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September 22, 1982

The Honorable Bob McFarland
House of Representatives
State Capitol Building, Room 151C
Austin, Texas 78701

Election Law Opinion DAD-62
Re: Filling vacancy in office
and vacancy in nomination for
the Office of State Senator.

Dear Representative McFarland:

I have received your request for an opinion on the election law provisions applicable to the filling of the vacancy in office and the vacancy in nomination created by the death of Senator John Wilson.

This official election law opinion is rendered by me as chief election officer of the state in accordance with V.A.T.S. Election Code, art. 1.03, subd. 1.

You have asked the following questions:

1. By what date must the vacancy in Senator Wilson's nomination have occurred in order for a substitute nominee to be supplied in accordance with V.A.T.S. Election Code, art. 13.56?
2. Does the Code Construction Act (Vernon's Ann. Civ. St. art. 5429b-2) alter the deadlines provided for in the Election Code?
3. Is a person whose name will appear on the November General Election ballot as a candidate for an office other than state senator eligible to run as a declared write-in candidate for the office of state senator as well?

4. In the event that Senator Wilson is elected posthumously at the November General Election, how is the vacancy in his office to be filled? Also, will a special election be needed to fill Senator Wilson's current unexpired term?

Your questions will be addressed in order.

1. V.A.T.S. Election Code, art. 13.56(b) reads as follows:

If on or before the 45th day before the day of the election, a nominee dies or declines the nomination, or is declared ineligible to be elected to or to hold the office for which he is a candidate, the executive committee of the party for the state, district, county, or precinct, as the office to be nominated may require, may nominate a candidate to supply the vacancy. A certificate of such nomination, signed and duly acknowledged by the chairman of the executive committee, must be filed with the officer with whom the certificate of the original nomination was filed and must set forth the name of the original nominee, the cause of the vacancy, the name of the new nominee, the office for which he was nominated, and when, where, by whom, and how he was nominated. The certificate must be filed not later than the 40th day before the day of the election. The officer with whom the substitute nomination is filed shall immediately take the necessary action to cause the name of the new nominee to be placed on the ballot. (Emphasis added.)

By this language the Election Code defines a period during which an appropriate party executive committee may act to fill a vacancy in a nomination where a death, declination, or declaration of ineligibility occurs on or before the 45th day preceding the day of the election. This period begins on the date of the death, declination, or declaration of ineligibility and extends through the 40th day preceding the election. Unless such a death, declination, or declaration of ineligibility occurs on or before a date certain (the 45th day preceding the election), no authority arises in a party executive committee to name a substitute nominee.

Therefore, in order for a substitute nominee to be supplied by the method provided in art. 13.56(b), the vacancy in nomination must have occurred on or before the 45th day before the election. The 45th day before the General

Election to be held this November 2 was September 18, 1982. Since Senator Wilson's death occurred on September 19, 1982 (the 44th day preceding the November 2 election), the appropriate party executive committee is without authority to supply this vacancy.

When a party nominee dies, declines, or is declared ineligible after the 45th day before the election, the procedure provided by V.A.T.S. Election Code, art. 8.22(a) is to be followed rather than the procedure prescribed by V.A.T.S. Election Code, art. 13.56(b). The application of article 8.22(a) in this circumstance is mandated by V.A.T.S. Election Code, art. 13.56(d).

Pursuant to art. 8.22(a), the deceased or ineligible candidate's name is printed on the ballot. The votes cast for such a candidate shall be counted, and if the votes cast for such a candidate are sufficient for election, "the vacancy shall be filled as in the case of a vacancy occurring after the election." This contingency is discussed in the first part of Answer 4 below.

2. The Code Construction Act, Vernon's Ann. Civ. St. art. 5429b-2, in sec. 2.04(a) and (b) provides rules for computing periods of days.

The Act provides in part:

(a) In computing a period of days, the first day is excluded and the last day is included.

(b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday.

As noted above, there is a time period prescribed by V.A.T.S. Election Code art. 13.56(b) for the nomination of a replacement nominee by an appropriate executive committee. This period ends on the 40th day before election day. If the 40th day were to fall on a Saturday, Sunday, or legal holiday, and if the Code Construction Act were applicable, it would extend the last day of the period to include the next day which was not a Saturday, Sunday, or legal holiday. In such a circumstance, the appropriate executive committee would be permitted to certify its substitute nominee to the appropriate certifying officer on the next working day after the deadline.

However, the 40th day before the November 2, 1982 General Election is Thursday, September 23, 1982. Indeed, the 40th

day before each general election for state and county officers will always be a Thursday as long as the general election continues to be held on the first Tuesday after the first Monday in November in accordance with V.A.T.S. Election Code, art. 2.01. Therefore, the Code Construction Act, even if it were applicable, does not extend the period for making a substitute nomination because the end of the period does not fall on a Saturday, Sunday or legal holiday.

Moreover, as discussed in the answer to Question 1, the provisions of V.A.T.S. Election Code, art. 13.56(b) are not applicable to the vacancy in Senator Wilson's nomination. The applicable provisions are art. 13.56(d) and art. 8.22(a). Neither of these provisions provide statutory time periods by which an official action must be taken. Therefore, the Code Construction Act is not applicable in any sense to the vacancy created by Senator Wilson's death.

However, should a question remain as to whether the Code Construction Act extends the 45th day before the election (prescribed by art. 13.56(b) as the last day for a death of a nominee to vest an executive committee with authority to name a replacement nominee) to the next day which is not a Saturday, Sunday, or legal holiday, an answer may be found in Thiel v. Harris County Democratic Executive Committee 534 SW2d 891, 894 (1976). In Thiel, the Texas Supreme Court stated:

Although the general aid and guidance of the Code Construction Act of 1967 is applicable to subsequently enacted legislation, it is not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation are, standing alone, indisputably clear. Thus, the Code Construction Act provides, not rules of substantive law which become part of subsequently enacted legislation, but principles of construction that are necessarily subordinate to the plain intent of the Legislature. . . [Emphasis added.]

In Thiel the challenged date was the day preceding a filing deadline that always fell on a Monday. Such a date would always be Sunday, and the Court wrote at p. 894:

Obviously, the Legislature knew that Sunday would be the last date for mailing before the Monday deadline. . . .

The Court noted that this date was an unambiguous substantive provision. Just as unambiguously the Legislature determined that the 45th day before the general election (always a Saturday) is the final date for which a death, declination, or declaration of ineligibility of a nominee will authorize a substitute nomination to be made. The Code Construction Act took effect September 1, 1967. At that time art. 13.56(b) provided for substitute nominations to be made if a vacancy occurred on or before the 21st day prior to the general election. The 21st day before the election was always a Tuesday. Article 13.56(b) in its present form became effective on August 29, 1977, nearly ten years subsequent to the effective date of the Code Construction Act.

It is clear that any application of the Code Construction Act to extend the 45th day before the election to the next Monday would make a substantive change in the law. While there is no affirmative official duty tied to this deadline, any engrafting of the Code Construction Act time construction clause upon V.A.T.S. Election Code, art. 13.56(b) would actually diminish, rather than expand, the prescribed time period for an appropriate executive committee to make a substitute nomination. This result would be contrary to that intended in the Code Construction Act. This would be a substantive change in the law, and contrary to the court's reasoning in Thiel. Therefore, it is my opinion that the Code Construction Act does not apply in the fact situation of this request.

3. A person whose name will appear on the November General Election ballot as a candidate for an office other than state senator may also run as a declared write-in candidate for the office of state senator. In order to become a declared write-in candidate for state senator a person must file a declaration of write-in candidacy with the Secretary of State by 5 p.m. on October 12, 1982. V.A.T.S. Election Code, art. 6.06b and art. 13.50 subd. 3. An otherwise qualified declared write-in candidate who receives sufficient votes for election may qualify and hold office just as if his name had been printed on the ballot.

A person elected to two incompatible offices may resign one as an officer-elect under the provisions of V.A.T.S. Election Code, art. 4.09, sec. 5. Otherwise, when a person is elected to two incompatible offices, his qualification for the second operates as a resignation of the first, which thereby becomes vacant. State ex rel Kingsbury v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109 (1886); Pruitt v. Glen Rose Independent School District No. 1, 126 Tex. 45, 84

S.W.2d 1004 (1935); Centeno v. Inselmann, 519 S.W.2d 889 (Tex. Civ. App. - San Antonio, 1975, no writ).

4. Your fourth question is discussed in two parts.

First, if Senator Wilson is elected posthumously in November, how will the unexpired term be filled?

Should the Republican nominee, the Citizens Party nominee, or a declared write-in candidate win the general election there will, of course, be no need for a special election as no vacancy will exist.

As discussed in Question 1 of this opinion, V.A.T.S. Election Code, art. 8.22(a) provides that a vacancy occurring by virtue of the death of a candidate who posthumously receives sufficient votes to be elected shall be filled as in the case of a vacancy occurring after the election. A vacancy in the state senate is filled by special election, Vernon's Ann. Tex. Const. Art. III § 13. V.A.T.S. Election Code, art. 4.09, sec. 6 prescribes the procedure to be followed for a special election necessitated by a vacancy due to a death occurring after an election. That section provides:

When the officer-elect to an office which must be filled by election dies or becomes ineligible to qualify for the office to which he was elected, the proper officer shall immediately order an election to elect a successor to the incumbent of the office.
[Emphasis added.]

In my opinion, a vacancy pursuant to art. 8.22(a) occurs at the time of the official canvass declaring a deceased candidate to be the winner of the general election. At that time, the Governor must immediately order an election.

The returns for the general election shall be counted and the official results declared not earlier than the 15th day after nor later than the 21st day after general election day. V.A.T.S. Election Code, art. 8.38.

The Governor is required to call a special election within 20 days after the vacancy occurs. Vernon's Ann. Tex. Const. Art. III, §13. V.A.T.S. Election Code, art. 4.12, subd. 4 provides in pertinent part:

Notwithstanding any other provision of this code, whenever a vacancy occurs in the office of state representative or state senator in

any representative or senatorial district in this state during a regular session of the Legislature and more than twenty-five days before the final date permitted by law for the continuation of the session, or within a period of sixty days prior to the convening of any session of the Legislature, the time intervals specified in this subdivision shall control the election. The proclamation of the Governor ordering the election shall be issued and mailed to the appropriate county judge or judges not less than twenty-one days before the election. . . . [Emphasis added.]

Because the returns of the general election will not be officially declared until at least November 17, 1982 (a date within 60 days of the convening of the legislature on January 11, 1983) the special election to fill the unexpired term must be ordered for a date no earlier than the 22nd day after said order.

V.A.T.S. Election Code, art. 4.09, Sec. 1 provides:

Where special elections are authorized by this Act, the officer authorized by law to order elections shall make such order, fixing the time of the election not less than twenty (20) nor more than ninety (90) days after the first public notice of such order.

If Senator Wilson is declared the winner when the returns of the election are counted, a vacancy will exist in the office to which he was elected. The earliest possible date of the official declaration of the November election returns is Wednesday November 17, 1982 and the last date for an official declaration is Tuesday November 23, 1982. V.A.T.S. Election Code, art. 8.38. A special election will have to be ordered within 20 days of the official declaration.

The earliest day that the special election may be held is the 22nd day after the order calling the election. V.A.T.S. Election Code, art. 4.12, subd. 4. The last day the special election can occur is the 90th day after the order, V.A.T.S. Election Code, art. 4.09, sec. 1.

Finally, you asked whether a special election must be held to fill the remainder of Senator Wilson's current term?

Vernon's Ann. Tex. Const. Art. III, §13 provides, in pertinent part:

When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer . . . shall be authorized to order an election. . .

The Governor shall order a special election within 20 days after the vacancy occurs. Id. The special election would be held solely for the purpose of filling the unexpired portion of the term because Vernon's Ann. Tex. Const. Art XVI, §27 provides:

In all elections to fill vacancies of office in this State, it shall be to fill the unexpired term only.

V.A.T.S. Election Code, art. 4.01 provides:

Notice shall be given to the people of all elections for State and district officers, electors for President and Vice-president of the United States, members of Congress, and members of the Legislature. Such notices shall be by proclamation by the Governor ordering the election, not less than thirty-five (35) days before the election, issued and mailed to the several county judges.
[Emphasis added.]

The special election must take place not earlier than the 36th day after the Governor's "first public notice" of his ordering of the election and not later than 90 days after said notice. V.A.T.S. Election Code, art. 4.01 and art. 4.09(1).

A special election to fill the remainder of Senator Wilson's current term may be ordered at any time after the vacancy occurred but not later than Saturday October 9, 1982. The governor may select a date for the election to occur not earlier than the 36th day after the notice of the election is given. The election must be held not later than the 90th day after notice is given.

SUMMARY

An executive committee of a political party is not authorized to make a substitute nomination for the general

election ballot when a vacancy in nomination occurs after the 45th day before election day.

The Code Construction Act is not applicable to time periods found in Article 13.56(b) and Article 8.22(a) of the Election Code.

A person whose name will appear on the general election ballot as a candidate for an office other than state senator may also be a declared write-in candidate for the office of state senator.

If a deceased candidate for state senator is elected at the November general election, the resulting vacancy must be filled in a special election.

A special election must be held to fill the remainder of a term that becomes vacant on the death of the incumbent.

Sincerely,



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Election Law Opinion DAD-62

Request from Representative Bob McFarland, Austin, concerning procedures to be followed in filling the vacancy in office and vacancy in nomination created by the death of Senator John Wilson.

SUMMARY

An executive committee of a political party is not authorized to make a substitute nomination for the general election ballot when a vacancy in nomination occurs after the 45th day before election day.

The Code Construction Act is not applicable to time periods found in Article 13.56(b) and Article 8.22(a) of the Election Code.

A person whose name will appear on the general election ballot as a candidate for an office other than state senator may also be a declared write-in candidate for the office of state senator.

If a deceased candidate for state senator is elected at the November general election, the resulting vacancy must be filled in a special election.

A special election must be held to fill the remainder of a term that becomes vacant on the death of the incumbent.