

Election Law Opinion DAD-46

Request from Mr. Orlando L. Garcia, San Antonio, concerning whether an individual who was ineligible to be a candidate by the filing deadline could, nonetheless, be eligible to run in the general primary if the factor causing his ineligibility is removed before the general primary.

SUMMARY

An individual who was on felony probation at the time of the filing deadline for an application for a place on the general primary ballot was an ineligible candidate notwithstanding the fact that a court removed his probationary status before the primary election. The mere passage of time would not cure this disqualification. In order to be an eligible candidate, he must have been able to show at the time of filing that he would be able to hold office if elected.

If an ineligible candidate wins the primary election, he is not entitled to a position on the general election ballot. Votes cast for an ineligible candidate are taken into account in determining whether any other candidate received the necessary vote for nomination or election. If no other candidate receives the necessary vote for nomination or election, the vacancy created by a determination of ineligibility shall be filled as provided by law.



OFFICE OF THE SECRETARY OF STATE

DAVID A. DEAN
SECRETARY OF STATE

STATE CAPITOL
P.O. Box 12697
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August 6, 1982

Mr. Orlando L. Garcia
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Election Law Opinion DAD-46
Re: Whether an individual who was ineligible to be a candidate by the filing deadline could, nonetheless, be eligible to run in the general primary if the factor causing his ineligibility is removed before the general primary.

Dear Mr. Garcia:

This opinion is in response to your inquiry of June 10, 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.

Your inquiry was based upon the following fact situation:

Candidate X files his application for his party's nomination on the last day of the filing period. On that day, he was on probation for a felony conviction. Sometime before the general primary, a district court terminated the candidate's probationary status. Candidate X wins the primary race against Candidate B.

With reference to the foregoing, you asked:

1. Was Candidate X eligible to run in the primary election?
2. Will Candidate X be eligible to have his name placed on the general election ballot?

3. If Candidate X was not eligible to run in the primary election, will Candidate B become the party nominee or must the executive committee fill the vacancy in accordance with law?

In order to answer your first two questions a determination must be made as to when eligibility to be a candidate in the primary election is determined. Is the determination based upon facts as they existed at the time of the filing of an application for a place on the general primary ballot, or on the day of the general primary election; or, is the determination based upon facts as they will exist after the candidate would take office if elected?

V.A.T.S. Election Code, art. 1.05, subd. 1, states in part:

No person shall be eligible to be a candidate for, or to be elected or appointed to, any public elective office in this state unless he is eligible to hold such office under the Constitution and laws of this state. . . (and) has not been convicted of a felony for which he has not been pardoned or had his full rights of citizenship restored. . . . (Emphasis added.)

Article 1.05 was interpreted in Lemons v. State, 570 S.W.2d 593 (Civ. App. 1978, writ ref'd n.r.e.). In that case an individual was running for county attorney. Candidates for county attorney are required to be licensed attorneys. On the day of the filing deadline, the individual was not licensed to practice law. He was elected at the primary election but the court enjoined the party from certifying him as its nominee for the general election. The individual filed a motion for new trial based on the fact that he had become a licensed attorney after the election but before the judgment granting a permanent injunction was signed. On appeal, the court held that the individual must show before the filing deadline that he would be able to qualify to hold the office sought. The court pointed out that his qualification depended on his action or the actions of others and not the mere passage of time, therefore rendering him unable to show his qualification on time.

In the fact situation posed, Candidate X was not able to show at the filing deadline that he would be able to qualify to hold the office which he sought because at that time he was serving a probated sentence for a felony conviction. His actions or someone else's actions were necessary to remove this factor causing ineligibility. Just as in Lemons v. State, the mere passage of time would not cure the disqualification. He was therefore ineligible to run in the primary election. Following Lemons v. State, his election

in the primaries would not entitle him to a position on the general election ballot.

In your final question you asked who would be the party's candidate in the event an ineligible candidate won the general primary election. V.A.T.S. Election Code, art. 1.05, subd. 4 provides that votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election.

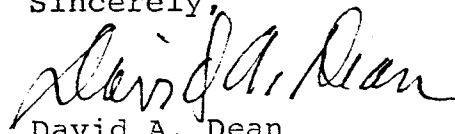
In the fact situation posed, Candidate X won the general primary election; therefore, Candidate B could not have received the necessary vote for nomination. Candidate B would not become the party's candidate unless he is nominated by the appropriate executive committee as provided in V.A.T.S. Election Code, arts. 8.22 and 13.56. The manner in which the vacancy created by a determination of ineligibility is filled is determined by the date on which the vacancy occurs.

SUMMARY

An individual who was on felony probation at the time of the filing deadline for an application for a place on the general primary ballot was an ineligible candidate notwithstanding the fact that a court removed his probationary status before the primary election. The mere passage of time would not cure this disqualification. In order to be an eligible candidate, he must have been able to show at the time of filing that he would be able to hold office if elected.

If an ineligible candidate wins the primary election, he is not entitled to a position on the general election ballot. Votes cast for an ineligible candidate are taken into account in determining whether any other candidate received the necessary vote for nomination or election. If no other candidate receives the necessary vote for nomination or election, the vacancy created by a determination of ineligibility shall be filled as provided by law.

Sincerely,



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Mr. Orlando L. Garcia
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