



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

November 28, 1995

The Honorable Antonio O. Garza, Jr.
Secretary of State
Executive Division
P.O. Box 12697
Austin, Texas 78711-2697

Letter Opinion No. 95-073

Re: Status of party primary election
workers under state law (ID# 35922)

Dear Secretary Garza:

You request an attorney general opinion as to "whether, under state law, primary election workers, specifically election judges and clerks under Section 32.006 of the Texas Election Code, are employees of the state, a political subdivision thereof or a wholly owned instrumentality of either for the purposes of the work they perform on primary elections."

Your request letter indicates that your question is prompted by a concern whether the employment of the primary election workers you ask about is subject to federal taxation under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. ch. 21, and the Federal Unemployment Tax Act ("FUTA"), *id.* ch. 23. You point to United States Code title 26, section 3121(b)(7), which excepts from the definition of "employment" taxable under FICA "service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby."¹ United States Code title 26, section 3306(c)(7) makes a similar exception to the definition of "employment" taxable under FUTA, but the statute adds to such exception services performed for governmental instrumentalities "immune under the Constitution of the United States" from FICA taxation.

We note at the outset of our discussion that we generally do not, in the opinion process, attempt to determine the application of federal provisions of which a federal agency is charged with the construction and application, as the Internal Revenue Service (the "IRS") is here with respect to FICA and FUTA provisions, but rather advise requestors to seek resolution of such matters before such agency and/or the proper court. Accordingly, we do not here attempt to determine as a matter of law whether the primary election workers you ask about are employees of the state or a political subdivision thereof or a wholly owned instrumentality of either, within the above-referenced

¹Subpart (b)(7)(F) of section 3121 excepts from the subpart (b)(7) exception service by employees of states, political subdivisions, and instrumentalities thereof who are not members of the entities' retirement systems. However, subpart (b)(7)(F)(iv) excepts from the subpart (b)(7)(F) exception to the exception service by election workers receiving less than \$1,000 a year for such services.

exceptions to the application of FICA and FUTA taxes under the Internal Revenue Code.² We confine ourselves, rather, to considering the relationship between the State and political parties in the conduct of primary elections.

Much of the development of Texas law regulating political party primary elections in particular has been in response to federal court decisions finding that Texas political parties are "agencies of the state" in their conduct of primary elections. *Smith v. Allwright*, 321 U.S. 649 (1944) (party's exclusion of African-Americans from participation in its primary election is state action for purposes of federal Fourteenth Amendment and Fifteenth Amendment analysis). See also *Campbell v. Davenport*, 362 F.2d 624 (1966) ("[I]t is well settled that Texas has delegated its function of conducting primaries to the political parties and that in this respect 'the party's action is the action of the state.'" (quoting *Smith*, 321 U.S. 649).

In *Bullock v. Carter*, 405 U.S. 134 (1972), the United States Supreme Court held that the primary election scheme then in place under Texas law, where parties financed the cost of the primary elections solely through filing fees and all primary candidates were required to pay a filing fee in order to obtain a place on the ballot, constituted state action creating impermissible wealth classifications for ballot access. Subsequently, in *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972), the Texas Supreme Court, citing *Smith*, found that state financing of party primary elections served a public purpose for purposes of state constitutional prohibitions on grants of public money for private purposes, and overruled earlier Texas Supreme Court case law to the contrary.

Under Texas statutory law, party primary election workers such as you ask about are treated like the election workers in other public elections employed by the governmental bodies holding the elections. Chapter 32 of the Texas Election Code provides for the appointment, service, and compensation of primary election judges and clerks in the same provisions as apply to election judges and clerks of other public elections. The governing body of the political subdivision conducting the election appoints election judges in other elections, and section 32.006 treats county party officials as the governing body of a political subdivision in this respect by providing that the party county chairman, with the approval of the county party executive committee, appoints election judges for the primary election. Election clerks are appointed, as in other elections, by the election judge. Elec. Code § 32.031. Eligibility standards are the same for all election judges and clerks including those serving in the primaries. *Id.* ch. 32, subchs. C - D (powers and duties), E (provisions for compensation), F (training).

²We note that you advise that a recent Internal Revenue Service ruling directed to the Travis County Democratic Party addressed the issue whether primary election workers were employees or independent contractors for purposes of federal employment taxes and concluded that that such workers were employees of the party for federal employment tax purposes, although the Texas Employment Commission had earlier determined that such workers were independent contractors for purposes of FICA and FUTA tax payments. Please note that we do not understand you to raise this issue here, and we do not address it.

Moreover, the working hours and polling place procedures followed by election workers are the same for primaries as for other elections. *Id.* ch. 41, subch. B (hours for voting); *see also id.* tit. 6 (conduct of elections).³

The method of financing primary election costs differs, however, from that in other elections. While the costs of other elections are paid by the political subdivision conducting them, primary election costs, including compensation of the election workers you ask about, are paid from a fund consisting primarily of candidate filing fees and state monies appropriated by the legislature. Elec. Code §§ 172.024, 173.001, .031 - .032.⁴ State payments for financing primary costs are made to party county chairmen in installments beginning 30 days before the primary filing period opens and ending with payments after the election in amounts necessary to settle actual primary expenses. *Id.* § 173.083. That the entire primary fund, including state-appropriated funds and filing fees, is state money is made clear by the provisions for remitting to the state any money remaining in the fund after primary expenses are paid. *Id.* § 173.0851.

Thus, (1) the conduct of the primary elections is entirely regulated by state law; (2) a party in its role of conducting the Texas primary elections functions as an agency of the state; and (3) the compensation of the party primary election workers is paid from state funds.⁵

³*See also, e.g.,* Elec. Code §§ 161.004 (party documents are public information), .009 (party officer subject to mandamus as public officer is regarding performance of duties prescribed by code).

⁴The primary funds also include money contributed to defray primary election expenses, and earnings on the funds. Elec. Code §§ 172.024, 173.001, .031 - .032.

⁵Again, we stop short in this opinion of concluding as a matter of law that the workers in question should be considered employees of the state or its instrumentality for purposes of the exceptions in federal law to the application of FICA and FUTA taxes, as that is an issue which can be effectively resolved only by the Internal Revenue Service or the proper court. *But see, e.g., State Bar of Texas v. United States*, 560 F. Supp. 21 (N.D. Tex. 1983) (finding employment by State Bar of Texas within exemption from employment taxes in 26 U.S.C. § 3306(c)(7) on basis of state statute describing state bar as administrative agency of state).

S U M M A R Y

The conduct of the primary elections is entirely regulated by state law. A party in its role of conducting the Texas primary elections functions as an agency of the state. The compensation of the party primary election workers is paid from state funds.

Yours very truly,



William Walker
Assistant Attorney General
Opinion Committee