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JOHN W. FAINTER, JR.  
SECRETARY OF STATE

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Ms. Conny B. McCormack  
Elections Administrator  
Dallas County  
500 Main Street  
Dallas, Texas 75202

Hon. Dianne Wilson  
County Clerk, Fort Bend County  
P. O. Box 520  
Richmond, Texas 77469

Election Law Opinion JWF-28  
Re: Programming expenses for  
electronic tabulating  
equipment used in primary  
elections

Dear Ms. McCormack and Ms. Wilson:

This is in response to a request from Ms. McCormack dated November 23, 1983, and a request from Ms. Wilson dated November 28, 1983.

Ms. McCormack asked for a reconsideration of the opinion expressed by this office in Election Law Opinion JWF-19. Specifically two questions were asked:

- 1) Is it permissible for Dallas County to charge the political parties a lease fee for precinct ballot counters (PBCs) which tabulate the vote at the precinct level?
- 2) May programming charges for the PBCs be passed on to the political parties?

Dallas County uses the punch-card voting method.

Ms. Wilson asked whether counties may charge the political parties for the programming of tabulators used in

conjunction with the optical scanner voting system used in Fort Bend County.

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).

Questions on arrangements and expenses of elections are addressed in Chapter 7 of the Election Code. Chapter 13 of the Code specifically addresses election expenses of primaries and considerably restricts the charges a county can make to a political party.

Tex. Elec. Code Ann. art. 7.15, subd. 8(c) (Vernon Supp. 1982-1983) provides:

The voting equipment and automatic tabulating equipment shall be the property of the county paying for or renting it, subject to the terms of the rental contract. When used in any election not held at the expense of the county, the voting equipment and county-owned tabulating equipment so used shall be leased to the authority holding the election, and payment shall be received by the county at such lease price as the commissioners court shall fix for each piece of voting equipment or tabulating equipment used, but not to exceed ten percent of the original cost of the unit for each election day such equipment is used; and the authority charged with the expense of holding the election shall pay the lease price, whether it be a municipality or other political subdivision, a political party, or any other organization or authority.

Article 7.15, subd. 8(c) was added to the Texas Election Code by Senate Bill 58, 60th Legislature (1967). (Acts 1967, 60th Legislature, p. 1858, ch. 723).

Art. 13.08(f) was originally added to the Election Code by Senate Bill 571, 64th Legislature (1975). (Acts 1975, 64th Legislature, p. 2046, ch. 675.) Senate Bill 571 was captioned, in part: "An Act relating to the conduct, financing, and funding of primary elections; relating to the establishment of a primary fund and to its investment and use . . ."

Tex. Elec. Code Ann. art. 13.08(f) (Vernon Supp. 1982-1983) as amended by House Bill 1293, 68th Legislature (1983) now provides as follows:

In each county in which voting machines or an electronic voting system has been adopted, the county commissioners court shall permit the county-owned voting machines or voting equipment to be used for the primary election, including the conduct of absentee voting for the elections, at a charge for use at each election not exceeding \$16 per unit for voting machines adopted under Section 79 (Article 7.14, Vernon's Texas Election Code), and not exceeding \$5 per unit for voting equipment adopted under Section 80 (Article 7.15, Vernon's Texas Election Code); provided, however, that the county commissioners court shall not be required to provide voting machines or equipment for use in any election precinct in which fewer than 100 votes were cast in the preceding first or general primary or runoff primary election. The maximum amount fixed in this subsection includes the lease price for the use of the unit, and also the charge for its preparation and maintenance if the county provides these services. The county is entitled to reimbursement for the cost of transporting the machines or equipment to and from the polling places if the county provides this service. Where voting is by an electronic voting system, the county may not charge for use of county-owned automatic tabulating equipment at the central counting station; but all actual expenditures incidental and necessary to operation of the central counting station in counting the ballots are payable out of the primary fund.

Art. 7.15, subd. 8(c) directs the counties to provide their county-owned electronic voting and tabulating equipment to other authorities charged with the expense of holding elections. These authorities include political parties. The statute authorizes the county to fix a lease price not greater than 10% of the original cost of the unit for each election day.

Art. 13.08(f) specifically limits the lease price on county-owned electronic voting equipment to \$5 per unit when the lessee is a political party conducting a primary election.

Furthermore, this statute completely disallows charging a political party for the use of the county's automatic tabulating equipment at the central counting station.

In Brown v. Peterson, 609 SW2d 287, 289 (Tex. Civ. App.-- Dallas 1980), the court restated a basic principle of statutory construction:

When two statutes are alleged to be in conflict, additional principles come into play. If there is a clear conflict, the later expression of legislative intent controls, and to that extent the later statute will be held to have repealed the earlier statute. Repeals by implication, however, are not favored, and, if there is no positive repugnance between the two, they will be harmonized so as to give effect to both.

According to the principle of statutory construction outlined in Brown, article 13.08(f), as the later, far more explicit, expression of legislative intent on the specific issue of the use of county-owned electronic voting systems in primary elections, is controlling. Thus, art. 13.08(f) is a specific limitation on the general authority granted to the counties by art. 7.15, subd. 8(c).

This interpretation of the law is in accordance with Brown v. Patterson, id., at 290:

Two statutes dealing with the same subject matter, though enacted at different legislative sessions, will be construed together and their provisions harmonized to the extent possible.

Under the provisions of art. 13.08(f), which is controlling for purposes of primary elections, the maximum lease price for electronic voting equipment is \$5 per unit. Voting equipment is defined as "any kind of equipment used in connection with an electronic voting system other than automatic tabulating equipment." Tex. Elec. Code Ann. art. 1.01a(a) (58); art. 7.15, subd. 2(c) (Vernon Supp. 1982-1983). The county is not allowed to make any charge to a political party for the use of county-owned automatic tabulating equipment at the central counting station.

Automatic tabulating equipment is defined as "any apparatus which automatically examines and counts voted ballots and tabulates the results." Tex. Elec. Code Ann. art.

1.01a(a)(2); art. 7.15, subd. 2(b) (Vernon Supp. 1982-1983). Central counting station is defined as "one or more locations selected by the proper public official for the automatic counting and tabulating of ballots." Tex. Elec. Code Ann. art. 1.01a(a)(9); art. 7.15, subd. 2(g) (Vernon Supp. 1982-1983) (Emphasis added).

In common parlance, the use of precinct ballot counters (PBCs) is spoken of as an alternative to the use of a central counting station. However, the Election Code does not speak to the use of PBCs at all. Art. 7.15, authorizing the use of electronic voting systems in Texas, only anticipates tabulation taking place at a central counting station.

All locations selected for the automatic counting and tabulating of ballots meet the statutory definition of "central counting station" whether they are at a polling place or elsewhere. There is no reason to believe that the legislature had any intention to limit its prohibition against charging for the use of such equipment to equipment used at a central location since the Election Code expressly provides for the use of multiple central counting stations. On the contrary, art. 13.08(f) shows a legislative intent that the primary fund not be used to subsidize the purchase of electronic tabulating equipment by a county.

Therefore, it is my opinion that absent an expression of the legislature to provide a different rule for automatic tabulating equipment used at polling places, the secretary of state is without authority to provide for the leasing of PBCs to political parties. If PBCs are used in primary elections, the use of such devices must be provided to the parties free of charge pursuant to art. 13.08(f). Nor may the secretary of state provide for disbursements from the primary fund to cover such expenses.

A clear distinction must be drawn between "voting equipment" and "tabulating equipment." Not all electronic voting systems adopted under art. 7.15 employ voting equipment. In the case of punch-card systems, the device into which the ballot is inserted is voting equipment within the definition of art. 7.15, subd. 2(c). Optical scanner or mark-sense systems, however, typically employ no devices which could be classed as voting equipment. As stated in Election Law Opinion JWF-19, when PBCs certified under art. 7.17a are used in conjunction with an electronic voting system certified under 7.15, the PBCs become an integral part of the 7.15 system. The basic principle that PBCs used in conjunction with a 7.15 system become part of that 7.15 system is sound. However, to the extent that Election Law Opinion JWF-19 implied that PBCs become an integral part of the

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"voting equipment" used in a 7.15 system, I believe that Election Law Opinion JWF-19 was in error and is hereby overruled.

In response to the question posed concerning programming charges, Art. 13.08(f) does expressly provide that "all actual expenditures incidental and necessary to operation of the central counting station in counting the ballots are payable out of the primary fund." Art. 7.15, subd. 11a(b) provides:

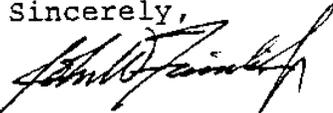
The authority charged with the duty to provide ballots shall select a competent person to prepare the program for the electronic tabulating equipment. The programmer may be one of the persons appointed or approved by the commissioners court under Paragraph (b), Subdivision 20 of this section or some other person, but if the program is prepared by anyone other than the tabulation supervisor, it must be submitted to the tabulation supervisor for his approval at least 10 days before the election.

The political parties may, therefore, select a programmer subject to the limitations stated in art. 7.15, subd. 11a(b). It is my opinion that such expenses are incidental and necessary to the tabulation of the ballots. When such services are provided by the county, the county may make a reasonable charge to the parties. Disbursements may be made from the primary fund to cover a reasonable programming charge. Election Law JWF-19 is hereby overruled to the extent that the opinions expressed therein conflict with those expressed herein.

SUMMARY

If PBCs are used in primary elections, the use of such devices must be provided to the parties free of charge pursuant to art. 13.08(f). Disbursements may be made from the primary fund to cover a reasonable programming charge.

Sincerely,



John W. Fainter, Jr.  
Secretary of State

Ward Allen White III  
General Counsel

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Hon. Dianne Wilson  
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