

ELECTIONS:
PRIMARY:

Depositing a written declaration of candidacy in mails is not a filing; but declaration must have been in County Clerk's office before June 8, 1934, the last day for filing.

July 2, 1934



Mr. F. M. Stamps
Marshal
City of Pleasant Hill
Pleasant Hill, Missouri

Dear Mr. Stamps:

This is to acknowledge receipt of your letter of June 14th addressed to this Department, in which you request an opinion. Your letter of request is as follows:

"We would thank you for your legal opinion on the following question.

On June 7th Mrs. Nelle Shortridge filled out her filing application for township Committeewoman for Pleasant Hill Township and to my personal knowledge this filing was mailed on June 7th, though Mr. Frank Davidson, county Court Clerk claims the paper did not reach his Office until the morning of the 11th, so says he don't think he should file same until he gets legal advice from your office.

We know this filing was made in due time, so are anxious to have an early reply from your office."

I.

Section 10254, R. S. Mo. 1929, provides as follows:

"The primary shall be held at the regular polling places in each precinct on the

Mr. F. M. Stamps

first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

Under this section the primary this year will be held August 7th, 1934.

Section 10257, R. S. Mo. 1929, provides as follows:

"The names of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * * * * *"

This Department has previously rendered an opinion to Honorable Paul H. Sanderson, Clerk of County Court, Pike County, Missouri, in which we stated that all written declarations of candidates, to have their names printed on the primary ballot for the August primary, should be filed with the proper officials before midnight, June 8th, 1934. It will be noted that this section provides that the "written declaration shall have been filed by the candidate." The question, therefore, would seem to depend upon what constitutes a valid legal filing.

If the deposit in the mails before the expiration of the filing date would be considered the filing of the written declaration, then, under the facts set forth in your letter that the declaration was deposited in the mails on June 7th addressed to the County Clerk of Cass County, that would be a sufficient filing. On the other hand, if a deposit was made

Mr. F. M. Stamps

in the mails before the expiration of the filing date and the written declaration was not received by the county clerk before midnight June 8th, 1934, then the filing is not sufficient to authorize the county clerk to print the name of the candidate on the official primary ballot.

II.

The question considered in this division of the opinion at hand is as to whether a filing is complete on deposit of the written declaration in the mails.

In the case of *United States v. Lombardo*, 228 Fed. 980, l. c. 983, District Judge Neterer had this to say as to what is meant by the word "file":

"The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered, and ordinary meaning applied. The word 'file' is derived from the Latin word 'filum', and related to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails. *Gates v. State*, 128 N. Y. 221, 28 N. E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. *Bouvier, Law Dictionary; Hoyt v. Stark*, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. 525; *In re Von Borcke* (D. C.) 94 Fed. 352; *Mutual Life Ins. Co. v. Phinney*, 76 Fed. 618, 22 C. C. A. 425. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

Mr. F. M. Stamps

The law is stated, on the question of what constitutes "filing", in 23 R. C. L., at page 185, as follows:

"The word 'file' is derived from the Latin 'filum' signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers on a thread or wire for safekeeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it on the thread or wire. And accordingly, under modern practice, regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice, or affects private rights is filed only when deposited with the proper officer at his office for this especial purpose, and it is not deemed to be filed when it is delivered to the officer authorized to receive it at a place other than his office and if he does so and indorses it as filed at the time of delivery his act is ineffectual."

In the case of State ex rel. O'Hearn v. Erickson, County Auditor, reported in 188 N. W. 736, a Minnesota case, which was an original proceeding against the county auditor of Hennepin County to require the placing of relator's name on the election ballot, the court said:

"The filing affidavit was in form a compliance with the statute on the subject, and was mailed to the auditor on May 10, 1922, the last day for filing, but was not received at the auditor's office until the following day, and that must be regarded as the date of filing. Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791. It is not important that it was deposited in the United States post office within the period fixed by the statute. It was not filed until it reached the office of the county auditor."

Mr. F. M. Stamps

In the celebrated case of State ex rel. Smith v. Marsh, Secretary of State (Norris, Intervenor), 232 N. W. 99, rendered by the Supreme Court of Nebraska, September 23, 1930, which involved the question as to whether George W. Norris, of Broken Bow, Nebraska, had filed his written declaration within the forty days before the primary, who was not the George W. Norris of McCook, the then and now United States Senator of identical name whose legal residence is at McCook and who had previously duly filed as a candidate at the primaries for the same office, the court said, in construing a statute similar to ours, the following (l. c. 101):

"The name of no candidate shall be printed upon an official primary ballot unless at least forty days prior to such primary, either he, or twenty-five qualified electors of the party with which such candidate affiliates, shall have filed a written application with the proper authority and in substantially the following form.' It is conceded July 3 was the last day for political filings for the general primary of August 12, 1930, and that a filing later than that would be less than 40 days prior to the primary. But the facts showed as pleaded in the answer that it had been the custom for a long time to receive filings if postmarked within the legal filing time, and the secretary of state caused to be published by newspaper men that in this instance he would receive filings for the primary if postmarked any time on July 3, 1930. The evidence shows that the nomination application of George W. Norris of Broken Bow was postmarked July 2, 1930, was sent by registered mail, addressed to the secretary of state, Lincoln, was received at the post office at Lincoln shortly after 1 o'clock P. M., July 3, and was not delivered at the office of the secretary of state until the morning of July 5, 1930. It did not arrive at the post office in time July 3 to be handled as a registered item and to be taken to the Capitol in due course of mail that afternoon and there was no delivery on the following holiday."

Mr. F. M. Stamps

And the court said further in rendering its opinion (1. c. 102):

"The affidavit was mailed the last day for filing but was not received until the next day. The court held that the statute was mandatory, that the depositing in the mails was not a substitute for filing, and that the frequent practice of receiving such filings when so mailed was not such an interpretation or construction of a plain and unambiguous statute as would be accepted as a correct interpretation of the statute. * * * * *"

And the court ordered, in this case, the Secretary of State to omit the name of George W. Norris of Broken Bow from the list of candidates for United States Senator.

III.

In some jurisdictions failure to file a certificate in time may be relieved against by the courts, where the delay has not been due to the fault or negligence of the convention making the nomination, or to the person with whom the filing of the certificate was entrusted. In re Darling, 189 N. Y. 570; 82 N. E. 438; Matter of Bayne, 69 Misc. Reports, 579; 127 N. Y. Supplement, 915; Earl v. Lewis, 25 Utah 116; 77 Pacific, 235.

A reading of these cases disclosed that in every instance where the court relieved against the default, it did so under a state statute giving the court jurisdiction to review the acts of an official with whom the certificate of nomination was required to be filed, and to make such order as justice might require. We have been unable to find any such statute in Missouri. Of course, if it could be shown that the written declaration was received in the office of the county clerk on June 8th, 1934, and for some reason it was not actually marked "filed" but was in the hands of the clerk or his deputies on that date, the courts would relieve against such a situation.

Mr. F. M. Stamps

It is, therefore, our opinion that a depositing in the mails before the expiration of the filing date, to-wit, June 8th, 1934, is not such a filing as is contemplated by the statute and therefore if the written declaration in question was not received in the office of the county clerk on June 8th, and was not actually received until June 11th, that said declaration was not received within the statutory time and therefore the name was not entitled to be on the printed primary ballot for the August, 1934, Primary.

Very truly yours,

OLLIVER W. NOLEN
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG