

157# 12916
MJ

THE OFFICE OF
**THE CRIMINAL DISTRICT ATTORNEY
McLENNAN COUNTY, TEXAS**

302 Courthouse Annex
Waco, Texas 76701
Phone - (817) 757-5084
Fax - (817) 757-5021

July 5, 1991

RQ 119

John W. Segrest
Criminal District Attorney

Hon. Dan Morales
Attorney General for the State of Texas
Opinions Division
P.O. Box 12548
Austin, Texas 78711

RECEIVED

JUL 08 91

Opinion Committee

RE: Request for Opinion

Dear General Morales:

Pursuant to Section 402.043 of the Texas Government Code I am requesting your advice and opinion concerning the prosecution of an action before the District Court in which the State is interested. I have investigated the question involved and submit herewith briefs upon the matter.

The State's interest is based upon the fact that I am considering quo warranto proceedings against an alderman of the City of Robinson, McLennan County, Texas. The facts bearing upon this matter are as follows:

1. On January 7th, 1957, Charles Louis Olson, hereinafter called "Olson", pled and was adjudged guilty of felony theft in the 54th District Court of McLennan County and given a sentence of three (3) years confinement in the State Penitentiary. The Court entered an order of the same date ordering "that probation be granted". The Court's docket sheet entry states that Olson was "sentenced to serve not less than 2 nor more than 3 yrs from date Probated to J.B. Brown, Jr.", the McLennan County's probation officer at that time. Olson successfully completed probation and has been considered a productive and law abiding citizen ever since.
2. On two occasions in the past Olson ran for, and won, a seat on the Robinson City Council, and served parts of two terms. Robinson is a Type B General-Law City.
3. It is believed that Olson's old probation was well known in Robinson.

ACCOMPANIED BY ENCLOSED

4. In the most recent city elections, held May 4, 1991, Olson's name again appeared on the ballot for alderman. He had signed a sworn application stating he had no felony convictions. This was based, I am led to understand, upon the advice of an attorney. He was opposed by C.B. Herring, hereinafter called "Herring". Herring filed no suit to have Olson's name removed from the ballot.
5. In the election Olson received a majority of the votes, namely 372. Herring received 253 votes. A candidate named Simons received 44 votes. No election contest was filed questioning the validity of the election or the accuracy of the results.
6. Herring then hired an attorney, Ms. Kathleen French and filed suit against Billy Simons, the Mayor, and through him the City of Robinson, seeking declaration that Olson was ineligible due to his felony conviction, and seeking to enjoin Simons from certifying Olson as the winner of the election. Suit was not brought against Olson. Suit was not brought by me, as District Attorney, by information of quo warranto. I was joined as an involuntary defendant, I was told, to give Herring standing. The District Court granted an order temporarily restraining Simons from certifying Olson as the winner, but due to a "service error" the results were nonetheless certified, and Olson declared the winner. Herring amended his petition to include Olson and by agreement a temporary order was entered restraining Olson from taking the oath of office. Olson hired Pat Millar as his attorney.
7. Olson filed a petition with the 54th District Court and received an order allowing Olson to withdraw his plea, dismissing the indictment, and thus releasing Olson "from all penalties and disabilities resulting from the offense or crime of which he [had] been convicted . . .", under Article 42.12, §23, Texas Code of Criminal Procedure.
8. Herring's suit was dismissed upon my motion as the suit was not quo warranto, and I had not authorized the proceeding.
9. Olson was sworn in and is sitting as an alderman.

My questions is this:

Was Olson ineligible to be a candidate for, or to be elected to, the position of alderman under § 141.001 (a)(4), Texas Election Code, or does Section 23.024 (a), Local Government Code, conflict with Section 141.001 (a) (4), Texas Election Code, so that the former supersedes the later?

Section 141.001 (a)(4), Texas Election Code, reads:

"(a) To be eligible to be a candidate for, or elected . . . to, a public elective office in this state, a person must:

(4) have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities;"

Constitutional or statutory provisions which restrict the right to hold public office should be strictly construed against ineligibility. Willis v. Potts, 377 S.W.2d 622 (Tex. 1964); Kothmann v. Daniels, 397 S.W.2d 940 (Tex.App. - San Antonio 1965, no writ); Hall v. Baum, 452 S.W.2d 699 (Tex. 1970).

In Kothmann it was held that . . . "where the disqualification involved is of such a nature that its continuation or termination is not within the control of the person seeking office, the better reasoning supports the proposition that where the word "eligible" is used in connection with qualification for office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold office, rather than the qualification to be elected to office."

Thus in Rose v. White, 536 S.W.2d 395 (Tex.App. - Dallas 1976, no writ), a Constitutional eligibility requirement that . . . "no person shall be a Representative, unless he . . . shall have attained the age of twenty-one years" . . . did not disqualify a candidate who was not twenty-one at the time of election, but would, by the mere passage of time, be twenty-one at the time of assuming office, while in Lemons v. State, 570 S.W.2d 593 (Tex.App. Amarillo 1978, writ ref'd n.r.e.), under Article 1.05, Section 1, Texas Election Code, which provided that ". . . no person shall be eligible to be a candidate . . .", a candidate for county attorney, who had not attained his law license by the filing deadline, was not eligible to be elected since by that deadline he "was unable to show . . . that he would be eligible to hold the office at the commencement of the term sought."

The basis of this rule appears to be that the law will not allow situations wherein the voters, at the time they cast their ballots, will not know whether they will be successful in filling the office. Kothmann.

At the time of the primary election in this matter it is undisputed that Olson had a prior felony probation and that he had not sought to have his disabilities removed. It appears that the statutory wording ". . . eligible to be a candidate for, or elected . . . to," are to act as "explanatory words indicating that such word[s] are] used with reference to the time of election". It is also clear that the removal of Olson's disabilities was discretionary with the probation court, and that a person under such disability could not show that he would be eligible to hold office if elected, since the District Court Judge could, in his discretion, refuse to lift the disability.

Thus it appears that under Section 141.001 (a)(4), Texas Election Code, Olson was ineligible to run for the office of Alderman.

However, Section 141.001 (b), Texas Election Code, concerning general eligibility requirements for office, also states:

"(b) A statute outside this code supersedes Subsection (a) to the extent of any conflict."

Section 1.003 (b), Texas Election Code, provides:

" (b) When a provision of this code provides that it supersedes another specifically referenced provision of this code to the extent of any conflict, . . . a conflict exists only if the substance of the superseding and any related provisions is irreconcilable with the substance of the referenced provision. If the substance of the superseding provision, together with any related provisions, and the substance of the referenced provision can each be applied to the same subject or set of circumstances, both provisions shall be given effect."

Section 23.024 (a), Texas Local Government Code, states:

"(a) To be eligible for the office of . . . alderman of the municipality, a person must be a qualified voter in the municipality . . . :

Section 11.002, Texas Election Code, states:

"In this Code, "qualified voter" means a person who:

(4) has not been finally convicted of a felony, or if so convicted, has:

(A) . . . completed a period of probation ordered by the court and at least two calendar years have elapsed from the date of . . . completion;"

It can be argued that Section 23.024 (a), Texas Local Government Code, read in connection with Section 11.002, Texas Election Code, conflicts with Section 141.001 (a)(4), Texas Election Code, and therefore supersedes it.

We must strictly construe the statutory provisions restricting Olson's right to hold office against ineligibility, and for eligibility. Willis v. Potts, 377 S.W.2d 622 (Tex. 1964).

The phrase . . . to be eligible for the office of . . . contains no explanatory words indicating that "eligible" is used with reference to the time of election. It appears to have reference to the qualification to hold office, rather than the qualification to be elected to office. Kothmann v. Daniels, 397 S.W.2d 940 (Tex.App. - San Antonio 1965, no writ).

Olson was, without question, a qualified voter, since more than two calendar years elapsed since the completion of probation. Actually, it was more like thirty-three years.

If Olson was eligible for the office of alderman because he was a qualified voter, then Section 141.001 (a)(4), Texas Election Code, is in conflict with Section 23.024 (a), Texas Local Government Code, because if he is eligible for the office of alderman, he must be eligible to be elected thereto.

The provisions of Section 1.003 (b), Texas Election Code, may not be applicable to this situation since it applies to one provision of "this code" superseding another "specifically referenced provision of this code". Section 141.001 (b), Texas Election Code, refers to a statute "outside this code" which supersedes a specifically referenced provision of "this code".

In a similar matter addressed in Attorney General's Opinion - JM-909 (1988), the Attorney General concluded that Section 51.072, Texas Water Code, providing:

"To be qualified for election as a director, a person must be a resident of the state, own land subject to taxation in the district, and be at least 21 years of age",

conflicted with Section 141.001 (a)(5), Texas Election Code, providing:

"To be eligible to be a candidate for, or elected . . . to, a public elective office in this state, a person must . . . have resided continuously in the state for 12 months and in the territory from which the office is elected for six months immediately preceding the [described dates]",

and that the provisions of the Water Code superseded the Election Code. Unfortunately I was unable to attain a copy of this opinion from your office prior to mailing this request, but I assume it may give some guidance.

Read in the same way, Section 23.024 (a), Texas Local Government Code, which provides that:

"(a) To be eligible for the office of . . . alderman . . . of the municipality, a person must be a qualified voter in the municipality . . . , [that is, under Section 11.002, Texas Election Code], a person who . . . has not been finally convicted of a

felony, or if so convicted, has . . . completed a period of probation ordered by the court and at least two calendar years have elapsed from the date of . . . completion . . . ",

would appear to conflict with Section 141.001 (a)(4), Texas Election Code, which provides:

"(a) To be eligible to be a candidate for, or elected a person must . . . (4) have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities",

and that the provisions of the Local Government Code would supersede the Election Code.

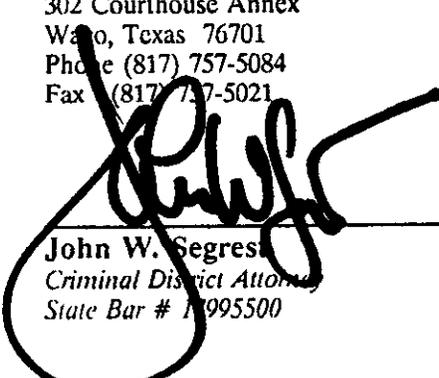
Thus it appears that under Section 23.024 (a), Texas Local Government Code, Olson was eligible to run for and be elected to the office of Alderman.

I am submitting herewith a letter written by Kathleen French, the attorney for Mr. Herring, and a letter by Pat Millar, the attorney for Olson, each expressing their opinions and positions.

Your prompt consideration and response to this question will be greatly appreciated.

Respectfully Submitted:

John W. Segrest
McLennan County Criminal District Attorney
302 Courthouse Annex
Waco, Texas 76701
Phone (817) 757-5084
Fax (817) 757-5021



John W. Segrest
Criminal District Attorney
State Bar # 1795500

Fax: Kathleen French (817) 753-1318
Pat Millar (817) 776-3010
(No attachments)

Certified Mail, Return Receipt Requested