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September 30, 1982

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Election Law Opinion DAD-63
Re: Whether an election judge
appointed by the Commis-
sioners court must select
at least one clerk from
each list submitted by
the county chairmen of
the major political
parties.

Dear Mr. Moseley:

This is in answer to your inquiry of September 2, 1982.

This official election law opinion is rendered by me as
chief election officer of the state in accordance with
V.A.T.S. Election Code art. 1.03, subd. 1.

You asked whether it is mandatory for an election judge to
select at least one election clerk from each list of eli-
gible nominees submitted to him pursuant to V.A.T.S.
Election Code, art. 3.01(a). You also asked whether the
election judge is relieved of his duty to select one of the
nominees appearing on the list for a particular party if the
county commissioners selected a member of the nominees'
party to serve as an alternate presiding judge in that
precinct.

V.A.T.S. Election Code, art. 3.01(a) states:

The commissioners court at its July term
shall appoint from among the citizens of each
election precinct one qualified voter as
presiding judge of elections held at the

expense of the county in that precinct and one qualified voter as alternate presiding judge, each of whom shall continue to act until his successor is appointed. Whenever a vacancy arises in either of such offices, the commissioners court may fill the vacancy at any regular or special term of court. All orders appointing judges and alternates shall be entered of record. Each presiding judge shall appoint two voters, who are eligible for appointment, to serve as election clerks, and shall appoint for each election as many additional clerks as he deems necessary for the proper conduct of the election, not to exceed the maximum number authorized by the commissioners court. The commissioners court shall fix the maximum number of clerks that may be appointed for each precinct, and may fix different maximums depending on the type of election. The clerks shall be selected from different political parties, when practicable. The chairman of the county executive committee of each of the two parties whose candidate for Governor received the most votes statewide in the last prior gubernatorial general election may submit a list of not less than two eligible nominees who are members of that party to each election judge at least 30 days prior to the date of a general election or 10 days prior to the date of a special election. If any such list is submitted to him, the election judge shall appoint at least one clerk from each list submitted. For the purpose of this section, the term "members of that party" means persons who affiliated with the party in the manner prescribed in Article 13.01a, Vernon's Texas Election Code during the last preceding set of primary elections and conventions. (Emphasis added.)

Resolution of your first question involves a determination of whether the word "shall" as it is used in the above-cited provision which governs the election judges selection of clerks is directory or mandatory and, thereby, determining whether an election judge has discretion in selecting at least one person from each list submitted by a county chairman or whether it is incumbent upon the election judge to select at least one person from each list to serve as a clerk.

In Chisholm v. Bewley Mills, 155 Tex. 400, 287 S.W.2d 943, 945 (1956), the Texas Supreme Court provided the following guidance:

. . . Although the word "shall" is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. . . .

Article 3.01(a), supra, was amended in 1967 by S.B. 58, Acts of the 60th Leg., p. 1863, ch. 723, § 8 to add the language that authorizes the county chairmen to submit a list of nominees to an election judge and that requires the election judge to appoint at least one clerk from each list submitted. Before the 1967 amendment of paragraph (a), the statute required only that clerks be selected ". . . from different political parties when practicable."

Giving effect to the heretofore-cited language of Chisholm, an analysis of art. 3.01(a), supra, shows that its purpose is to facilitate the participation in the election process by all interested major parties. Concurrently, the provision is designed to ensure that elections held at county expense are free from charges of bias or partisan influence by providing a mechanism through which each major party may have at least one of its members appointed as an election clerk. This analysis is supported by the 1967 amendment. The conclusion, therefore, is that the Legislature intended that it be mandatory for election judges to appoint at least one person to serve as a clerk from each list submitted by the county chairmen. To reach a contrary conclusion, would require a reading of the statute that gives no effect to the additional language added by the Legislature in 1967, making that language merely surplusage devoid of any substantive content.

In Ramirez v. State, 550 S.W.2d 121, 124 (Tex. Civ. App.--Austin, 1977, no writ) it was stated:

If the provision in question is included by the Legislature simply to promote prompt, orderly, and proper business conduct, the word "shall" is generally construed not to be mandatory. . . If the provision is the very essence of the thing to be done, the converse rule is applicable and the word "shall" is mandatory.

It cannot be disputed that the language added to art. 3.01(a) was included to guarantee the participation in the conduct of elections by all major parties interested in doing so. The ". . .very essence of the thing to be done. . ." is for the election judges to accept the lists submitted in a timely fashion by the county chairmen and to select at least one of the nominees appearing on each list to serve as a clerk.

Finally, you asked if the fact that the county commissioners have previously appointed, as an alternate presiding judge, a member of the same party as those whose appointment is sought as a clerk will relieve the election judges of the duty to select one of the nominees. Art. 3.01(a), supra, provides in pertinent part:

The commissioners court at its July term shall appoint from among the citizens of each election precinct one qualified voter as presiding judge of elections held at the expense of the county in that precinct and one qualified voter as alternate presiding judge, each of whom shall continue to act until his successor is appointed.

It is clear that the Legislature did not contemplate that election judges would be excused from their duty to select clerks from lists of nominees submitted in a timely fashion by county chairmen due to the appointment of a party member as an alternate presiding judge. The statute directs the commissioners court to appoint the presiding judge and alternate presiding judge and continues by directing the presiding judge to select election clerks from the lists timely submitted by county chairmen. Article 3.01(a) clearly distinguishes between the duties of the commissioners court and those of the election judges and the performance of duties by one does not excuse the performance of duties by the other. This conclusion is supported by the aforementioned fact that the Legislature added the language which required the election judges to select clerks from the list of nominees in 1967, after the county commissioners were directed in art. 3.01(a) to select an alternate presiding judge.

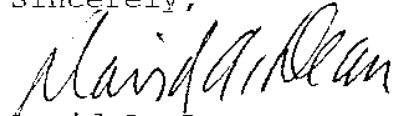
In conclusion, you are advised that, pursuant to V.A.T.S. Election Code, art. 3.01(a), if a county chairman of a major political party submits a list of eligible nominees to serve as election clerks to an election judge, the judge must select at least one of those nominees to serve as a clerk.

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SUMMARY

If a county chairman of a major political party timely submits a list of eligible nominees for election clerks to an election judge, the election judge must select at least one person from the list to serve as a clerk.

Sincerely,



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