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1. ELECTION EXPENDITURES—SUCCESSFUL CANDIDATE —NOMINATION FOR COUNTY OFFICE—WITHIN TEN DAY PERIOD, STATEMENT OF EXPENDITURES FILED —BOARD OF ELECTIONS FOUND STATEMENT INCORRECT—WHERE BOARD FOUND ERROR NOT WILFUL—OMISSION WOULD NOT APPEAR TO "DISCLOSE A VIOLATION OF THE LAW"—AMENDED STATEMENT MAY BE ACCEPTED—IF A FULL, TRUE AND ITEMIZED STATEMENT FILED, BOARD MAY ISSUE CANDIDATE CERTIFICATE OF NOMINATION—SECTIONS 4785-186, 4785-187, 4785-189, 4785-196 G.C.

2. WHERE CANDIDATE SWORE TO FALSE STATEMENT FILED—DUTY OF BOARD TO REPORT FACTS TO PROSECUTING ATTORNEY—BOARD WARRANTED TO REFUSE TO ISSUE CERTIFICATE OF NOMINATION PENDING INVESTIGATION BY PROSECUTING ATTORNEY.

SYLLABUS:

1. Where a successful candidate for nomination for a county office files, within the ten day period prescribed by Section 4785-186, General Code, a statement of expenditures with the board of elections and such board, in investigating the correctness or falsity of such statement, as provided by Section 4785-189, General Code, determines that such statement is incorrect in that such candidate failed to list all of his campaign expenditures, but the board further determines that such omission was inadvertent and not made wilfully, such omission would not appear to "disclose

a violation of the law" within the meaning of Section 4785-187, General Code, and the board may accept an amended or corrected statement of expenditures, even after the ten day period, and if such amended or corrected statement is found to contain a full, true and itemized statement of such expenditures, issue to such candidate a certificate of nomination.

2. Where the board of elections determines that the facts in its possession indicate a probability that such candidate subscribed and swore to such statement of expenditures, knowing the same to be false, it is the duty of such board, as provided by Section 4785-187, General Code, to promptly report such facts to the prosecuting attorney for such action as may be appropriate, and the board would be warranted in refusing to issue a certificate of nomination on the basis of an amended or corrected statement of expenditures pending an investigation by the prosecuting attorney of such matter.

Columbus, Ohio, July 24, 1952

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading in part as follows:

> " 'X' was a candidate for sheriff in the May Primary Election. Within the ten days following such election 'X' filed a Statement of Expenditures with the Board of Elections. The Board had a hearing on said statement on June 26, at which time it appeared that the candidate had not listed all of his expenditures. He testified that he had spent various amounts for printing and other campaign expenses which he had not listed. The Board specifically asked the following questions:
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> > "1. If 'X' now submits an amended Statement of Expenditures, since the statutory ten-day period has elapsed, would the Board have authority to accept said amended statement?
> >
> > "2. Shall the Board issue a Certificate of Nomination to such candidate?"

Your request involves a consideration of those sections of the election laws of Ohio relating to campaign expenditures.

Section 4785-184, General Code, limits the expenditure of campaign funds to certain enumerated purposes and prohibits a candidate for election to public office from expending an amount in excess of that prescribed in the formula there set forth. The section provides that "Any candidate

for a public office who shall expend for the purpose above mentioned an amount in excess of the amounts herein specified shall be guilty of a corrupt practice." By reference to Section 4785-196, General Code, it is clear that expenditures in excess of the amount specified in Section 4785-184 constitute a crime and result in forfeiture of office or nomination. Section 4785-196 reads as follows:

> "Whoever violates the provisions of this act relating to expenditures in a primary or election by expending a sum in excess of the amount allowed by law, shall be guilty of corrupt practices, and upon conviction thereof shall be fined not less than one hundred and not more than five hundred dollars, or imprisoned in the county jail not to exceed six months, or both; and if he shall have been nominated or elected to office, he shall in addition thereto have forfeited such nomination or such office."

There is no indication in your letter that the candidate in question expended an amount in excess of the limitation prescribed by Section 4785-184, General Code. The above discussion serves only to illustrate the fact that the General Assembly has chosen to make certain acts the basis for forfeiture of nomination or election. We, therefore, must examine the applicable statutes to determine whether the General Assembly has provided that the filing of an incorrect statement of expenditures per se is a basis for forfeiture of nomination.

Sections 4785-186, 4785-187 and 4785-189, General Code, read in pertinent part as follows:

Section 4785-186, General Code:

> "Every candidate * * * shall, not later than 6:30 p. m. of the tenth day, after such election, file as hereinafter provided a full, true, and itemized statement, subscribed and sworn to before an officer authorized to administer oaths, setting forth in detail the monies or things of value so contributed, promised, received or expended, and the names of the persons from whom received, and to whom paid, and the object or purpose for which expended; * * * All such statements shall be open to public inspection in the office where they are filed, and shall be carefully preserved for a period of at least two years."

Section 4785-187, General Code:

> "If the statement prescribed by Section 4785-186 of the General Code relates to the nomination or election of persons whose candidacy for nomination or election was submitted to

electors throughout the entire state, such statement shall be filed with the secretary of state. * * * If such statement relates to the nomination or election of persons whose candidacy for nomination or election was submitted only to electors within a county it shall be filed with the board of elections of such county, * * *. In the event of a failure to file such a statement with a board of elections as required by law, or in the event such a statement filed with a board of elections *appears* to disclose a *violation of law*, such board shall promptly report such facts to the prosecuting attorney of the county of such board, who shall forthwith institute such civil or criminal proceedings as may be appropriate. No certificate of nomination or election shall be issued to a person, nor shall a person elected to an office or position enter upon the performance of the duties of such office or position *until* he shall have fully complied with the law relating to statements as herein and in sections 4785-184 and 4785-186 of the General Code provided." (Emphasis added.)

Section 4785-189, General Code:

"Upon presentation to the court of common pleas or any judge thereof, of a certified petition setting forth any failure to comply with, or any violation of the provisions of this act relating to such statements, or of any falsification of any such statement, and upon the giving of security as herein provided, such judge shall proceed to a summary investigation of the charges made in the petition. At the time of presenting such petition the petitioner or petitioners shall file with the clerk of the courts an undertaking in the sum of two hundred and fifty dollars with sureties to be approved by the court or judge thereof conditioned to pay such costs in such proceedings as may be adjudged against such petitioners. The proceedings upon, and the investigation of, the charges set forth in the petition shall take precedence over all other actions or proceedings in said court or before said judge; and in case of appeals in the court of appeals or supreme court. If the judge shall find the statements as filed to be false or any *willful intent* to violate or defeat the provisions of this act, he shall forthwith transmit a copy of his decision and of the evidence to the prosecuting attorney of the county wherein such statements should be filed, and to the attorney general if such statement should be filed with the secretary of state, *with directions to such prosecuting attorney to present the same to the next grand jury in the county* or with directions to the attorney general to prosecute the case on behalf of the state. *Any candidate nominated or elected to an office found guilty of violating the provisions of this act relating to expenditures for campaign purposes shall thereby forfeit his nomination or his election to such office.* A candidate nominated or elected to an office whose nomination or election thereto has been annulled and set aside by reason of any

> offense specified in this act shall not, during the period fixed by law occupy or perform the duties of such office or be appointed to fill any vacancy in such office. *The board of elections or the secretary of state may summon any candidate or other persons filing such statements and question them under oath relative to the correctness or falsity of any such statement.*"
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> (Emphasis added.)

While, as contrasted with the statutes under consideration in the case of Belknap v. Board of Elections, 3 O.App. 190, the last sentence of Section 4785-189 clearly authorizes a board of elections to inquire into the correctness or falsity of the statement of a candidate, and the last sentence of Section 4785-187 clearly authorizes such board to withhold a certificate of nomination *until* a full, true and itemized statement of expenditures has been filed, I find no provisions of the above statutes, or of any other statutes, which would authorize such board to *forfeit* a nomination solely because the statement theretofore filed was incorrect. If, of course, the candidate swore to a false statement, knowing it to be false, an entirely different situation is presented.

In speaking of former Section 5175-1, General Code, the predecessor of the statutes under consideration, it was stated by Jones, J. in the case of Prentiss v. Dittmer, 93 Ohio St., 314, at page 319:

> "Owing to the severe penalties imposed by the act, inflicting punishment by way of fines and imprisonment, the forfeiture of office and invalidating the election of the person offending, the whole scope and intent of the act is to impose such penalties on those who wilfully commit the offenses named. If intention is absent, no offense has been committed. * * *"

The Supreme Court, in a per curiam opinion, in the case of Mehling v. Moorehead, 133 Ohio St., 395, stated at page 406:

> "* * * Strictly speaking, all provisions of election laws are mandatory in the sense that they impose the duty of obedience upon those who come within their purview, but irregularities, which were not caused by fraud and which have not interfered with a full and fair expression of the voters' choice, should not effect a disfranchisement of the voters. * * *"

As further authority for the proposition that *wilful* intent to defeat the requirements of the corrupt practices act must be shown, reference should be made to the cases of State v. Long, 19 O.N.P. (N.S.), 29, and

State, ex rel. Riggs v. Jaquis, 11 O.C.D., 91. The third headnote in the Jaquis case reads:

> "The statute having pointed out the specified offenses on account of which one may forfeit his office, a court is not authorized to add other causes and declare that for such acts or omissions one may forfeit or be deprived of his office. Therefore, the Garfield law requiring statements of nomination and election expenses to be filed within ten days, contains no express provision that one who fails to comply therewith shall forfeit his office, a court has no power to so declare."

In Opinion No. 1221, Opinions of the Attorney General for 1924, page 87, Opinion No. 1813, Opinions of the Attorney General for 1928, page 595 and Opinion No. 2620, Opinions of the Attorney General for 1928, page 2178, my predecessors in office held that, although an elected officer could not enter into the performance of his duties or receive any of the emoluments of the office until a proper statement of expenditures had been filed by him, the ten day limitation for such filing was directory and not mandatory as to the *time* of filing.

It appears that in construing corrupt practices acts, the authorities out of Ohio, as well as those in Ohio, have held that technical non-compliance with such acts, not involving wilful intent or fraud, may not serve as a basis for forfeiture of nomination or election. 18 American Jurisprudence, page 339; Annotation in 103 A.L.R., 1424. Such authorities hold that in order to conform to the requirements of the statutes or to the truth, a candidate, who in good faith had theretofore filed an incorrect statement, may file an amendment correcting such statement, even after the last date for filing as prescribed by statute. Barnard v. Superior Court, 187 Mich. 560; Re Wilhelm, 111 Pa. Super. Ct., 133. The reasoning of the court in the case of Commonwealth, ex rel. Kovacs v. Schrotnick, 240 Pa. 57, is particularly in point. In this case the absence of any express provision for a forfeiture for not filing an account in connection with the provisions for penalties was held to negative any inference that a forfeiture of office was contemplated. The court noted the prohibition against the elected candidate entering upon the duties of his office until "he has filed such account" which it construed as a plain inference that he might enter upon such duties after filing such account. The language of the last sentence of Section 4785-187 is similar to that under consideration in the Kovacs case.

As heretofore noted, and as contrasted with the specific provisions of the election laws declaring a forfeiture of nomination in case of expenditures in excess of that permitted under Section 4785-184, there is no specific provision of such laws forfeiting such nomination for failure to file a full, true and itemized statement of expenditures within ten days. The only penalty for such failure prescribed by the election laws is the provision that no certificate of nomination shall be issued to a person *until* he has filed such statement. Section 4785-187, supra.

By reference to other statutes, however, it is clear that such nomination may be forfeited if it be established that such incorrect statement was filed with full knowledge by the affiant that his sworn statement in such regard was false. Under the provisions of Section 12842, General Code, such a false oath, wilfully and corruptly made, would constitute perjury, a felony under the laws of this state. Under Section 13458-1, General Code, a person convicted of a felony is incompetent to hold an office of honor, trust or profit. I think it clear that a person ineligible for office is ineligible for nomination for such office.

Since a board of elections, of course, can not convict a person of perjury, the question remains as to the responsibility of such board where its investigation of the correctness or falsity of a statement of expenditures appears to disclose a violation of the law relating thereto. Section 4785-187 provides that in the event the statement filed with the board "appears to disclose a violation of law, such board shall promptly report such facts to the prosecuting attorney of the county of such board, who shall forthwith institute such civil or criminal proceedings as may be appropriate." Thus, in the process of investigating the correctness or falsity of a statement of expenditures, it would appear that the board does have the duty of determining whether the evidence therein "appears to disclose a violation of law" relating to perjury. Such determination, of course, is a question of fact and not of law.

In this connection, however, it should be noted that prior to the last amendment to Section 4785-187, effective January 2, 1948, the word "appears" was not contained in the statute. Thus, it is evident that the board need not place itself in the position of a criminal jury which is required to determine, beyond a reasonable doubt, that there has been a violation of law. Where the facts in possession of the board are of sufficient probative value to indicate the probability that the affidavit con-

tained in the statement of expenditures was false, within the knowledge of the signer, it would be the duty of the board to promptly report such facts to the prosecuting attorney for such action as he may determine to be appropriate. In such event, I believe that the board would be warranted in refusing to issue a certificate of nomination on the basis of an amended or corrected statement of expenditures pending the investigation by the prosecuting attorney and determination of what action, if any, would be appropriate.

In specific answer to your questions, it is my opinion:

1. Where a successful candidate for nomination for a county office files, within the ten day period prescribed by Section 4785-186, General Code, a statement of expenditures with the board of elections and such board, in investigating the correctness or falsity of such statement, as provided by Section 4785-189, General Code, determines that such statement is incorrect in that such candidate failed to list all of his campaign expenditures, but the board further determines that such omission was inadvertent and not made wilfully, such omission would not appear to "disclose a violation of the law" within the meaning of Section 4785-187, General Code, and the board may accept an amended or corrected statement of expenditures, even after the ten day period, and if such amended or corrected statement is found to contain a full, true and itemized statement of such expenditures, issue to such candidate a certificate of nomination.

2. Where the board of elections determines that the facts in its possession indicate a probability that such candidate subscribed and swore to such statement of expenditures, knowing the same to be false, it is the duty of such board, as provided by Section 4785-187, General Code, to promptly report such facts to the prosecuting attorney for such action as may be appropriate, and the board would be warranted in refusing to issue a certificate of nomination on the basis of an amended or corrected statement of expenditures pending an investigation by the prosecuting attorney of such matter.

Respectfully,

C. WILLIAM O'NEILL
Attorney General