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ELECTIONS—LOCAL OPTION—§§4301.33, 3501.11 R.C.—BOARD OF ELECTIONS TO DETERMINE SUFFICIENCY OF PETITIONS PRESENTED—SUBMISSION TO SECRETARY OF STATE.

SYLLABUS:

When a local option petition has been presented to a board of elections such board has the duty and exclusive jurisdiction to determine the sufficiency of such petition pursuant to Section 4301.33, Revised Code, except that under the conditions as specified in Section 3501.11, Revised Code, the question shall be submitted for determination to the Secretary of State whose decision shall be final.

Columbus, Ohio, September 10, 1958

Hon. James W. Dinsmore, Prosecuting Attorney
Geauga County, Chardon, Ohio

Dear Sir:

You have requested my opinion as to the sufficiency of the language in a petition filed pursuant to Section 4301.32, *et seq.*, Revised Code, which petition reads:

“The undersigned electors of Newbury Township, Geauga County, Ohio, hereby petition the Board of Elections of Geauga County, Ohio, to submit the question of local option in and for the said township of Newbury as to whether or not the sale of liquor and alcoholic beverages shall be permitted within the geographical confines of said township, pursuant to the provisions of Section 4301.32 etc. of the Revised Code of Ohio.”

You have also advised me in your letter of request that the Secretary of State has informally ruled that the petition is insufficient and that the county board of elections has set a hearing on a protest to the petition.

The “local option” privilege was conferred by the legislature upon electors in certain specified districts pursuant to Section 4301.32, Revised Code. Section 4301.33, Revised Code, provides in applicable part:

“Upon the presentation of a petition, not later than four p. m. of the ninetieth day before the day of a general election, to the board of elections of the county wherein the district or any

part thereof, as defined in section 4301.32 of the Revised Code, is located, signed by the qualified electors of the district concerned, equal in number to fifteen per cent of the total number of votes cast for governor at the next preceeding regular state election in such district, the board shall proceed as follows:

“(A) Such board shall, not later than the eighty-fourth day before the day of a general election, examine and determine the sufficiency of the signatures, *determine the validity of such petition.* * * *

“(B) If the petition is *sufficient*, and, in case of overlapping residence district petitions, after the governing petition has been determined, the board to which the petition has been presented shall order the holding of a special election in the district for the submission of the questions specified in section 4301.35 of the Revised Code, on the day of the next general election, and shall certify such order to the board of any other county in which any part of such district is situated.

“All petitions filed with a board of elections as provided by this section, shall, under proper regulations, be open to public inspection.

“Protest against such local option petitions may be filed by a qualified elector eligible to vote on the question or questions, described in such petitions not later than four p. m. of the sixty-fourth day before the day of such general election. Such protests must be in writing and shall be filed with the election officials with whom the petition was filed. Upon filing such protest the election officials with whom it is filed shall promptly fix the time for hearing the same, and shall forthwith mail notice of the filing of such protest and the time for hearing same to the person who filed the petition which is protested. They shall also forthwith mail notice of the time fixed for the hearing to the person who filed the protest. At the time so fixed such election officials shall hear the protest and determine the validity or invalidity of the petition.” (Emphasis added)

The requirement that the board of elections shall determine the validity of the petition in question is similarly found in Section 3501.11, Revised Code, which also provides for the submission of certain questions from the board of elections to the Secretary of State under certain circumstances. The pertinent part of the statute reads:

“Each board of elections shall exercise by a majority vote all powers granted to such board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall:

“(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers;

“In all cases or a tie vote or a disagreement in the board, if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final.”

The Supreme Court had occasion to consider Sections 3501.11 (K), and 3513.262, Revised Code, which latter section requires the board of elections to determine the sufficiency of petitions as does Section 4301.33, *supra*, in *The State, ex rel. Flynn v. Board of Elections of Cuyahoga County et al.*, 164 Ohio St., 193. The first paragraph of the syllabus reads:

“Section 3501.11, Revised Code, providing that each board of elections shall ‘review, examine, and certify the sufficiency and validity of petitions and nomination papers,’ and Section 3513.262, Revised Code, which provides that each board of elections shall ‘examine and determine the sufficiency of the signatures on the petition papers transmitted to or filed with it’; that ‘all other matters affecting the validity or invalidity of such petition papers shall be determined by the Secretary of State or the board with whom such petition papers were filed’; and that, upon filing of such protest and after notice, ‘such election officials shall hear the protest and determine the validity or invalidity of the petition’ and ‘such determination shall be final’; authorize and require a board of elections to conduct a hearing on a protest against the nominating petition of a candidate who is alleged to be ineligible to assume the office sought, if elected, and to determine the validity of such petition; *and the decision of such board is final and, in the absence of allegations of fraud, corruption, abuse of discretion or a clear disregard of statutes or legal provisions applicable thereto, is not subject to judicial review. * * **” (Emphasis added)

The Flynn case was cited as authority in April of this year in *The State, ex rel. Ford v. Board of Elections of Pickaway County*, 167 Ohio St., 449. The general rule is found in 19 Ohio Jurisprudence, 19, which reads:

“Public elections belong to the political branch of the government, and consequently, for the most part, questions arising in reference to elections are not subject to judicial review. In this respect amendments to the Election Laws of the state have not rendered obsolete the principles which have prevailed for decades, that the declarations of candidates for public office, their qualifications for nomination, and their election, belong to the political branch of the government, and that they are not, per se, the subject of judicial cognizance. However, jurisdiction has been expressly given to certain courts in election contest cases, and the

courts may, in certain instances at least, exercise jurisdiction in cases in which a remedy is sought when election officials have acted in bad faith or have abused their discretion.”

Therefore, I must conclude that the legislature has imposed a mandatory duty upon the election officials, *i.e.* boards of election and the Secretary of State, to determine the validity and sufficiency of petitions. Since our courts have consistently held that the validity or sufficiency of a petition is not subject to judicial review in the absence of allegations of fraud, corruption, abuse of discretion or a clear disregard of statutes or legal provisions applicable thereto, it would, in my opinion, be presumptuous of me to encroach upon the exclusive jurisdiction of the election officials and render an opinion on the sufficiency of a petition such as you have presented in the absence of fraud, corruption, *etc.*

Particularly would this be the case in a situation where the Secretary of State, in his capacity of chief election officer of the state, has already undertaken to advise the board in the matter, as I am informed is the case here. Moreover, should the board in question disagree on the question of sufficiency of the petition, the matter would be referred to the Secretary of State as provided in Section 3501.11, Revised Code, for his decision. Such decision, thus made administratively, would be final in the absence of fraud, a clear disregard of the statutes, *etc.*, and not subject to judicial review. See *Flynn* case, *supra*.

In the case at hand, should the board elect, upon the advice of the Secretary of State, to hold the petition insufficient, I could not say that a “clear disregard of statutes” has occurred. In such cases the courts could not subsequently review the matter, as we have seen, and I must likewise refrain from doing so in advance of such administrative action.

Therefore, you are advised that when a local option petition has been presented to a board of elections such board has the duty and exclusive jurisdiction to determine the sufficiency of such petition, pursuant to Section 4301.33, Revised Code, except that under the conditions as specified in Section 3501.11, Revised Code, the question shall be submitted for determination to the Secretary of State whose decision shall be final.

Respectfully,
WILLIAM SAXBE
Attorney General