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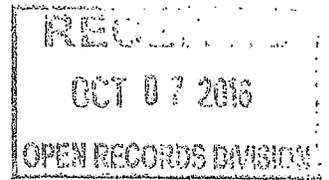
OCT 11 2016

OPINION COMMITTEE



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RQ-0134-KP

October 4, 2016

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
PO Box 12548
Austin TX 78711-2548

RE: Request for Attorney General Opinion re: Applicability of Texas
Constitution Art. XVI §1 Oath Requirement to Election Judges

Dear General Paxton:

On behalf of El Paso County and in my capacity as El Paso County Attorney, I respectfully submit this request for an opinion as to whether Texas election judges are required to take the oath prescribed by Texas Constitution Art. XVI § 1 before the judges may serve. After having reviewed and analyzed constitutional provisions, statutes and case law, I believe an attorney general opinion is necessary in order to address some uncertainties. I respectfully submit the following information in support of the request for an opinion.

Article XVI §1 of the Texas Constitution requires that all elected and appointed officers shall take an oath of office before they enter upon the duties of their offices.¹ Case law and attorney general opinions have established that the oath applies where the appointed or elected officers are "public officers". A question has arisen as to whether election judges and early voting clerks appointed under the Texas Election Code are "public officers" subject to taking the prescribed constitutional oaths.² This

¹ Tex. Const. art XVI, §1(a) (b)

² The required oaths are as follows: (a) "I _____, do solemnly swear (or affirm) that I will faithfully execute the duties of the office of _____ of the State of Texas and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God". (b) "I _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving, or withholding

includes judges appointed under § 32.001 in elections ordered by the governor or a county authority³, primary election judges appointed under §32.006⁴, early voting officers (also commonly referred to as “early voting clerks”) appointed under § 83.001,⁵ election officers appointed pursuant to §85.009⁶, joint primary election judges appointed under §172.126⁷ and early voting clerks appointed under §271.006⁸. An attorney with the Election Division of the Texas Secretary of State (“SOS”) has opined that these offices are not subject to this oath requirement.⁹ However, based on its own research, the County Attorney’s Office respectfully disagrees with the SOS’s Election Division and is of the opinion that the oaths may in fact be required.¹⁰

Election judges are appointed pursuant to the Texas Election Code (“Election Code”). Election Code §32.001 mandates that a presiding election judge and an alternate presiding judge shall be appointed for each election precinct in which an election is held. The alternate presiding judge serves as presiding judge and has all the powers of presiding judge when the regularly appointed presiding judge for an election cannot serve.¹¹ Judges are appointed for a term of one to two years and any replacements are appointed for the unexpired term.¹²

The commissioners court appoints an election judge and an alternate presiding judge for each regular county election precinct.¹³ In an election ordered by the governor or county authority, in which regular county precincts are required to be used, the commissioners court appoints the judges from lists of eligible submitted by the political parties. In the event of a death or resignation, the commissioners court appoints a presiding judge or alternate presiding judge for the remainder of the unexpired term. Preference is given to nominees affiliated with the party of the replaced judge.¹⁴ In addition to general eligibility requirements, certain classes of persons are ineligible to serve as election judges, including elected officers, candidates for office, employees and relatives of candidates, and campaign officials.¹⁵

of a vote at the election at which I was elected or as a reward to secure any appointment or confirmation, whichever the case may be, so help me God.”

³ Election day judges for non-primary elections; Elect. Code Ann. §32.001 (2010)

⁴ Judges for primary elections; Election Code Ann. §32.006 (2010)

⁵ Early voting clerks for specified general state and county elections as well as primaries and special elections and municipal elections; Elect. Code Ann. §83.001 et seq. (2010)

⁶ Early voting election officers for state and county elections in November of even-numbered years when a joint election is not being held; Elect. Code Ann. §85.009

⁷ Co-judges for primary elections; Election Code Ann. § 172.126 (2010)

⁸ Other joint elections; Elect. Code Ann. §271.006 (2010)

⁹ August 24, 2014 email from SOS Director of Elections Keith Ingram to Eric Opiela and April 26, 2016 email from Ingram to El Paso Assistant County Attorney Erich A. Morales.

¹⁰ Presiding election judges and election clerks present at the polls are required to take a separate oath under Elect. Code Ann. § 62.003. There is no dispute as to whether this statutory oath is required, only if the constitutional oath is also required of the named officials.

¹¹ Elect. Code Ann. § 32.001 (Vernon 2010)

¹² Elect. Code Ann. § 32.002 (Vernon Supp. 2016)

¹³ Elect. Code Ann. § 32.001 (Vernon 2010)

¹⁴ Elect. Code Ann. §32.002 (Vernon Supp. 2016)

¹⁵ Elect. Code Ann. § 32.051 (Vernon Supp. 2016)

With respect to judges for primary elections specifically, the county chair of a political party holding a primary election shall, with the approval of the county executive committee, appoint for each primary, the judges for each precinct in which the election will be held in the county.¹⁶

Early voting officers are essentially “early voting election judges” and conduct the early voting in each election and have the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting, except as otherwise provided in the Election Code.¹⁷ Depending on the type of election, the early voting clerk may be the county clerk (or county election administrator) or the city secretary in city elections unless the authority calling the election appoints another person.¹⁸ In joint early voting, the governing bodies conducting the election appoint one of their early voting clerks as the presiding early voting clerk for the joint early voting.¹⁹

Separate “election clerks” are appointed by the presiding judge and alternate clerks for each election precinct and assist the judge in the conduct of the election. While the presiding judge must appoint the alternate presiding judge as one of the election clerks²⁰, not all of the election clerks are alternate presiding judges. For purposes of this discussion, a distinction is made as to “early voting election clerks” (or “early voting officers”) and “early voting officials” as opposed to what are commonly referred to simply as “election clerks”. “Election clerks” are not considered in this request.

The Texas Secretary of State’s Election Division has opined that election judges are not “state officers within the meaning of the constitution and the “constitutional oath of office is not applicable to election judges and early voting election officials.²¹ The SOS cites to the *Aldine Independent Sch. Dist. v. Standley* opinion²² and to Texas Attorney General Opinion GA365.²³

Texas Attorney General Opinion GA-0365 applies the *Aldine* reasoning in addressing whether peace officers are public officers of the State for purposes of Art. XVI, § 1. In its written opinion, the Attorney General references that a defining feature of being a public officer for constitutional purposes is the ability to act independently of others and that while in the past the Attorney General had concluded that Department of Public Safety officers were “public officers” under article XVI § 1, a DPS officer who would be subject to discharge for a specified infraction or other just causes, does not largely act independently of the control of others and is therefore not a “public officer” for the constitutional oath. The Attorney General opined that ultimately to determine whether a specific rank of DPS officer is a constitutional public officer, the *Aldine* test must be applied on a case by case basis and raises questions of fact for the Department to resolve.²⁴

We respectfully disagree with the SOS’s opinion on this matter with its reliance on *Aldine*. While the Attorney General opinion reaffirms reliance on *Aldine*, the opinion does not provide a clear answer

¹⁶ Elect. Code Ann. § 32.006 (Vernon 2010)

¹⁷ Elect. Code Ann. §83.001. (Vernon 2010)

¹⁸ Elect. Code Ann. §83.003 et seq. (Vernon 2010)

¹⁹ Elect. Code Ann. §271.006. (Vernon 2010)

²⁰ Elect. Code Ann. §32.032 (Vernon 2010)

²¹ Ingram emails as cited above.

²² *Aldine Indep. Sch. District v. Standley*, 280 S.W.2d 578 (Tex. 1955) (Disapproved on other grounds by *Nat. Sun Corp. v. Friendswood Indep. Sch. Dist.* 433 S.W. 2d 690 (Tex. 1968))

²³ Tex. Att’y. Gen. Op. No. GA-0365 (2005)

²⁴ *Id.*

on the instant question. After considering the opinions, we conclude that election judges may in fact be considered public officers subject to the constitutional oath of office.

“Public office” has been defined as the right to exercise a public station conferred by the appointment of a government and the right, authority and duty created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him or her for the benefit of the public. The individual so invested is a public officer.²⁵ The Texas Supreme Court in 1955 formally adopted a standard by which to determine whether a person occupying a particular position is a public officer.²⁶ Under the *Aldine* standard “the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.” A public officer is authorized by law to independently exercise functions of either an executive, legislative, or judicial character and the exercise of this power by the officer is subject to revision and correction only according to the standing laws of Texas.²⁷

Election judges have a broad array of duties. The presiding judge designates the working hours of and assigns the duties to be performed by the election clerks serving under the judge. The election judge may direct the counting of ballots to occur at any time after the polls have been open for one hour and designates the team of election officers to count the ballots.²⁸ An election judge may administer any oath required or authorized to be made at a polling place. The presiding judge is charged to preserve order and prevent breaches of the peace and violations of the Election Code in the polling place and in the area within which electioneering and loitering are prohibited from the time the judge arrives at the polling place on election day until the judge leaves the polling place after the polls close.²⁹ The presiding judge may appoint one or more persons to act as special (limited duty) peace officers for the polling place. The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.³⁰ Notably, in preserving order and preventing breaches of the peace, a presiding judge has the power of a district judge to enforce order and preserve the peace, including the power to issue an arrest warrant. This power is exercised at the full discretion of the presiding judge. An appeal of an order or other action of the presiding judge under this section is made not to the commissioners court or to the appointing party but in the same manner as the appeal of an order or other action of a district court in the county in which the polling place is located.³¹ This certainly reflects an exercise of sovereign power largely independent of the control of others.

In a somewhat analogous situation, the courts have found that even where a senior district judge may hold no true “permanent” office and is merely assigned to various courts from time to time, they are nevertheless authorized to function as judges and as such are entrusted with independent and

²⁵ *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App. Galveston 1949) writ ref’d.)

²⁶ *See Aldine*, 280 W.W.2d 578, 583 (Tex. 1955) citing *Dunbar*, 224 s.W.2d 738, 740 (Tex Civ. App. – Galveston 1949, writ ref’d)

²⁷ *State ex rel. Hill v. Pirtle*, 887 S.W. 2d 921, 931 (Tex. Crim. App. 1994)

²⁸ *Elect. Code Ann. § 65.001 et seq.* (Vernon Supp. 2016)

²⁹ *Elect. Code Ann. § 32.073* (Vernon 2010)

³⁰ *Elect. Code Ann. § 32.071 et seq.* (Vernon 2010)

³¹ *Elect. Code. Ann. § 32.075* (Vernon 2010)

sovereign powers.³² An election judge's ability to exercise powers similar to a district judge in the polling place suggests in particular that the election judge has had bestowed a sovereign function which may be exercised for the benefit of the public largely independent of the control of others. The election judges exercise these powers within his or her own right involving the exercise of their own discretion. This fits within and is consistent with the rule set out in *Aldine* and related cases determining when a person may be considered a "public officer".

Assessing the totality of the functions which election judges exercise, and the circumstances under which the judges exercise them, the County Attorney's office believes election judges (and by extension alternate election judges and early voting officers who exercise the same authority) could be considered public officers of the State subject to the constitutional oath requirements of Texas Constitution Article XVI, §1 (a) and (b).

The SOS acknowledges that election judges have "some power" and refers to Election Code sections 32.071 and 32.075, but also opines that election judges are more like employees of the county than public officers and that their powers are circumscribed within boundaries and instruction by the counties. We respectfully disagree with this characterization. A public employee, as opposed to a public officer, is a person in public service whose duties are generally routine, subordinate, advisory, and as directed.³³ While some of the election judges' duties may be seen as routine and limited, the nature of their appointments and replacement, terms of office, the authority that they are given to act independently, and the supremacy of that authority in the polling place also suggest that they are more like public officers than public employees.

Historically, election judges, alternates, and early voting officers have not been required to take the constitutional oaths before serving. However, in examining the statutory provisions, case law and Attorney General opinions, our office continues to believe that these positions are in fact "public offices" subject to the requirements of the constitutional oaths. Therefore, the County Attorney's office respectfully requests an opinion as to whether election judges, alternate judges, and early voting officers are subject to and must take the constitutional oaths of office proscribed by Art. XVI § 1 before exercising the duties of those offices, and what would the effect be of a failure to take the oaths.

The County Attorney's office also recognizes the significance of now requiring that these positions take the oaths before assuming the duties of office. In light of the pending November election, and in an abundance of caution, we have urged that all the local election judges and officers take the oaths prescribed under article XVI, § 1. We believe that while there would be no harm in a person taking the oaths even though there is a possibility they may not be constitutionally required to do so, a greater harm could result in the officers *not* taking the oaths when they are required to do so. However, in deference to the opinion expressed by the Secretary of State's Election Division and in deference to the pending response from your office, El Paso County is allowing election judges to independently determine whether they take the oaths.

³² *Prieto Bail Bonds v. State of Texas* 994 S.W. 2d 316, 1999 (Tex. App.—El Paso 1999, pet. ref'd)

³³ *Id.*

Honorable Ken Paxton
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I appreciate your attention to this request. Please do not hesitate to contact me if you need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jo Anne Bernal". The signature is fluid and cursive, with the first name "Jo" and last name "Bernal" clearly distinguishable.

Jo Anne Bernal
El Paso County Attorney

Attachments

CC: Keith Ingram , SOS Election Division
El Paso County Election Commission