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John Hannah, Jr.

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Opinion Committee

MEMORANDUM

MBJ

TO: Opinions Committee
Office of the Attorney General

FILE # ML-19578-93

FROM: John Hannah, Jr.,
Secretary of State

I.D.# 19578

REQUEST FOR ATTORNEY GENERAL OPINION

AUTHORITY FOR REQUEST

The Texas Attorney General is authorized to give written legal advice to executive officers in Texas state government. Tex. Const. Article 4, Section 22, Tex. Government Code, § 402.042. The Secretary of State is an executive officer authorized to request a written advisory opinion. § 402.042(b)(2), supra. The instant request affects public interest and concerns the official duties of the Secretary of State. § 402.042(a), supra.

QUESTION PRESENTED

Can the Secretary of State provide by rule that state funds available under Chapter 19 of the Texas Election Code may not be used to pay costs associated with the normal operation of the voter registrar's office?

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BRIEF OF THE ISSUE

I.

OVERVIEW

Chapter 19 of the Texas Election Code governs the financing of voter registration efforts. The Comptroller disburses state funds from General Revenue to pay vouchers submitted by voter registrars and approved by the secretary of state in an amount not to exceed their entitlement. The entitlement is based on the number of initial and cancelled voter registrations. See § 19.01 - 19.02.¹ The voter registrars are required to provide the secretary of state with voter registration information every even numbered year detailing new registrations, cancelled registrations, and changes in registration information. § 18.063. The state funds disbursed under Chapter 19 may be used only to defray expenses of the registrar's office in connection with voter registration. § 19.004. The state funds may not be treated as fees of office § 19.005. The county commissioners may not consider the availability of state funds in adopting the county budget for the office of voter registrar. § 19.006.

The Secretary of State has adopted a rule² limiting the use of Chapter 19 disbursements.

¹ Unless otherwise indicated, all statutory references are to the Texas Election Code.

² The Secretary of State has authority to promulgate and distribute written directives and instructions to obtain and maintain uniformity in the application, operation and interpretation of the election laws. Sec. 31.003. The Secretary of State also has authority to prescribe necessary procedures for the issuance of warrants by the Comptroller in amounts that do not exceed the registrar's entitlement. Sec. 19.002(b).

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See 1 TAC § 81.11. The rule provides generally that "Chapter 19 funds may not be used for capital outlays without prior approval of the secretary of state or costs associated with the normal operation of the voter registrar's office." R. 81.11 (b). Capital outlays are items with an invoice cost in excess of \$500 that will not be consumed within one calendar year. R. 81.11(c). Costs "associated with the normal operation of the voter registrar's office" include costs associated with the performance of any statutory duty required by the Election Code, R. 81.11(a)(2)(A), and expenditures for a permanent staff. R. 81.11(a)(2)(B); See also 81.11(f). The basic premise in support of this rule is the longstanding interpretation by this agency that Chapter 19 funds cannot be used to pay costs associated with the basic operation of the voter registrar's office. ³

An appendix accompanies this request for opinion. Appendix "A" is a chronological compilation of the legislative history of Chapter 19, including provisions of the former poll tax system. Appendix "B" is a chronological compilation of Secretary of State Chapter 19 Directives, including the current rule.

³ The Election Code provides that the county tax assessor-collector is the voter registrar unless the position of county elections administrator is created or the county clerk is designated as the voter registrar. Sec. 12.001. See also Sec. 12.031 et seq and Sec. 31.031 et seq.

II.

HISTORY OF CHAPTER 19.

A. Precursors of Chapter 19.

The origins of the Voter Registration Fund can be traced to the former poll tax system. Payment of the poll tax was a prerequisite to voting. Article 2.01 of former title 122A (Taxation-General) Vernon's Civil Statutes permitted the county tax assessor to charge a fee (not to exceed 25 cents per collection) for collecting the poll tax. The fees were to be deposited in the county treasury for general revenue purposes of the county. The tax collector received 15 cents for each poll tax receipt collected or certificate of exemption issued. See Article 7.01 of the former Texas Election Code of 1951. The poll tax was declared unconstitutional in 1966. See Harper v. Virginia State Board of Elections 383 U.S. 663 (1966).

In 1966, during the First Called Session of the 59th Legislature, the first direct precursor of Chapter 19 was enacted and codified as article 5.19b of the former Election Code of 1951. Acts of 1966, 59th Leg., 1st C.S., ch. 1, § 2. Under this article, the State Comptroller was directed to issue a warrant to each county in the amount of 25 cents multiplied by the number of newly registered voters in the county. The money received by the county was to be placed in the county treasury and was not to be considered fees of office by the county tax assessor. Clearly, this article was designed to substitute state funds for the money previously collected by the counties from voters under the poll tax.

In 1971 the Legislature amended the article to require that monies received be

"deposited in the county treasury in a special fund to be used for defraying expenses of the registrar's office in the registration of voters." Acts 1971, 62nd Leg., R.S., ch. 827, § 13. The amendatory language also increased the amount of money to be received to 40 cents for each new voter registered and 20 cents for the difference between the total number of registered voters and the total number of new registrants.

In 1975 the Legislature amended article 5.19b to increase the amount of money paid to the counties. Counties were to receive: (1) 40 cents for each new registrant; (2) 40 cents for each cancelled voter registration; and (3) 40 cents for the difference between the total number of registered voters and the total number of new registrants in the preceding year. Acts 1975, ch. 296, § 13.

In 1977 the Legislature added subdivision 3 to article 5.09b of the former Election Code of 1951 and provided that expenses of the county voter registrar in excess of the reimbursement received from the state under article 5.19b were to be borne by the county. Acts 1977, 65th Leg., R.S., ch. 609, § 1.

B. The 1985 Recodification of the Election Code.

Following the 68th Legislative Session, the Election Code Study Committee was formed to propose a recodification of the Texas Election Code. The efforts of this Committee produced the current Election Code and (with some modifications) the current version of Chapter 19. The 1985 revision changed three aspects of former law. First, under the law extant until the recodification, state warrants were deposited in a special fund in the county treasury. (See

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subdivision 3 of former article 5.19b). The 1985 revision provided for direct payments to the voter registrar. This change "eliminate(d) the requirement to deposit the state fund in the county treasury in a separate fund." Texas Legislative Council, Report of the Election Code Study Committee, Volume II, Appendix B (1985).

Second, under former law prior to recodification, the county was responsible only for the voter registrar expenses in excess of the money received from the state:

"The expenses of the registrar in excess of the reimbursements received from the state under Section 51b [art. 5.19b, Vernon's Tex. Election Code] shall be borne by the county."

The 1985 recodification rewrote this provision to read as follows:

"Section 19.006. State funds not part of county budget. The commissioners court may not consider the availability of state funds under this chapter in adopting the county budget for the office of voter registrar."

Acts 1985, 69th Leg. R.S. Ch. 211. The enactment of Section 19.006 contains a statutory reference to former law with the notation "new", which denotes that the proposed section is derived mainly from former law but contains provisions or concepts not found specifically in the former law. See Introduction to the Report of the election Code Study Committee.

Third, the 1985 recodification instituted a change in terminology. The former laws (from 1966-1985) were entitled "Reimbursement of County by State". Beginning with the 1985 recodification and continuing to the present, Chapter 19 omits the term "reimbursement" and instead refers to use of state funds by the counties: "Disbursement of State Funds" § 19.003; "Use of State Funds Restricted" § 19.004; "State Funds Not Fees of Office" § 19.005; "State

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Funds Not Part of County Budget" §19.006 .

C. Legislative History: 1985-The Present.

The Legislature in 1987 enacted a significant amendment to Section 19.002. See Acts 1987, 70th Leg., R.S., ch. 472, § 4. Previously, the Comptroller had issued warrants directly to the voter registrar. The amendatory language requires the voter registrar to submit vouchers to the secretary of state for approval in an amount not to exceed the entitlement. The Comptroller then issues a warrant for payment of the voucher. Consistent with this language, the 1987 legislation also amends Sections 19.004-.005 to substitute "disbursed" for "received by the registrar." The amendment also adds the following language to Section 19.002(b): "The secretary of state shall prescribe the procedures necessary to implement this subsection."

The Legislature in 1989 amended Section 19.002 to require the secretary of state to monitor the voter registrar's compliance with Section 18.042, a preelection registration statement which must be filed with the secretary of state. Acts 1989, 71st Leg. R.S., ch. 114, § 5.

D. Administrative History.

The Secretary of State issued written directives to voter registrars and election administrators on June 28, 1988 (Appendix).⁴ This directive states generally:

"Section 19.004 of the Election Code restricts the use of these funds to 'expenses of the registrar's office in connection with voter registration.' These funds are to enhance the voter registration functions of the voter registrar's office and not the day-to-day

⁴ These directives were incorporated by reference in a publication in the Texas Register on July 29, 1988.

operations of that office.

Section 19.006 of the Election Code states:

"The commissioners court may not consider the availability of state funds under this chapter in adopting the county budget for the office of the voter registrar."

June 28 Directive, p.1 (emphasis in original). The Directive details procedures for obtaining approval or disapproval of vouchers. The Directive also details allowable expenditures from the Chapter 19 fund in three areas: use of temporary employees; travel expenditures; and capital outlays. These restrictions define the distinction between expenditures that "enhance" voter registration and those that constitute daily operations. For example, the Directive provides that temporary, part-time and seasonal personnel may be hired on a contract basis and paid with Chapter 19 funds, but that expenses for work related injuries and overtime for permanent employees must be paid from the county budget. The Directive enumerates allowable travel expenses (e.g. voter registration seminars, area and state legislative committee meetings), allowable purchases (e.g. office equipment, computer related equipment, office supplies for temporary workers) and allowable operating expenses (e.g. billboards, pamphlets, pins, public service announcements). On July 8, 1988, the Secretary of State issued an addendum clarifying the scope of permissible travel expenses.

On August 31, 1988, the Secretary of State issued a further clarification. This Directive addresses the permissible use of Chapter 19 funds to purchase computer equipment. The Directive states:

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"Any expenditure relating to the basic operation of the Voter Registrar's Office as required by the Election Code is an expenditure that should be paid from the county budget. Expenditures of this nature are those that are related to furnishing updates to the masterfile...and any other normal day-to-day job duty relating to voter registration."

The Directive concludes that the basic rental or purchase of computer equipment must be made with county funds, but that additional equipment (e.g. extra terminals) or any enhancement of the system (e.g. additional hardware) may be paid with Chapter 19 funds.

On September 29, 1989 the Secretary of State issued a new Directive superseding all previous directives. The Directive reiterates in language identical to the original directive that:

"These funds [Chapter 19] are to be used to enhance the voter registration functions of the registrar's office and are not to be used to fund the day-to-day operations of that office." This directive largely reincorporates previous restrictions on expenditures for personnel, travel, purchases and equipment and adds that purchases of computer hardware and computer software must receive prior written approval from the Secretary of State's Office.

The current directives regarding Chapter 19 funds are contained in Title 1 of the Texas Administrative Code, Section 81.11.⁵ The rule cites in full the language of § 19.006 of the Texas Election Code and then provides:

"Consistent with the intent of this section [§ 19.006], Chapter 19 funds may not be used for capital outlays without prior approval of the secretary of state or costs associated with the normal operation of the voter registrar's office."

R. 81.11(a)(2). The rule defines the day to day operation of the voter registrar's office to

⁵ The provisions of Section 81.11 were adopted to be effective June 5, 1991. 16 Tex.Reg.2825.

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include the performance of statutory duties and lists examples of such duties. R. 81.11(b). The rule provides that the commissioners court must provide adequate staffing for the voter registrar and defines permissible uses of temporary employees with Chapter 19 funds. R.81.11(a)(2)(B); see also R.81.11(f). The rule defines capital outlays as "those items that will not be consumed within one calendar year and have an invoice cost in excess of \$ 500 per unit" and cites specific examples. R.81.11(a)(2)(C). In addition, the rule provides restrictions on the use of Chapter 19 funds for travel expenses. R. 18.11(b)&(g). The rule also provides detailed procedures for the submission of vouchers for approval by the secretary of state and other purchasing requirements.

D. Section 31.100.

The language of Section 19.006 also appears in Section 31.100 of the Texas Election Code. Subchapter D of Chapter 31 of the Election Code authorizes the County Election Officer to enter into contracts with the affected political subdivision and the county political parties to administer the election. Section 31.100 governs the use and disposition of money received pursuant to such contracts. The section provides that contract money is to be deposited in a separate fund in the county treasury but may be expended without budgeting and appropriation by the commissioners court. § 31.100(a). Regular employees of the county election officer are paid from county funds but temporary employees may be paid from the contract fund together with other expenses directly attributable to the contract. § 31.100 (e).

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The 72nd Legislature amended Section 31.100 in two respects material to this discussion.

First, the Legislature the Legislature enacted subsection (g) which provides:

"(g). The commissioners court may not consider the availability of the election services contract fund in adopting the county budget for the office of the county election officer."

Second, the Legislature amended the section to provide that "the county election officer may not charge for performing any duties that the officer is required by law to perform". See Acts 1991,

72nd Leg., Ch. 622, § 1. See now § 31.100(b).

QUESTION RESTATED

Can the Secretary of State provide by rule that state funds available under Chapter 19 of the Texas Election Code may not be used to pay costs associated with the normal operation of the voter registrar's office ?

IV.

ARGUMENT

A. OVERVIEW OF ARGUMENT.

Prior to 1985, use of the voter registration fund was limited only by the requirement that expenditures be "reasonable expenses incurred by the registrar in the registration of voters." In Attorney General Opinion JM-61 your office construed former article 5.19b and concluded as follows:

"Our examination of the legislative history indicates that the legislature did not intend that funds received pursuant to article 5.19b of the Election Code be

expended in a particular way. We conclude that funds may be used for defraying any reasonable expenses incurred by the registrar's office in the registration of voters. Such expenses could include, but are not necessarily limited to, salaries of deputy registrars or the establishment of voter registration places in the county...or the distribution of forms at high school graduation exercises."

The opinion then noted that expenses in excess of reimbursements received from the state "must be borne by the county". Our agency, also construing former article 5.19b, reached the same conclusion:

"In the opinion of this office, the registration funds from the Comptroller may be used for any activity related to voter registration. Salaries of voter registrar employees, equipment for voter registration office, computer programming related to voter registration, and general office expenses related to voter registration may be paid with voter registration funds received from the Comptroller."

Election Law Opinion JWF-7 (1983). Thus, the issue is whether legislative changes to Chapter 19 mandate a different result. Our agency submits that this is the case, for reasons articulated more fully below:

B. Analysis.

1. Textual Analysis.

The Attorney General Opinion and the Election Law Opinion cited above construed the provisions of Art. 5.19b of the former Election Code. Under that law, the Comptroller issued warrants to a special fund in the county treasury and expenditures were made by vote of the county commissioners court to defray reasonable costs of the voter registrar in the registration of voters. The county was fiscally responsible only for those expenditures in excess of reimbursements received from the state. The only limitation on use of the voter registration was

found in the legislative language: "to be used for defraying expenses of the registrar's office in the registration of voters."

The current version of Section 19.004 is similarly worded: "State funds disbursed under this chapter may be used only to defray expenses of the registrar's office in connection with voter registration." Although the statutory words "defray expenses" remain unchanged from former law, the context in which they appear has changed significantly.

First, the 1985 recodification of the Election Code altered the fiscal role of the county with respect to the voter registrar's office. Prior law provided that : "(the) expenses of the registrar in excess of the reimbursements received from the state...shall be borne by the county." The Legislature deleted this language and substituted the following: "(the) commissioners court may not consider the availability of state funds under this subchapter in adopting the county budget for the office of voter registrar."

The Legislature is presumed to have intended some change to existing law when an amendment is enacted and effect must be given to the amendment. American Surety Co. of New York v. Axtell Co. 36 S.W.2nd 715, 719 (1931); Texas Bank and Trust Co. v. Austin 280 S.W. 161, 162 (1926). The Legislative history indicates that the enactment of Sec. 19.006 was intended to incorporate provisions and concepts not found in former law.⁶ The nature of the change was to alter the fiscal role of the county. The role of the county, prior to recodification, was secondary, i.e. to cover those expenses in excess of the reimbursements received from the

⁶ See discussion above at page 6.

state. The role of the county, as expressed in current law, is primary. Current law contemplates the adoption of a county budget for the office of the voter registrar separate and apart from the voter registration fund. The requirement for independent funding is disclosed in the statutory language that "the commissioners court may not consider the availability of state funds" in adopting the county budget.

Second, the Legislature altered the method of control of the voter registration funds. Originally, the funds were deposited directly in the county treasury without limitation on their use. The next phase was to deposit the funds in a special fund in the county treasury to defray voter registration expenses, but the funds were still subject to the control of the commissioners court. The next phase was to disburse the funds directly to the voter registrars. Under current law, the state warrants are issued to pay specific vouchers submitted by the voter registrar and approved by the secretary of state. Thus, the textual changes have emphasized with ever greater precision the voter registration funds as "state funds" subject to state control. The clear demarcation between "state" and "county" funds is consistent with the plain import of Section 19.006 that the county is obligated in the first instance to adopt a county budget for the voter registrar.

2. Construction with Other Laws.

The construction of the text of Chapter 19 is consistent with other provisions of the Election Code. See Tex.Gov.Code, § 311.023(4). Specifically, the Election Code contains numerous provisions which, considered in conjunction, inform the meaning of the Section

19.006 requirement that the county must provide an adequate budget for the voter registrar.

The voter registrar is the county tax assessor collector unless the position of county elections administrator is created or the county clerk is designated as the voter registrar. § 12.001. In the event the county clerk is designated the voter registrar, the commissioners court may not appropriate less money for voter registration activities than was appropriated to the previous voter registrar. § 12.033. In the event the position of elections administrator is created, the commissioners court sets the salary of the administrator, the number of deputies and their salaries, and automobile expenses. § 31.039 (a)-(c). The commissioners court must also provide office space, equipment, and necessary operating expenses for the administrator and may not appropriate less money for operating expenses than the total amount previously appropriated to the county clerk and tax assessor for the functions assigned to the administrator. § 31.039 (d)-(e). In the event the duties of the county clerk are assigned to the county tax assessor, the commissioners court may appropriate less money that was appropriated to the county clerk for that same purpose. § 31.074.

These provisions reflect a legislative determination that the counties must adequately budget the positions that perform the functions of voter registrar and the budget must not be reduced when the functions of the voter registrar are transferred from one position to another. The textual revisions to Chapter 19 take state funds out of the county budget and instruct the commissioners court not to consider the "availability" of state funds in adopting a budget. Thus, the fiscal role of the county as reflected in the above cited provisions is consistent with

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the interpretation of the secretary of state, i.e. that state funds may not be used for normal daily operations.

3. Administrative Interpretation.

The Secretary of State's Office has, since the recodification of the Election Code, interpreted the wording of Section 19.006 to impose a limit on the use of state funds under Chapter 19. A construction of a statute by an official charged with its administration is entitled to weight Calvert v. Kadane 427 S.W.2nd 605, 608 (Tex.1968); Slocum v. Cameron Indep. School Distr. 288 S.W. 1064, 1066 (1926); Reed v. Department of Licensing and Regulation 820 S.W.2nd 1 (Tex.App.--Austin, 1991). As your office noted in Att.Gen.Op. DM-168 (1992): "...given the secretary of state's express statutory duty to maintain uniformity in the interpretation of the elections laws...we think that a court would accord considerable deference to that office's longstanding position on the issue presented here." Further, if the Legislature reenacts a statute of doubtful construction without substantial change, the statute will ordinarily be given the same construction previously given by the agency. Humble Oil Refinery Co. v. Calvert 414 S.W.2nd 172, 180 (1967); Sharp v. House of LLoyd, Inc. 815 S.W.2nd 245, 248 (Tex.1991).

The Legislature has not substantially amended Chapter 19 since the date of the first Secretary of State Directive issued June 28, 1988. The Legislature in 1989 did, as noted above, amend Section 19.002 to require the secretary of state to monitor compliance of the registrars with the submission of the preelection registration statement. Significantly, in 1991 the

Legislature amended Section 31.100 to insert language identical to Section 19.006 with respect to the election service contract fund. The Legislature simultaneously imposed the limitation that the election service contract fund cannot be charged for performing a statutory duty, a limitation which mirrors the Secretary of State Directives and the current administrative rule. Thus, the Legislature not only has left the secretary of state interpretation of Chapter 19 intact, but has patterned changes in a related election law after the Chapter 19 directives.

3. Legislative Purpose.

The administrative construction given to Chapter 19 is consistent with the legislative purpose of the enactment.

The Voter Registration Fund began simply as a revenue source for county government to compensate for the loss of funds previously realized from the collection of poll taxes. One of the problems with the precursor to Chapter was the inadequacy of the county fiscal role. A survey of registrars in 1969 disclosed that only one-third of the counties contributed funds in addition to the state allotment and three-fifths of the registrars felt the available funds were inadequate. Robert W. Doty, "The Texas Voter Registration Law and the Due Process Clause" Vol. 7 *Houston Law Review* 163, 170 (1969).

An interpretation of Chapter 19 which permits the use of state funds to defray basic operating expenses of the voter registrar's office would frustrate the legislative purpose. A commissioners court would have no incentive to provide an adequate budget for the voter registrar if state money could be used to defray such costs. To say that the county may use state

funds to defray basic costs but may not consider the availability of such funds simply ignores the realities of fiscal constraints, a lack of knowledge the Legislature cannot be presumed to have possessed. Further, a construction which permits state funds to be used for basic costs necessarily diverts state funds from efforts designed to enhance voter registration. Thus, our agency's interpretation maintains the fiscal role of the county intended by the Legislature and promotes what may be said to be the overall purpose of the legislation, i.e. to promote effective voter registration. Further a contrary interpretation--one which permits use of state funds for basic county operation -- is inconsistent with the control mechanism enacted by the Legislature for the disbursement of Chapter 19 funds. The Legislature has given the secretary of state the authority to approve vouchers prior to disbursement. The precondition of secretary of state approval would -- contrary to the legislative intent -- involve the secretary of state in purely county matters such as capital outlays, and salaries for permanent staff, if in fact the voter registration funds are to be used for daily operation of the voter registrar's office.

In sum, the whole of Chapter 19 indicates a coherent legislative purpose. The counties are fiscally and managerially responsible for the basic operation of the voter registrar. State funds are designed to enhance not supplant these daily operations.

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Conclusion

Chapter 19 of the Texas Election Code has undergone a continual evolution of purpose since the original predecessor statute was enacted in 1966. Originally a source of revenue, pure and simple, subject to county control, the fund has evolved into a state-county cooperative venture to promote and enhance voter registration and participation. Beginning with the 1985 recodification of the Election Code and continuing through subsequent amendments, principally in 1987, the Secretary of State's Office has given effect to the legislative changes that have marked the evolution of this chapter. The premise upon which the current administrative is based -- that the counties must independently fund basic daily operations is consistent with the text and purpose of Chapter 19.

Respectfully submitted,



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