OPINION NO. 2000-033

Syllabus:

1. After the primary election, a county board of elections has no authority to remove from the general election ballot the name of a candidate, who was elected at the primary election as a political party's nominee for office, on the basis that the candidate was, at the time he filed his declaration of candidacy and campaigned for office, a classified employee who engaged in partisan political activity in violation of R.C. 124.57. Further, there is no prohibition in current law against the individual continuing to be a candidate in the general election, even though he was convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.

2. There is no prohibition in current law against an individual holding public office where he filed a declaration of candidacy and campaigned for such office in a partisan election in violation of R.C. 124.57. Nor is there a prohibition in current law against an individual holding public office where he has been convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.

To: James F. Stevenson, Shelby County Prosecuting Attorney, Sidney, Ohio
By: Betty D. Montgomery, Attorney General, September 7, 2000

You have asked several questions concerning an individual who, while serving in the classified civil service, became a candidate for county sheriff, and was then convicted under R.C. 124.62 of engaging in political activity in violation of R.C. 124.57.

You have explained that a person who was employed as a deputy sheriff was elected in the last primary election to be the Democratic nominee for the office of county sheriff. This deputy sheriff served in the classified civil service at the time he circulated his petition and filed his declaration of candidacy and petition with the county board of elections.

As explained more fully below, R.C. 124.57 prohibits an employee in the classified service from engaging in partisan political activity. The board of elections certified the deputy sheriff's candidacy for the primary ballot, although the board was apparently not aware of the fact that he was employed in the classified service. No one filed a protest

challenging his eligibility to file and run as a candidate. No Republican candidate filed for the office of sheriff, but one Independent candidate has filed to be on the ballot as a candidate for sheriff in the general election.

As a result of the employee's candidacy, a prosecution was commenced against him in municipal court pursuant to R.C. 124.62, and subsequent to the submission of your original opinion request, the individual pled no contest to the charge. The court accepted his plea and found him guilty under R.C. 124.62 of engaging in political activity in violation of R.C. 124.57, which the court determined to be an unclassified misdemeanor. The candidate was fined five hundred dollars with two hundred and fifty dollars suspended. He resigned his position as deputy sheriff the day before he pled no contest and was convicted.

Your questions regarding this situation are as follows:

1. Can the individual continue to be a candidate for office or does the county board of elections have the authority to remove his name from the ballot?

2. If the individual may continue to be a candidate and is elected at the general election to the office of county sheriff, may he assume that position or would he be disqualified from assuming the position as a result of his being a candidate while a classified employee? Does the candidate's conviction under R.C. 124.62 operate to disqualify him from assuming the office of county sheriff?

3. If, for any reason, the individual is disqualified from either continuing his candidacy or assuming the office of sheriff if elected, would the Independent candidate assume the office of sheriff or would the entire election be considered a nullity, thereby necessitating a special election?

Before addressing your specific questions, it will be useful to set forth the provisions of state law that prohibit classified employees from engaging in political activity. R.C. 124.57(A) reads as follows:

> No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

See generally R.C. 124.01(C) (defining the "classified service"); R.C. 124.11 (dividing the civil service into the unclassified service and the classified service). *See also Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980).

The courts have interpreted R.C. 124.57 as prohibiting an employee in the classified service from engaging in *partisan* political activity. *See Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph 2) (the term "politics" as used in what is now R.C. 124.57 "must be defined as politics in its narrower partisan sense"). *See also Gray v. City of Toledo*, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971) (upholding the constitutionality of R.C. 124.57, using the narrow interpretation of "politics" adopted in *Heidtman*, and indicating that if "politics" were read more broadly as referring to "the science of government and civil polity," R.C. 124.57 would be unconstitutional). Based on this judicial interpretation of R.C. 124.57, the Director of the Department of Administrative Services has adopted 2 Ohio Admin. Code 123:1-46-02, setting forth the political activities in which classified employees may and may not engage. Division (C)(1) of rule 123:1-46-02 states that a classified employee is prohibited from being a candidate for public office in a partisan election. *See also* 1996 Op. Att'y Gen. No. 96-035 at 2-138 ("[a] classified employee takes part in a partisan activity when he becomes a candidate for public office in a partisan election"); 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085. *Cf.* 1991 Op. Att'y Gen. No. 91-065 (a collective bargaining agreement may provide that classified employees may engage in partisan politics, and the agreement will prevail over R.C. 124.57). In this instance, the individual, while a classified employee, filed to be a candidate in a partisan election. *See* R.C. 311.01; R.C. 3505.03; R.C. 3513.01. *See also* 1996 Op. Att'y Gen. No. 96-035 at 2-137 ("the election to the office of county sheriff is on a partisan basis"); 1984 Op. Att'y Gen. No. 84-070 at 2-225 n.2.

R.C. 124.62 reads:

> After a rule has been duly established and published by the director of administrative services or by any municipal or civil service township civil service commission according to this chapter, *no person shall* make an appointment to office or select a person for employment contrary to such rule, or *willfully refuse or neglect to comply with or to conform to the sections of this chapter, or willfully violate any of the sections*. If any person who is convicted of violating this section holds any public office or place of public employment, such office or position shall by virtue of such conviction be rendered vacant. (Emphasis added.)

Whoever is found to have violated R.C. 124.62 "shall be fined not less than fifty nor more than five hundred dollars or be imprisoned not more than six months, or both." R.C. 124.99(A). *See also* R.C. 124.64 (prosecutions for the violation of R.C. 124.01-.64, or the rules and regulations of the Director of Administrative Services established in conformity thereto). As noted above, a prosecution was commenced against the individual in municipal court, and he was found guilty under R.C. 124.62 of engaging in political activity in violation of R.C. 124.57 after pleading no contest to the charge.[1]

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[1]As part of your request for an opinion, you asked what remedies are available to prevent the employee from continuing to engage in political activity, other than to file additional charges against him for violating R.C. 124.62. Your opinion request was submitted at a time when the individual was still employed as a deputy sheriff. Because the individual has resigned from his county employment, it is no longer necessary to address this question. *See generally* R.C. 124.34 (provides that the tenure of every employee in the classified service "shall be during good behavior and efficient service," and sets forth the grounds for which a classified employee may be removed or otherwise disciplined, including any violation of R.C. Chapter 124 or the rules of the Director of the Department of Administrative Services or "any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfea-

You have first asked, in light of the foregoing, whether the individual may continue to be a candidate for office or whether the county board of elections has the authority to remove his name from the ballot. A board of elections is empowered to judge the qualifications of a candidate for office. *See* R.C. 3501.11(K) (requiring a board of elections to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers"); R.C. 3501.39 (grounds for board of elections to reject a candidacy); R.C. 3513.05 (authority of board of elections to conduct hearing on protest filed against the candidacy of any person filing a declaration of candidacy "and determine the validity or invalidity of the declaration of candidacy and petition"); R.C. 3513.262 (authority of board of elections to determine validity of nominating petitions). *See, e.g., State ex rel. Shumate v. Portage County Bd. of Elections*, 64 Ohio St. 3d 12, 16, 591 N.E.2d 1194, 1197-98 (1992) (a board of elections "has not only the authority to review R.C. 311.01(B)'s qualification requirements for the office of sheriff, but also the duty to do so whenever those qualifications are challenged in a protest"); *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986) (upholding the refusal of a board of elections to certify the candidacy of a person who filed for the office of appeals court judge, on the grounds he was seventy years old and thus could not, pursuant to Ohio Const. art. IV, § 6(C), qualify for office); *Wiss v. Cuyahoga County Bd. of Elections*, 61 Ohio St. 2d 298, 401 N.E.2d 445 (1980) (a board of elections has authority, *sua sponte*, to disqualify a potential candidate for county school board on the basis that he does not live within the district, since R.C. 3311.052 requires board members to reside in the school district and he is ineligible for the office he seeks); *State ex rel. Jedlicka v. Board of Elections*, 20 Ohio St. 2d 13, 251 N.E.2d 862 (1969) (upholding the board of elections' determination that a person who wished to file for office was disqualified from being a candidate pursuant to R.C. 3517.11 which, at the time, disqualified any person who had previously been a candidate and failed to file a statement of campaign receipts and expenses from being a candidate in any future election for five years); *State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623, 628 (1955), *overruled in part on other grounds by State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982) (holding that a board of elections has the authority to determine whether one who has filed to be a candidate for the office of municipal court judge has engaged in the practice of law

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sance in office, or conviction of a felony"); *Jackson v. Coffey*, 52 Ohio St. 2d 43, 368 N.E.2d 1259 (1977) (partisan political activity, as proscribed for classified employees under R.C. 124.57, constitutes a "failure of good behavior" for purposes of R.C. 124.34 and is an adequate basis for removal of an employee who engages in such behavior); 2 Ohio Admin. Code 123:1-46-02(D) (a classified employee who engages in prohibited political activity is subject to removal from his position); 1983 Op. Att'y Gen. No. 83-095 (the power of an appointing authority to remove or otherwise discipline, in conformity with R.C. 124.34, a classified employee who has engaged in conduct prohibited by R.C. 124.57 is discretionary, not mandatory, in nature). *See also* R.C. 124.62 ("[i]f any person who is convicted of violating this section holds any public office or place of public employment, such office or position shall by virtue of such conviction be rendered vacant"); R.C. 124.63 (right of taxpayer to bring action to restrain the payment of compensation to any person holding an office or place of employment in violation of R.C. 124.01-.64). *Cf. Painter v. Graley*, 70 Ohio St. 3d 377, 639 N.E.2d 51 (1994) (an unclassified employee has no right, guaranteed under the Ohio Constitution, to seek partisan elected office, and may be discharged by his employer for doing so, even though neither R.C. 124.57 nor local ordinance prohibits an unclassified employee from running for office in a partisan election); 1994 Op. Att'y Gen. No. 94-087 (possible restrictions on ability of an unclassified employee to be a candidate in a partisan election).

for at least five years, as required by R.C. 1901.06, stating that "the board of elections has statutory authority to determine whether [a possible candidate], if elected, could successfully assume the office he seeks"); 1984 Op. Att'y Gen. No. 84-025 (syllabus) ("a board of elections may not certify as valid the petition of a candidate for county office who does not reside in the county in which he seeks office"). A board of elections may invalidate a candidacy *sua sponte* or upon a written protest. R.C. 3501.39. *See also* R.C. 3513.13 ("primary election ballots shall contain the names of all persons whose declarations of candidacy and petitions have been determined to be valid").[2]

However, in this instance, the board of elections lacks the authority to invalidate the former deputy sheriff's candidacy for two reasons. First, it has been previously decided that a classified employee is not, on that basis alone, disqualified from being a candidate for, or holding, an elective partisan office, although his political activity may subject him to removal from his classified position and criminal prosecution. 1954 Op. Att'y Gen. No. 4058, p. 367 considered the ability of a classified employee to be a candidate for, and hold, elective office, and states at 373, "if the person concerned is already occupying the classified position he would not, ipso facto, be ineligible to declare his candidacy and to prosecute said candidacy with an end to occupying a public office," although he would be subject to the penalties of R.C. 124.62 and R.C. 124.99, and his declaration of candidacy would be a ground for removal under R.C. 124.34. *See also* 1962 Op. Att'y Gen. No. 3005, p. 361 (partially overruled on other grounds by 1988 Op. Att'y Gen. No. 88-020 and 1983 Op. Att'y Gen. No. 83-095) (a classified employee who becomes a candidate for office is subject to removal from his classified position under R.C. 124.34 regardless of whether he is elected or not).

This conclusion is supported by contrasting the purpose and language of R.C. 124.57 to that of statutes which specifically make compliance with their requirements a qualification for candidacy. R.C. 124.57 restricts a classified employee from engaging in any partisan political activity, other than to vote as he pleases and to express his political opinions. Rather than being related to the electoral process, the purpose of R.C. 124.57, as part of the state civil service law, is to ensure the integrity and efficiency of the public service, and to prevent classified employees "from being in any way obligated to political parties or civic officers for civil service positions, or from having the power to ingratiate themselves with the parties or elected officials by political activity." *Heidtman v. City of Shaker Heights*, 163 Ohio St. at 119, 126 N.E.2d at 143. *See also Gray v. City of Toledo*, 323 F. Supp. at 1285 and 1286 ("[a] government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly significant" and

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[2]R.C. 3501.39, authorizing a county board of elections to invalidate a candidacy, either upon written protest or *sua sponte*, was enacted in 1986. 1985-1986 Ohio Laws, Part III, 4919 (Am. Sub. H.B. 555, eff. Feb. 26, 1986). Prior to that time, courts found that a board's power under R.C. 3501.11(K) to review and certify the validity of petitions and nomination papers, and R.C. 3513.13, providing that primary election ballots must "contain the names of all persons whose declarations of candidacy and petitions have been determined to be valid," constituted sufficient authority for a board, *sua sponte*, to reject a candidacy without a prior protest. *See State ex rel. Ehring v. Bliss*, 155 Ohio St. 99, 97 N.E.2d 671 (1951); *State ex rel. McGinley v. Bliss*, 149 Ohio St. 329, 78 N.E.2d 715 (1948). *See also Wiss v. Cuyahoga County Bd. of Elections*, 61 Ohio St. 2d 298, 401 N.E.2d 445 (1980); 1956 Op. Att'y Gen. No. 6919, p. 601. *Cf. State ex rel. Harbarger v. Cuyahoga County Bd. of Elections*, 75 Ohio St. 3d 44, 46, 661 N.E.2d 699, 701 (1996) (holding, after the enactment of R.C. 3501.39, that a board of elections may not rely on its power under R.C. 3501.11 to review a declaration of candidacy or nomination petition after the time deadlines in R.C. 3501.39 have passed).

"partisan political activity by civil servants is a direct and viable threat to an efficient and honest public service").

The restrictions of R.C. 124.57 are triggered by an individual's status as a classified employee in the public service, and the consequences for violating these restrictions, as discussed above, fall primarily on the individual's position of employment. *See, e.g.*, R.C. 124.34; R.C. 124.62; R.C. 124.63. The fact that an individual may be a classified employee does not, however, reflect on the ability of that individual to perform the duties of the elective office he seeks, and there is nothing in R.C. 124.57 or elsewhere that makes compliance with R.C. 124.57 a qualification for candidacy, or that subjects a candidate seeking nomination or election in a partisan election to ballot disqualification if he is a classified employee.

In contrast, constitutional and statutory provisions that impose qualifications for candidacy or holding public office are intended to protect the integrity of the state's electoral system, such as minimizing frivolous candidacies, to ensure that those who seek and hold office possess the knowledge, training, experience, and independence of judgment necessary to enable them to perform the duties of office, and to otherwise promote state interests relevant to the functioning of a specific elective office. *See Cicchino v. Luse*, No. C-2-99-1174 (S.D. Ohio Feb. 1, 2000) (unreported); *State ex rel. Keefe v. Eyrich; State ex rel. Schenck v. Shattuck; Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50 N.E. 6 (1898); *Bennett v. Celebrezze*, 34 Ohio App. 3d 260, 518 N.E.2d 25 (Lorain County 1986). The language used in these constitutional and statutory restrictions explicitly ties the qualification or requirement to one's eligibility to be a candidate or officeholder.[3] For example, R.C. 3513.05 authorizes a board of elections to reject a candidacy if the candidate is not an elector of the territory in which he seeks a party nomination or election to office. *See State ex rel. Ehring v. Bliss*, 155 Ohio St. 99, 97 N.E.2d 671 (1951); 1984 Op. Att'y Gen. No. 84-025. *Cf. State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 170 N.E.2d 428 (1960). R.C. 315.02, setting forth the qualifications for county engineer, states that, "[n]o person is eligible in any county as a candidate for such office or shall be elected or appointed thereto unless he is a registered professional engineer and a registered surveyor, licensed to practice in this state." *See State ex rel. Barklow v. Appel*, 165 Ohio St. 498, 137 N.E.2d 674 (1956); *State ex rel. Kirk v. Wheatley*, 133 Ohio St. 164, 12 N.E.2d 491 (1938); *State ex rel. Cox v. Riffle*, 132 Ohio St. 546, 9 N.E.2d 497 (1937). R.C. 311.01(B), setting forth the qualifications for county sheriff, states that, "no person is

[3]Provisions which set forth qualifications for holding office, rather than being a candidate for office, have been interpreted as authorizing boards of elections to reject the candidacy of a person who does not meet them. *See State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623, 628 (1955), *overruled in part on other grounds by State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982) ("'one who would be ineligible to hold a public office has no right to be a candidate for election thereto, since his election would be a nullity'") (citation omitted)). Again, these provisions explicitly make eligibility to hold office dependent upon compliance with the specified requirement or qualification. *See, e.g.*, Ohio Const. art. IV, § 6(C) ("[n]o person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years") and *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986); R.C. 1901.06 ("[a] municipal judge shall have been admitted to the practice of law in this state and shall have been, for a total of at least six years preceding his appointment or the commencement of his term, engaged in the practice of law in this state or served as a judge of a court of record") and *State ex rel. Flynn v. Bd. of Elections*.

eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements" specified therein. *See State ex rel. Shumate v. Portage County Bd. of Elections.*

There is nothing in R.C. Chapter 124, Title 35, or elsewhere that disqualifies a classified employee from being a candidate for an office in a partisan election. The consequences of such candidacy are specified as being criminal liability and removal from the classified position. It is apparent that if the General Assembly intended for compliance with R.C. 124.57 to be a qualification for candidacy, it would have explicitly so stated as it has done in the examples set forth above. In keeping with the precept that election laws must be construed in favor of persons seeking to hold office so as to avoid restricting the right of voters to choose from all qualified candidates, *see State ex rel. Lynch v. Cuyahoga County Bd. of Elections*, 80 Ohio St. 3d 341, 686 N.E.2d 498 (1997); *State ex rel. Hawkins v. Pickaway County Bd. of Elections*, 75 Ohio St. 3d 275, 662 N.E.2d 17 (1996), we conclude that compliance with R.C. 124.57 is not a qualification for candidacy, and a classified employee is not disqualified from being a candidate in a partisan election, although he may face criminal prosecution and removal from his classified position for pursuing that candidacy.

Thus, even if the board of elections had been aware of the candidate's employment as a classified employee when he filed his declaration and petition, prior to the primary, it would have had no authority to reject the employee's candidacy on that basis.

Secondly, even if violation of R.C. 124.57 were a basis for disqualifying a classified employee's candidacy for partisan office, the board did not, in this instance, act in a timely manner to decide the matter, and is thus precluded at this point in the election cycle from taking action to disqualify the individual from being a candidate for sheriff. Any determination by a board of elections as to the validity of a person's candidacy must be made well before the primary election. *See* R.C. 3501.39(A)(3) and (B) (a board of elections may not act, *sua sponte*, to invalidate a person's candidacy after the fiftieth day prior to the election at which he seeks nomination to office); R.C. 3505.13 (a protest filed pursuant to that section must be filed no later than sixty-four days before the primary); *State ex rel. Harbarger v. Cuyahoga County Bd. of Elections*, 75 Ohio St. 3d 44, 661 N.E.2d 699 (1996); *State ex rel. Klein v. Cuyahoga County Bd. of Elections*, 102 Ohio App. 3d 124, 656 N.E.2d 1031 (Cuyahoga County 1995) (the right to be a candidate must be established prior to the primary election; there is no statutory means to protest a candidate on his qualifications after the primary election). *See also State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St. 3d 289, 291, 649 N.E.2d 1205, 1207 (1995) ("a writ of prohibition may issue to prevent the placement of names or issues on a ballot even though the protest hearing has been completed, as long as the election has not yet been held"); *Portis v. Summit County Bd. of Elections*, 67 Ohio St. 3d 590, 592, 621 N.E.2d 1202, 1203 (1993) ("[t]he vehicle for challenging a candidate's qualifications ... is a protest," and "[e]lection contests may not be used as a vehicle for asserting an untimely protest").

In this instance, the board of elections accepted the employee's declaration of candidacy and petition, and placed his name on the primary election ballot. He was elected at the primary election to be the Democratic nominee for the office of county sheriff. There is no statutory provision authorizing the board of elections to remove the name of a successful primary election candidate from the general election ballot or otherwise invalidate his candidacy. *See* R.C. 3505.03 (on the general election ballot "shall be printed the names of all candidates for election to offices ... who were nominated at the most recent primary election as candidates of a political party").

Although, as you state, the fact that the candidate was a classified employee "apparently escaped the attention" of the board of elections, the candidate did not conceal his employment status. *See State ex rel. Klein v. Cuyahoga County Bd. of Elections* (the failure to act on a matter that is of public record reflects a lack of due diligence on the part of the one challenging the candidate's qualifications rather than concealment on the part of the candidate). Any attempt by the board of elections, or by any other person, to invalidate the nominee's candidacy after the primary election would likely be considered moot or denied because of laches. *See State ex rel. White v. Franklin County Bd. of Elections*, 65 Ohio St. 3d 45, 48, 600 N.E.2d 656, 659 (1992) (holding that laches required the court to deny the relators' writ of prohibition to prevent the board of elections from accepting a candidate's nomination in the primary and placing his name on the general election ballot, where the complaint was not filed until more than two months after the nomination was certified, stating, "[w]e have routinely dismissed complaints or otherwise denied extraordinary relief in election-related cases due to laches"); *State ex rel. Snider v. Stapleton*, 65 Ohio St. 3d 40, 600 N.E.2d 240 (1992) (the matter of appellant's eligibility to seek election as county sheriff was moot because the primary election had passed); *State ex rel. Pendell v. Adams County Bd. of Elections*, 40 Ohio St. 3d 58, 61 n. 1, 531 N.E.2d 713, 715 n. 1 (1988) (even if relator's challenge to the qualifications of two other candidates was not denied on other grounds, it would be dismissed "as moot because the primary is over"); *Maranze v. Montgomery County Bd. of Elections*, 167 Ohio St. 323, 148 N.E.2d 229 (1958) (dismissing a writ of mandamus to nullify certificates of nomination because, the candidates having been elected at the general election, the question was moot); *State ex rel. Whetsel v. Murphy*, 122 Ohio St. 620, 621, 174 N.E. 252, 253 (1930) (even though it was unlawful to place the letters, "M.D.," after the name of a candidate on the primary ballot, "[t]he primary election having been closed and the result declared the court will not order the choice of the people at the primary election to be disregarded"); *State ex rel. Klein v. Cuyahoga County Bd. of Elections*, 102 Ohio App. 3d at 129, 656 N.E.2d at 1035 ("protests and other matters relating to candidacies become moot after the election has been held"). *See also State ex rel. Patrick v. Board of Elections*, 174 Ohio St. 12, 185 N.E.2d 433 (1962); *State ex rel. Keller v. Loney*, 169 Ohio St. 394, 159 N.E.2d 896 (1959). *But cf. State ex rel. Kelly v. Cuyahoga County Bd. of Elections*, 70 Ohio St. 3d 413, 639 N.E.2d 78 (1994) (hearing appeal, after the primary election, from lower court's refusal to remove candidate from primary ballot; the court affirmed the court of appeals without discussion of the timeliness issue).

Furthermore, a board of elections' lack of authority to disqualify the candidate in this instance is not altered by the fact that the candidate was convicted under R.C. 124.62, regardless of whether the board sought to act before or after the primary. R.C. 311.01(B)(5) states that no person is eligible to be a candidate for sheriff if the person has been "convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States," or if the person has been "convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state." *But cf.* note 5, *infra.* A conviction under R.C. 124.62 is an unclassified misdemeanor, not a first degree misdemeanor or felony, and the municipal court so found in considering this individual's case. *See* R.C. 2901.02(F); *State v. D.M. Pallet*

Service, Inc., No. 94APC02-195, 1994 Ohio App. LEXIS 5199 (Franklin County Nov. 15, 1994).[4]

It also does not appear that violation of R.C. 124.62 is an offense involving moral turpitude. An offense involving moral turpitude is one involving "[c]onduct that is contrary to justice, honesty, or morality." *Black's Law Dictionary* 1026 (7th ed. 1999). *See also In re McBride*, 164 Ohio St. 419, 425, 132 N.E.2d 113, 117 (1956) ("'turpitude' implies something extremely bad, turpitude being derived from the Latin word, 'turpis,' meaning vile"). It is difficult to characterize running for public office as being something that is "extremely bad" or "contrary to justice, honesty, or morality," even though a certain class of public employees is prohibited by the civil service law from doing so. This is especially true where an employee has not abused his authority or position or misused public resources to promote his candidacy.

There are no other statutes prohibiting a person who has been convicted of an unclassified misdemeanor from being a candidate for office. Thus, in response to your first question, after the primary election, a county board of elections has no authority to remove from the general election ballot the name of a candidate, who was elected at the primary election as a political party's nominee for office, on the basis that the candidate was, at the time he filed his declaration of candidacy and campaigned for office, a classified employee who engaged in partisan political activity in violation of R.C. 124.57. Further, there is no prohibition in current law against the individual continuing to be a candidate in the general election, even though he was convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.

Your second question is whether the individual, if he is elected county sheriff at the general election, may assume office or whether he would be disqualified from doing so since his candidacy was prohibited by R.C. 124.57 and he was convicted under R.C. 124.62. Just as there is nothing in R.C. Chapter 124 or elsewhere that makes compliance with R.C. 124.57 a qualification for candidacy, there is nothing providing that violation of R.C. 124.57 disqualifies a classified employee from holding office. This is in contrast to other statutory and constitutional provisions, examples of which are set forth above, that specifically make compliance with their requirements a qualification for holding office. 1962 Op. Att'y Gen. No. 3005, p. 361 (partially overruled on other grounds by 1988 Op. Att'y Gen. No. 88-020 and 1983 Op. Att'y Gen. No. 83-095), concluded that if a classified employee is elected to office, he is not automatically precluded by R.C. 124.57 from qualifying and serving in the office to which he was elected, but is subject to removal from his classified position. *See also* 1954 Op. Att'y Gen. No. 4058, p. 367 (a person may simultaneously occupy elective office and a classified position in the civil service in violation of R.C. 124.57 without automatically vacating either position or office but is subject to removal from his classified position under R.C. 124.34).

Furthermore, a conviction under R.C. 124.62 does not prevent the candidate from assuming and retaining the office of sheriff if he is elected. As discussed above, R.C. 311.01(B)(5) does not apply because a conviction under R.C. 124.62 is an unclassified misdemeanor. There are other statutes prohibiting or disqualifying a person convicted of a

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[4]The penalties for violating R.C. 124.62 are a fine of not less than fifty dollars nor more than five hundred dollars, or imprisonment for not more than six months, or both. R.C. 124.99(A). Conviction of a first degree misdemeanor is punishable by imprisonment for not more than six months, or a fine of not more than $1,000, or both. R.C. 2929.21(B)(1),(C)(1).

crime from holding office, but they do not apply to persons convicted of a misdemeanor.[5] *See, e.g.*, R.C. 2921.02(F) (a public servant who is convicted of bribery, a third degree felony, is "forever disqualified from holding any public office, employment, or position of trust in this state"); R.C. 2921.41(C)(1) (a public official who is convicted of or pleads guilty to theft in office, a felony, is "forever disqualified from holding any public office, employment, or position of trust in this state"); R.C. 2961.01 ("[a] person convicted of a felony under the laws of this or any other state or the United States, unless the conviction is reversed or annulled, is incompetent to hold an office of honor, trust, or profit"). *See also State v. Bissantz*, 40 Ohio St. 3d 112, 116, 532 N.E.2d 126, 130 (1988) ("a person convicted of bribery in office under R.C. 2921.02(B) is forever barred from holding public office in this state, even where such conviction is subsequently expunged").

In response to your second question, therefore, there is no prohibition in current law against an individual holding public office where he filed a declaration of candidacy and campaigned for such office in a partisan election in violation of R.C. 124.57. Nor is there a prohibition in current law against an individual holding public office where he has been convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.

Because we have concluded that the individual is not disqualified from continuing his candidacy or assuming the office of sheriff if elected, it is unnecessary to address your last question asking about the impact disqualification would have on the validity or results of the primary election.

Therefore, it is my opinion, and you are so advised, as follows:

1. After the primary election, a county board of elections has no authority to remove from the general election ballot the name of a candidate, who was elected at the primary election as a political party's nominee for office, on the basis that the candidate was, at the time he filed his declaration of candidacy and campaigned for office, a classified employee who engaged in partisan political activity in violation of R.C.

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[5]Indeed, it is arguable that the General Assembly may not constitutionally enact such a statute. Ohio Const. art. V § 4 provides that the "General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony." In *Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50, 50 N.E. 6, 8 (1898), the court held that this section "is not in itself a grant of power, but a limitation upon power otherwise generally granted." The court continued that had this section and Ohio Const. art. II, § 5 (prohibiting a person convicted of embezzling public funds from holding any office) "not been adopted, the general assembly, by force of the general grant of legislative power, could have provided a permanent disqualification from voting, and from holding office, for causes or offenses other than those enumerated in the sections above cited." *Id.* The court concluded, however, that the statute in question, declaring an office to be vacant where the candidate elected to that office engaged in unlawful campaign practices, was within the power of the General Assembly to enact. *Cf. In re Removal of Coppola*, 155 Ohio St. 329, 98 N.E.2d 807 (1951) (Ohio Const. art. V, § 4 does not limit the power of the General Assembly to establish reasonable qualifications for public office, and a statute providing that a member of council, who had violated the prohibition against having an interest in the expenditure of money by the municipality, was disqualified from holding any office in that municipality did not violate Ohio Const. art. V, § 4).

124.57. Further, there is no prohibition in current law against the individual continuing to be a candidate in the general election, even though he was convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.

2. There is no prohibition in current law against an individual holding public office where he filed a declaration of candidacy and campaigned for such office in a partisan election in violation of R.C. 124.57. Nor is there a prohibition in current law against an individual holding public office where he has been convicted under R.C. 124.62 of engaging in partisan political activity in violation of R.C. 124.57.