



OFFICE OF THE SECRETARY OF STATE

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P.O. Box 12697
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August 16, 1982

Mr. Harry V. Burns
Black Republican Council
of Bexar County
P. O. Box 20732
San Antonio, Texas 78220

Election Law Opinion DAD-51
Re: Whether an ineligible
candidate who ran in the
general primary election
and won may withdraw as
the party's elected
nominee and subsequently
be appointed as the
party's nominee if he
meets all the eligibility
requirements for candi-
dates at the time of
appointment.

Dear Mr. Burns:

This opinion is rendered in response to your inquiry of
August 6, 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.

In your letter, you asked whether the candidate receiving
the second highest number of votes in a general primary
election would have a right to be named as the party's
nominee if it is determined after the general primary
election that the candidate who received the party's nomi-
nation was ineligible to run in that election. The answer
to this question is no. 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. If an ineligible candidate received the party's
nomination at the general primary election, the candidate

receiving the second highest number of votes would not have had sufficient votes for the nomination. The appropriate party executive committee would fill the vacancy by nomination as provided in Arts. 8.22 and 13.56. See Election Law Opinion DAD-46 for further discussion.

You also asked whether a winning candidate in a general primary election who is later determined to have been ineligible to run in that election, may be selected by the appropriate executive committee as the party's substitute nominee if: (1) the person resigns as the party's elected nominee; and (2) the person meets all of the eligibility requirements for selection as a candidate for the office at the time of the executive committee's selection. The answer to this question is yes.

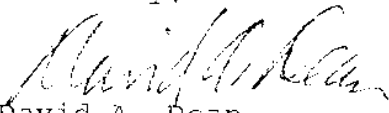
The Election Code does not specifically state when the eligibility of a substitute nominee is to be determined, however, an analogy can be drawn between being appointed a substitute nominee and filing for an application for a place in the general primary ballot. In both instances the candidate is seeking access to the ballot. Election Law Opinion DAD-46, relying on Lemons v. State, 570 S.W.2d 593 (Civ. App. 1978, writ ref'd, n.r.c.) concluded that eligibility to run in the general primary is determined at the time of the filing deadline. A candidate must be able to determine at that time that he will be able to hold office if elected. Similarly, a substitute nominee's eligibility is determined at the time of his selection.

SUMMARY

A candidate receiving the second highest number of votes in a general primary election does not have a right to be named as the party's nominee if it is determined after the general primary election that the candidate nominated in the election was ineligible to run in that election.

If an ineligible candidate runs in the general primary election and wins, but subsequently resigns, he may be selected as his party's nominee if at the time of his selection he meets all the eligibility requirements to be a candidate for the office.

Sincerely,


David A. Dean
Secretary of State

Mr. Harry V. Burns
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