereon, and prescribe the form of ballot.

"I might point out that these elections have been held in various municipal corporations, following each of these two theories as to the method."

Section 8, Article XVIII, of the Ohio Constitution reads:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter.' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party design-

nation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein."

This section specifically directs that whenever the question of selecting a commission to frame a charter is presented to the electors of a municipality, provision shall be made on the nonpartisan ballot for the election of fifteen electors to serve as a charter commission. That section does not require that a candidate for member of such commission file a petition.

Section 7, Article V, supra, reads in part:

"All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality."

The basic question seems to me to be whether members of a commission to frame a charter for a municipality are municipal officers within the meaning of Section 7, Article V, of the Ohio Constitution. If this answer is in the affirmative, then it becomes necessary to examine the statutes providing for the filing of nominating petitions by candidates for election as officers of municipal corporations in those cases where nominations are not made at a primary election. Section 3513.251, Revised Code, controls as to municipalities with a population of less than two thousand and those with a population in excess of two thousand in which a primary election was not held for the nomination of candidates for the next preceding regular municipal election, unless such primary was eliminated solely because the number of candidates for any office did not exceed the number to be nominated by a political party. Section 3513.252, Revised Code, governs the nominating petitions to be filed by independent candidates in municipalities having a population of more than two thousand

where a primary election was held for the preceding regular municipal election and of candidates in such municipalities in which a primary election was eliminated because the number of candidates for any office did not exceed the number to be nominated by any political party. These sections both provide that the petitions shall be signed by twenty-five electors or a percentage of those voting for governor at the next preceding regular state election in the municipal corporation, whichever number is greater. The percentages are not the same in the two sections.

The then Attorney General considered this problem in Opinion No. 1021, Opinions of the Attorney General for 1929, page 1558. The syllabus reads:

"1. Candidates for commissioners to frame a charter under Section 8 of Article XVIII of the Ohio Constitution should be nominated as provided by general law, for the nomination of other municipal officers.

"2. Where no nominations have been made for such candidates, it is the duty of the election officials to provide blank spaces for such election upon the ballot, as provided in Section 5025 of the General Code."

The first paragraph of the syllabus, standing alone, suggests at first reading that petitions conforming to present Sections 3513.251 and 3513.252, Revised Code, would be required. The two paragraphs when read together, however, suggest to me that this procedure was held to be preferable but not mandatory. I am strengthened in this conclusion by the following language which appears at page 1560:

"In analyzing said Section 8, it will be noted that while it is a mandatory requirement that the ordinance provide for the time of the submission of the question, it apparently is not mandatory that the ordinance contain a provision relative to the election of the commissioners. However, it may be stated, as a general practice, that it has been the custom, in the adoption of such an ordinance, to enact therein express provisions as to the method of nominating the candidates who are to be voted for as the commissioners to frame a charter. See Ellis' Ohio Municipal Code. The form of ordinance set out in the text above mentioned, after providing for the submission of the question as to whether a commission shall be chosen, provides in detail the method of selecting the candidates for commissioners. Without undertaking to set forth all of the provisions thereof it may be stated that it apparently undertakes to adopt the method provided by statute for the nomination by petition of candidates for municipal offices. However, it may be noted in Section 3 of said form that it is provided that the filing of the certificate and nomination papers of candidates shall be made

not less than twenty-five days prior to the date of election. This provision is significant, for the reason that the statutes governing such cases now provide that such papers shall be filed not less than sixty days before the election."

Review of Section 8 of Article XVIII of the Ohio Constitution shows that the election provided for therein must be held within the period from sixty to one hundred and twenty days after the legislative authority adopts the ordinance provided for therein. Both Sections 3513.251 and 3513.252, Revised Code, require that nominating petitions be filed on or before the ninetieth day before the date of the election in question, being the general election and the primary, respectively. Clearly, then, if these sections control to any extent, they can control only in part.

In my opinion, members of a charter commission are not municipal officers within the meaning of Section 7, Article V, of the Ohio Constitution. Their duties are only those set out in Section 8, Article XVIII, supra; that is, they frame a charter for the municipality and submit it to the electors of the municipality at an election to be held within the designated time period. This commission does not adopt a charter, and I am unable to conclude that the members are public officers. In State, ex rel. Milburn vs. Pethel, 153 Ohio St., 1, the syllabus reads in part:

"1. A public officer, as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions either of an executive, legislative or judicial character."

In the course of that opinion, reference was made to State, ex rel. Attorney General vs. Jennings, 57 Ohio St., 415, the syllabus of which reads in part:

"2. To constitute a public office against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

I am unable to find that a commission elected to frame a charter in any way exercises any of the sovereignty of the municipal corporation. Only the electors can actually adopt the charter. It is my conclusion that there is no legal requirement that candidates for such commission file petitions such as must be filed by candidates for election to municipal offices. In my opinion, the legislative authority of a municipal corporation, in passing an ordinance to present to the electors the question of framing a charter, may and should provide for the election of a commission to frame such charter, including the determination of the number of signa-

tures necessary on any petitions required by such ordinance to be filed by the candidates for such commission.

It is, therefore, my opinion and you are advised:

1. Members of a commission selected to frame a municipal charter as provided by Section 8, Article XVIII, of the Ohio Constitution are not municipal officers, and candidates for election to such commission are not candidates for nomination for an elective municipal office within the meaning of Section 7, Article V, Ohio Constitution, and there is no requirement in law that such candidates file petitions in accordance with Sections 3513.251 and 3513.252, Revised Code.

2. The ordinance adopted by the legislative authority of a municipal corporation under the authority of Section 8, Article XVIII, Ohio Constitution, may prescribe the method of selection of candidates to be elected to the commission to frame a charter.