

OPINION 65-7**Syllabus:**

1. A nominating petition filed pursuant to Sections 1907.051 and 3513.261, Revised Code, is void where it states that the candidate is seeking election at the general election in November to a full term as county court judge and there is no full term for which an election could be held at that time;

2. A favorable vote cast by the electors for such candidate for a full term as judge of the county court is ineffective; such favorable vote can not be construed to be an election of the candidate for an unexpired term where the question presented on the ballot was election for a full term.

To: Bernard V. Fultz, Meigs County Pros. Atty., Pomeroy, Ohio
By: William B. Saxbe, Attorney General, January 13, 1965

Your request for my opinion reads:

"On July 17, 1964, FWP, Jr. filed a nominating petition for Judge of the County Court of Meigs County. The certificate recited that he was declaring himself as a candidate for election to the full term of County Court Judge at the General Election to be held on the 3rd day of November, 1964. I attach a copy of the heading of his Petition, for your information. At the General Election, Mr. P's name appeared on the ballot as a candidate for Judge of the County Court for a full term commencing January 1, 1965.

"Mr. P was appointed to the County Court in December of 1962, following the death of the then-Judge, Emmet W. Peoples on December 12, 1962. As I read Sections 1907.041 and 1907.08 of the Ohio Revised Code it appears to me that Mr. P should have filed for the unexpired term of the County Judge.

"The Meigs County Board of Elections has asked me to obtain your opinion as to whether Mr. P has been elected to a full term as County Judge, an unexpired term as County Judge, or whether his election is void by reason of the failure to designate the period for which he was running as the unexpired term instead of the full term.

"I also enclose a copy of the ballot for your information."

You have not mentioned in your inquiry the date that the present term expires, but I assume that such term runs through December 11, 1966. The population figures for Meigs County indicate that the county court district shall have, pursuant to Section 1907.041, Revised Code, one judge. In accordance with Section 1907.051, Revised Code, the judge of such county court district is elected at the general election in the even numbered years for a four-year term beginning the first day of the following January. That section now reads in part:

"Judges shall be elected by the electors of the county court district at the general election in the even numbered years, for a term of four years commencing with the first day of January next following the election for such court."

In accordance with Section 1907.051, Revised Code, as it was first enacted in 127 Ohio Laws, 978, 981, the first four-year term commenced on January 1, 1959. This term would have ended December 31, 1962, with the second such term beginning January 1, 1963, and expiring on December 31, 1966.

I assume from your letter that the incumbent was duly appointed to the county court for the term beginning January 1, 1963, in accordance with Sections 1907.041 and 107.08, Revised Code. Section 1907.041, Revised Code, reads in part:

"Vacancies caused by the death, resignation, forfeiture, or removal from office of a judge shall be filled in accordance with section 107.08 of the Revised Code except as provided in section 1907.071 (1907.07.1) of the Revised Code."

Section 1907.071, Revised Code, is not pertinent here as it relates to the redetermination of areas of jurisdiction by courts of common pleas. Section 107.08, Revised Code, reads:

"The office of a judge is vacant at the

expiration of the term of the incumbent when no person has been elected as his successor. Such vacancy shall be filled by appointment by the governor. A successor shall be elected for the unexpired term at the first general election for the office that occurs more than thirty days after such appointment."

I would say at this point that it is clear that there could have been no election in November, 1964, of any candidates for a full four-year term. The General Assembly has established the length of the terms and the initial date of the first such term. These terms, with the beginning and ending dates, can be changed only by legislative enactment and not by any factual situation existing in any county court district. No term is to begin on January 1, 1965, and there obviously could be no candidate elected for such a term.

You have next inquired whether this candidate was elected for the unexpired term. The final paragraph of Section 1907.051, Revised Code, reads in part:

"All candidates for county court judge shall be nominated by petition. The nominating petition shall be in the general form and signed and verified as prescribed by section 3513.261 (3513.26.1) of the Revised Code, ***."

Section 3513.261, Revised Code, provides that the nominating petition shall be substantially as shown in that section. The statement of candidacy and the nominating petition shown in that section both require a statement that the candidacy is for election to a "full term or unexpired term ending" The statement of candidacy filed by the incumbent shows his candidacy for a full term. Clearly, the statement of candidacy and petition did not meet the statutory requirements. The statement that the candidacy was for election to a full term was erroneous.

As a result of this error, the ballot presented to the electors at the November election did not meet the requirements of Section 3505.04, Revised Code. The fourth paragraph of that section, which controls the form to be used for non-partisan ballots, reads:

"Within the rectangular space within which the title of each judicial office is printed on the ballot and immediately below such title shall be printed the date of the commencement of the term of office, if a full term, as follows: 'Full term commencing (Date), or the date of the end of the term of office, if an unexpired term, as follows: 'Unexpired term ending (Date),'"

The ballot used by the electors shows that the votes were cast under the mistaken belief that the incumbent was a candidate for a full term commencing January 1, 1965, when there was in fact no full term which could begin at that time.

In The State, ex rel. McGinley v. Bliss et al, Board of

Elections of Summit County, 149 Ohio St., 329, the Court had for consideration Section 4785-71a, General Code, the predecessor to Section 3513.08, Revised Code. That section as amended in 122 Ohio Laws, 325, 336, effective January 2, 1948, then reads:

"Each person filing a declaration of candidacy for nomination at a primary election as a candidate for election to the office of judge of the supreme court, court of appeals, court of common pleas, probate court, and such other courts as are established by law, in addition to designating in such declaration the office for election to which he seeks such nomination, shall designate the term of the office for election to which he seeks such nomination by stating therein, if a full term, the date of the commencement of such term in words as follows, to-wit: 'Full term commencing (Date)', or by stating therein, if an unexpired term, the date on which such unexpired term will end in words as follows, to-wit: 'Unexpired term ending (Date)'"

The relator in that case sought nomination for election to the office of probate judge, but his declaration of candidacy and petitions did not show whether he was seeking election to a full term or unexpired term. The board of elections rejected the declaration of candidacy and petition, and relator filed a petition for a writ of mandamus. This language appears in the opinion, at page 331:

"It will be observed that section specifically requires a primary candidate to designate both the judicial office and the term for which he seeks nomination, and makes provision for setting forth the full term or the unexpired term, with dates thereof. The requirements of that section are mandatory."

The Supreme Court affirmed the decision of the Court of Appeals, finding that the declaration did not meet the mandatory requirements of the law and that the refusal to accept it and the petitions did not constitute an abuse of discretion warranting the issuance of a writ of mandamus.

The State, ex rel. Newdick, Appellant v. O'Leary, et al., Appellees, 149 Ohio St., 440 was decided by the Supreme Court a few weeks later. In that case a protest had been filed against a candidacy for nomination for election to the office of probate judge. A petition in mandamus was filed after the board of elections had found the declaration of candidacy valid. The Court of Appeals dismissed relator's petition, holding the provisions of Section 4785-71a, General Code, to be mandatory only where there were two or more judges of the same court to be elected. The Supreme Court reversed the Court of Appeals and adhered to the pronouncement in State, ex rel. McGinley v. Bliss, supra, saying this, at page 441:

"On March 31, 1948, in State, ex rel. McGinley v. Bliss et al., Board of Elections,

ante, 329, 78 N.E. (2d), 715, this court affirmed the judgment of the Court of Appeals for Summit County and held that the requirements of Section 4785-71a, General Code, as to designation of the judicial office and the term, are mandatory."

The factual situation considered in The State, ex rel. Hanna et al. v. Milburn et al., Lake County Board of Elections, et al., 170 Ohio St., 9 was quite different. There candidates for election to municipal office had indicated their candidacy for full terms, indicating that the terms would commence on January 1, 1960. The relators claimed that the failure to designate properly the beginning of the terms as set by the city charter invalidated the petitions. The court held, however, that Section 3513.261, Revised Code, does not require that the date of commencement of the term be shown and that showing such date was mere surplusage which in no way affected the validity of the petitions. This paragraph appears near the close of the opinion, page 14:

"Where a public office is of such a nature that in accurately describing it it is necessary to state not only the title but also the time of its commencement, then failure to accurately state the date of commencement of the term will invalidate a nominating petition. On the other hand, where the public office sought is of such a nature that it may be accurately described without pin pointing the date of the commencement of the term, a slight error in the insertion of the date which does not mislead the signers of the petition does not invalidate the petition."

The situation you have described is, however, quite different. Pursuant to Sections 1907.051 and 3513.261, Revised Code, a candidate for election for county court judge must state in his statement of candidacy that he is a candidate for a full term or for an unexpired term ending on a date certain; this the candidate failed to do. He erroneously stated that he was a candidate for a full term. There was no full term for which an election could have been held on November 3, 1964. It is my opinion that this incorrect designation of the term for which election was sought caused the nominating petition to be void and the facts that his name appeared on the ballot and the electors cast their votes in his favor can have no effect.

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

1. A nominating petition filed pursuant to Sections 1907.051 and 3513.261, Revised Code, is void where it states that the candidate is seeking election at the general election in November to a full term as county court judge and there is no full term for which an election could be held at that time;
2. A favorable vote cast by the electors for such candidate for a full term as judge of the county court is ineffective; such favorable vote can not be construed to be an election of the candidate for an unexpired term where the question presented on the ballot was election for a full term.