Election Law Opinion JWF-27

Request from Dolly Bailey, County Clerk, Brazoria County, Angleton, regarding absentee voting by a convicted felon whose conviction is pending appeal.

SUMMARY

A person confined in the Texas Department of Corrections, convicted of a felony, but whose conviction is on appeal, may vote absentee by mail if he or she is otherwise qualified to vote under Tex. Elec. Code Ann. art. 5.02 (Vernon Supp. 1982-1983). An absentee voting clerk does not need written proof of the expiration date of an appeal from a felony conviction in order to send ballot materials to be voted by mail by a person confined to the Texas Department of Corrections.

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JOHN W. FAINTER, JR.
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MEMORANDUM

TO: Voter Registrars and Election Administrators

FROM: Karen C. Gladney, Director, Elections Division

DATE: February 10, 1984

SUBJECT: JWF-27

Please find enclosed for your reference a copy of Election Law Opinion JWF-27 regarding absentee voting by a convicted felon whose conviction is pending appeal.

/mt

Enclosure

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January 24, 1984

Honorable Dolly Bailey
County Clerk, Brazoria County
Courthouse
Angleton, Texas 77515

Election Law Opinion JWF-27
Re: Absentee voting by a convicted felon whose conviction is pending appeal.

Dear Ms. Bailey:

This is in response to your October 25, 1983 request for an opinion in which you ask several questions regarding the voting rights of a convicted felon who has appealed his conviction.

This official election law opinion is rendered by me as chief election officer of the state in accordance with Tex. Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1982-1983).

Specifically, your first question asked whether a person who is confined in the Texas Department of Corrections and who is appealing a felony conviction has the privilege of voting absentee by mail.

Tex. Elec. Code Ann. art. 5.05, subd. 1(a) (Vernon Supp. 1982-1983) sets out who may vote absentee and provides in pertinent part:

> A voter who is confined in jail is entitled to vote absentee if at the time of applying for an absentee ballot he is: (1) serving a misdemeanor sentence which extends through

> election day; (2) being held for trial after a denial of bail; (3) being held without bail pending the appeal of a felony conviction; or (4) being held for trial or pending an appeal on a bailable charge but he expects not to have been released on bail by the date of the election. (Emphasis added.)

Paragraph (c)(iv) of the same article instructs qualified voters who are confined in jail under one of the circumstances listed in subdivision 1(a) above, how to vote absentee by mail. Accordingly, a person confined in the Texas Department of Corrections, convicted of a felony, but whose conviction is on appeal, may vote absentee by mail if he is otherwise qualified to vote under Tex. Elec. Code Ann. art. 5.02 (Vernon Supp. 1982-1983).

Your second question asked whether a county clerk must have proof in writing of the date of expiration of the appeal.

The Election Code requires the clerk of each court having jurisdiction of the trial of felony crimes to furnish to the voter registrar an abstract of each unappealed conviction for a felony crime and of each final conviction. The code also states that the registrar shall determine if the person convicted is a registered voter and, if so, shall cancel his registration. Tex. Elec. Code Ann. art. 5.18c, subd. 3 (Vernon Supp. 1982-1983).

Tex. Elec. Code Ann. art. 5.05, subd. 4(b) (Vernon Supp. 1982-1983) states in pertinent part:

> On the twentieth day preceding election day, or as soon thereafter as possible, the clerk shall mail an official ballot, ballot envelope, and carrier envelope . . . to each voter who has theretofore made application for a ballot in compliance with this section. (Emphasis added.)

An absentee voting clerk is not authorized to look beyond the contents of an application for a ballot to be voted by mail. An absentee voting clerk is required to send ballot materials to each voter who timely submits a valid application.

Ballots voted by mail are qualified on the day of the election by a special canvassing board in countywide elections and in elections less than countywide where a special canvassing board has been appointed, or, otherwise, by the presiding judges at the regular polling places. Tex. Elec.

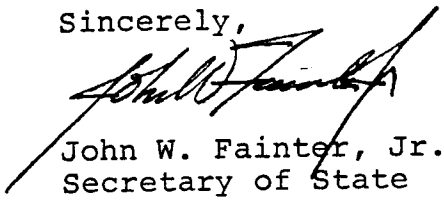
Code Ann. art. 5.05, subd. 6(b) and subd. 9 (Vernon Supp. 1982-1983). Whether a person who has voted absentee by mail is qualified to vote in a particular election is a decision which must be made by either the special canvassing board or the presiding judges of the precinct holding the election.

There is, therefore, no Election Code provision which requires an absentee voting clerk to have written proof of the expiration date of an appeal from a felony conviction before sending ballot materials to be voted by mail by a person confined to the Texas Department of Corrections.

SUMMARY

A person confined in the Texas Department of Corrections, convicted of a felony, but whose conviction is on appeal, may vote absentee by mail if he or she is otherwise qualified to vote under Tex. Elec. Code Ann. art. 5.02 (Vernon Supp. 1982-1983). An absentee voting clerk does not need written proof of the expiration date of an appeal from a felony conviction in order to send ballot materials to be voted by mail by a person confined to the Texas Department of Corrections.

Sincerely,



John W. Fainter, Jr.
Secretary of State

Ward Allen White III
General Counsel

Prepared by Adela P. Santos
Assistant General Counsel
Elections Division

APPROVED:
OPINION COMMITTEE

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