



THE ATTORNEY GENERAL OF TEXAS

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May 28, 1975

The Honorable Luther Jones
Chairman, Committee on Elections
House of Representatives
P. O. Box 2910
Austin, Texas 78767

Letter Advisory No. 110

Re: Constitutionality of
House Bill 377 concerning
effect of resignation by
officers

Dear Chairman Jones:

On behalf of the Committee on Elections you have asked if House Bill 377, introduced in the 64th Legislature, would operate to impose an unconstitutional additional qualification for office in Texas. The bill would enact a measure reading:

RESIGNATION OF OFFICER ELECTED TO SUCCEEDING TERM. Whenever, after having been elected to a succeeding term, an officer holding an office under this state which is regularly filled at the general election for state and county officers tenders his resignation from the unexpired portion of the current term and the resignation is accepted, the officer automatically relinquishes his right to qualify for the succeeding term to which he was elected and becomes ineligible to fill the vacancy thereby created, regardless of whether he tenders a resignation from the succeeding term or declares an intention not to qualify for the term.

The proposed statute, if enacted, would be applicable to all state, district and county officers standing for re-election. It does not purport to make such a person ineligible to stand for re-election; it purports to work a forfeiture of the office to which they are re-elected if, after re-election but before the new term begins, the officer effectively resigns the remainder of the term he is already serving.

In Attorney General Letter Advisory No. 43 (1973) we considered proposed legislation of the 63rd Legislature which would have disqualified persons seeking certain elective offices from having their names placed on the ballot if

they failed to file certain disclosures. We noted that most of those affected were constitutional officers whose qualifications were set out by the Constitution and concluded that the attempted disqualification was unconstitutional insofar as it applied to constitutional officers, but permissible insofar as it affected the qualifications of statutory officers. See the authorities cited there.

Here we are concerned not with the power of the Legislature to prevent the election to office of persons lacking certain qualifications, but with the power of the Legislature to prevent a person (eligible to an office at the time duly elected thereto by the people) from assuming the office to which he was elected.

In our opinion there is a distinction, but no difference. The proposed statute would restrict the class of persons who may hold public office, inter alia, to those who, having been re-elected to a succeeding term, have not subsequently resigned their previous term of office and would thus prescribe qualifications for office. Kilday v. State, 75 S. W. 2d 148 (Tex. Civ. App. --San Antonio 1934). Also see Kothmann v. Daniels, 397 S. W. 2d 940 (Tex. Civ. App. --San Antonio 1965, writ ref'd., n. r. e.). In 63 Am. Jur. 2d, Public Officers and Employees, § 42, it is said:

Eligibility to public office is of a continuing nature and must exist at the commencement of the term . . . The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term . . . he ceases to be qualified.

In Burroughs v. Lyles, 181 S. W. 2d 570 (Tex. Sup. 1944), the Texas Supreme Court held unconstitutional a statute which purported to render persons elected or appointed to an executive or administrative office for a term of more than two years ineligible for nomination or election to any other office the term of which would begin before the expiration of the term of the first office if the person had not resigned from that office. The Court said the statute sought to impose an additional test of eligibility, other than what is prescribed by the Constitution, for a candidate for State office and was, for that reason void. Because the Act contained no severability clause, it was held void in its entirety even though its language embraced statutory officers as well as those of constitutional rank.

You ask if any constitutional infirmity could be removed if House Bill 377 were "qualified in a manner similar to the last sentence of the first paragraph of Article 14.09, Vernons Texas Election Code." That language reads:

Provided, no candidate in the general election shall forfeit the right to have his name printed on the ballot for such election if the Constitution of this State prescribes the qualifications of the holder of the office sought by the candidate.

The above provision, appended to a statute which forfeits the right of candidates to appear on the ballot if they knowingly permit or assent to election law violations, was added to former article 3173, V. T. C. S. when its provisions were incorporated into the new Election Code (Acts 1951, 52nd Leg., ch. 492, art. 245, p. 1097).

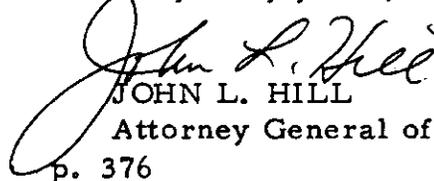
The article 14.09 proviso has not been judicially construed, but a broader one was discussed in Luna v. Blanton, 478 S. W. 2d 76 (Tex. Sup. 1972). The Supreme Court was called upon to determine if article 1.05 of the Election Code prevented a person from becoming a candidate for the State Senate, for which office the Constitution prescribes qualifications. The article contained a proviso reading:

The foregoing requirements shall not apply to any office for which the Constitution or statutes of the United States or of this state prescribe qualifications in conflict herewith, and in case of conflict the provisions of such other laws shall control.

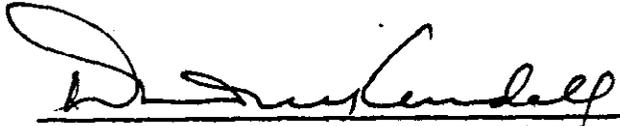
The Legislature, said the Court, had declared in plain terms that the statute had no application to one who is a candidate for an office for which qualifications are fixed by the Texas Constitution.

We believe the Supreme Court would view a proviso similar to that of article 14.09 in the same light, and would hold the proposed Act to be constitutional as limited to those offices where qualifications are not set by law or where statutory or constitutional qualifications are not in conflict. See also V. T. C. S., art. 11a.

Very truly yours,


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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee