

OPINION NO. 1261

Syllabus:

A person who falls within the prohibition in Section 3513.191, Revised Code, can not lawfully be nominated as a candidate or elected at a party primary and the board of elections is without legal authority to place such person's name as a candidate for election on the ballot to be used in the general election in November; the second paragraph of the syllabus of Opinion No. 1551, Opinions of the Attorney General for 1960, page 514, is overruled.

To: Donovan Lowe, Morgan County Pros. Atty., McConnellsville, Ohio
By: William B. Saxbe, Attorney General, July 29, 1964

Your request for my opinion reads:

"Mrs. M. was nominated as Republican candidate for Treasurer of Morgan County, at the May Primary. At the same Primary, Mrs. N. was nominated as Democratic candidate for the same position. Certificates of Nomination were issued to each individual by the Morgan County Board of Elections.

"Subsequent to the election and prior to the issuance of the Certificate, it was discovered that Mrs. N. had voted in the Republican Primary in 1960.

"The question arising is, is Mrs. N. a proper candidate for the office of Morgan County Treasurer on the Democratic ballot? If she is not eligible because of her voting record of 1960, what procedure should be taken to remove her from the ballot?"

It is my understanding that this candidate had duly filed a declaration of candidacy and petition. No protest was filed; her name was placed on the ballot, and this candidate received the number of votes by the electors of the Democratic Party voting in the primary election to effect her nomination. Thereafter, although it was then known that Mrs. N. had voted as a member of the Republican Party in the primary election in 1960, a certificate of nomination was issued to her by the board of elections.

Section 3513.191, Revised Code, directly prohibits certain electors from becoming candidates at primary elections; that section reads:

"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."

This statute was interpreted in State, ex rel., Mazaris vs. Gaylord, 104 Ohio App., 418, in which the Court of Appeals for Jefferson County had for consideration a situation in which a nomination for the office of city solicitor was by a write-in vote. The nominee had voted as a member of the opposite party at a primary election within the preceding four-year period, and he had not solicited the nomination. He received the required number of votes at the primary election, and he then filed a petition for a writ of mandamus commanding the board of elections to print his name on the November ballot. The board had refused to issue a certificate of nomination.

This language was used in the opinion of the court as shown at page 422:

"Under the circumstances, the relator is ineligible to be nominated either by declaration of candidacy or by write-in for the office of city solicitor of Toronto on either party ticket.

"We hold, therefore, that since the relator, George Mazaris, was affiliated with the Democrat Party until the primary election of May 3, 1955, he was disqualified to be nominated as a party candidate of the Republican Party for the office of city solicitor of Toronto at the general election to be held on November 5, 1957."

In the course of that opinion the court considered whether the voters at a primary election could disregard the inhibition of Section 3513.191, Revised Code. The answer was obviously in the negative.

In Informal Opinion No. 204, Informal Opinions of the Attorney General for 1964, issued June 22, 1964, I had before me a situation in which there had been a nomination by a write-in vote, and I held, citing the Mazaris case, supra, that such nominee was prohibited by Section 3513.191, Revised Code, from being a candidate at the general election in November.

I am unable to agree with the conclusion reached by my predecessor in office and expressed in the second paragraph of the syllabus of Opinion No. 1551, Opinions of the Attorney General for 1960, page 514. That syllabus reads:

"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."

Beginning at page 517, this language appears:

"'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 my opinion Section 3513.191, Revised Code, made this nominee ineligible to become a candidate for nomination at the primary election held in 1964 and nothing which was done by the nominee, the electors or the board of elections can correct this defect. Neither the votes cast by the electors in favor of this nominee nor the issuance of a certificate of nomination by the board of elections can have any validity. The statutory prohibition against becoming a candidate for nomination is clear, and I am unable to conclude that this provision of the law may be contravened either by affirmative action or by failure to act. As this nominee could not legally be a candidate or be nominated at the primary election in question, the board of elections could not legally, acting pursuant to Section 3513.22, Revised Code, declare that she was nominated and issue to her a certificate of nomination; such act was a nullity.

You have inquired concerning the procedure to be followed to remove Mrs. N.'s name from the ballot. In my opinion, her name should not appear on the ballot, as the board of elections is without authority to place thereon the name of any person not nominated according to law. Boards of elections are by Chapter 3505, Revised Code, directed to provide ballots for general elections and to place thereon the names of all candidates nominated at the next preceding primary election. Concluding, as I do, that the candidate in question was not and could not be legally nominated, the board of elections has neither the duty nor the authority to place her name on the ballot to be used in the general election in November.

It is, therefore, my opinion and you are advised that a person who falls within the prohibition in Section 3513.191, Revised Code, can not lawfully be nominated as a candidate or elected at a party primary; and the board of elections is without legal authority to place such person's name as a candidate for election on the ballot to be used in the general election in November; the second paragraph of the syllabus of Opinion No. 1551, Opinions of the Attorney General for 1960, page 514, is overruled.