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JOE DESHOTEL

Texas State Representative
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FILE # ML-46729-11
I.D. # 46729
RQ-0965-GA

April 20, 2011

The Honorable Greg Abbott
Attorney General of Texas
Att'n: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

Re: Applicability of Article III, § 19, and Article XVI, § 40(d), of the Texas Constitution to Member of Texas Legislature Serving as State Chair of Texas Political Party

Dear Attorney General Abbott:

This is a request for an opinion from your office.

Background

Questions recently have been raised about the applicability of certain provisions of the Texas Constitution to the circumstance of a sitting member of the Texas Legislature also serving as state chair of a Texas political party. The assertion being made by some is that the position of state chair of a political party in Texas is an "office" as that term is used in subsection (d) of Section 40 of Article XVI of the Texas Constitution. Those asserting this position conclude that, as a result of their interpretation of the constitutional term, a member of the Texas Legislature cannot also hold the political position of state chair of a Texas political party.

These assertions also raise similar questions about the applicability of a similar phrase in Section 19 of Article III of the Texas Constitution. Under this constitutional provision, a person holding an "office under . . . this State" is not "eligible to the Legislature" during the term of the "office."

Resolution of the issues raised about the meaning of these constitutional provisions is important to members of the Texas Legislature. The members have a close and obvious interest in the operation and performance of their state political parties, and, from time to time, some

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members of the Legislature may entertain a serious interest in also trying to serve as chair of one or another of the political parties. The additional legal light that your office may be able to throw on the constitutional implications of such a situation will be of significant value to those who may contemplate or are actively considering such a possibility.

Issues on which an opinion is requested

Due to these matters, I respectfully request an opinion from your office on the following two legal issues:

1. ***Is the position of State Chair of a Texas political party an "office . . . under this State" within the meaning of Section 40(d) of Article XVI of the Texas Constitution?***

2. ***Is the position of State Chair of a Texas political party an "office under . . . this State" within the meaning of Section 19 of Article III of the Texas Constitution?***

Background facts and attached briefing

I have attached to this request a legal brief addressing these issues. The brief was prepared by an attorney who regularly practices in the fields of constitutional and election law. It is not a brief on my behalf, but I bring it to your attention in order to assist your office as it considers the questions presented by this letter. I do suggest that, for purposes of answering this request, your office treat the discussion in Part II of the brief about the duties and compensation of the state chair of one of the state's two major political parties—the Texas Democratic Party—as an accurate factual presentation.

Conclusion

I appreciate the attention you will give to this important request. Thank you.

Sincerely,

Joe Deshotel, Chair
House Committee on Business & Industry

BRIEF ON WHETHER THE POSITION OF STATE CHAIR OF A TEXAS POLITICAL PARTY IS A STATE "OFFICE" FOR PURPOSES OF ARTICLE III, § 19, AND ARTICLE XVI, § 40(D), OF THE TEXAS CONSTITUTION

This brief addresses the two constitutional questions raised in the April 18, 2011, request by the Chair of the House Committee on Business and Industry for an Attorney General Opinion.

I. Issues under consideration

Both of the issues raised by the questions presented in the April 18th opinion request concern whether the state chair of a political party is an "office under this State" within the meaning of the Texas Constitution. One issue concerns Article III, § 19; the other, Article XVI, § 40(d). The specific questions in the request letter are:

- Is the position of State Chair of a Texas political party an "office . . . under this State" within the meaning of Section 40(d) of Article XVI of the Texas Constitution?

- Is the position of State Chair of a Texas political party an "office under . . . this State" within the meaning of Section 19 of Article III of the Texas Constitution?

The conclusion reached by this brief is that the position of state chair of a political party is not an "office under this State" under the relevant constitutional provisions and that, consequently, the answer to both questions is "no."

II. Duties and financial arrangements for the Position of State Chair of the Texas Democratic Party

This brief's factual background is limited to the position of State Chair of the Texas Democratic Party ("TDP Party Chair" or "Chair"). While the likelihood is that the circumstances concerning the state chair of Texas's other major political party—the Republican Party of Texas— is similar to that of the TDP Party Chair, this brief does not make representations concerning that other position.

The TDP Party Chair is the "principal and presiding officer" of the State Democratic Executive Committee ("SDEC") and is authorized to "deal with the affairs" of the TDP. TDP Rules Art. III.D.1(a). The Chair must be a resident of Texas and must "agree to support all of the Party's nominees" or be subject to removal. *Id.*

Art. II.C. The Chair is elected to a two-year term at the TDP state convention in June of even-numbered years. *Id.* Art. III.D.1(a). When the position is contested, the vote is by roll call or written ballot of convention delegates, who are themselves Democratic Party members. *Id.* Art. IV.A3.(d). For a Chair vacancy occurring between TDP state conventions, the position is filled, for the duration of the unexpired term, by a majority vote of members of the SDEC. *Id.* Art. III.D.1(k). The Chair is subject to removal for good cause by a two-thirds vote of the SDEC membership. *Id.* Art. III.D.3(a). The Chair is not an employee or official employed by the State of Texas.

The TDP provides the Party Chair no compensation (that is, no salary, *per diem* payments, or other payments) for service. Each year, the TDP adopts a budget with a line item for the Chair's expenses, and this budget item is used to cover expenses incurred by the Chair for such matters as out-of-town transportation and lodging. The Chair receives no payments from the State of Texas for services rendered to the TDP.

III. Analysis of the Meaning of "Office under this State" in the Relevant Constitutional Provisions

A. Text of the Constitutional Provisions

The two relevant constitutional provisions read in full as follows:

> No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as notary public if qualified by law.

TEX. CONST. Art. XVI, § 40(d).

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

TEX. CONST. Art. III, § 19.

For purposes of the issues presented to the Attorney General for an opinion, and addressed here, the key phrase is the same in both provisions: "office . . . under this State." If the position of state party chair is not an "office under this State" insofar as

these two provisions are concerned, then no other questions concerning these provisions need to be addressed.[1]

B. Texas law conclusively establishes that the position of state party chair is not a state "office" under the state constitutional provisions in question.

There is no authority for the proposition that the Texas Constitution treats the state chair of a Texas political party as a state officer. There is a substantial body of authority, longstanding and unbroken, following the opposite principle: that the head of a state political party is not an instrument of government under the Texas Constitution.

The governing test for determining whether serving in a given position renders a person a public official under the Texas Constitution was laid out in *Aldine I.S.D. v Standley*, 154 Tex. 547, 280 S.W.2d 578 (1955). There, the Supreme Court construed the meaning of "officer" in Article XVI, § 30, of the Texas Constitution and concluded that the decisive factor is "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public." 280 S.W.2d at 583. The Attorney General has followed the *Aldine* principle in construing the meaning of "offices" under the main constitutional provision involved in the opinion request addressed here: Section 40 of Article XVI of the Texas Constitution. *See* TEX. ATT'Y GEN. OP. No. GA-0365 (2005), at 3, citing TEX. ATT'Y GEN. OP. No. DM-212 (1993), at 2 (noting view that Texas courts would follow the *Aldine* test in interpreting the constitutional provision in Section 40). In an earlier opinion, the Attorney General specifically identified court of appeals decisions and Attorney General rulings which support the principle that the *Aldine* test for what

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[1] As indicated in Part II, the financial arrangements for the position of TDP Party Chair involve no state payments of any sort and no TDP salary, *per diem*, or other fee for service; only expenses are covered. Under these circumstances, in decisions such as *Whitehead v Julian*, 476 S.W.2d 444 (Tex. 1992), the Supreme Court has held that an office is not "lucrative" as that term is used in the Texas Constitution. Hence, even if state party chair were an "office under this State," Article III, § 19, would not apply to it because it is not a "*lucrative* office." (emphasis added). The "for profit" provision in Article XVI, § 40(d), has been interpreted by the Attorney General, who has opined that subsection (d) prohibits a state legislator from holding any other state or federal "office," regardless of whether it is paid or unpaid. *See* TEX. ATT'Y GEN. OP. No. JC-0464 (2002), at 3. None of these issues, however, needs to be, or is, addressed here, because of the conclusion that the position of state party chair is not an "office under this State," thereby making *both* Article III, § 19, and Article XVI, § 40(d), inapplicable to those legislators holding such a position. *See* Part III.B, below.

constitutes a "public officer" applies in the Article XVI, § 40 contest. TEX. ATT'Y GEN. OP. No. MW-415 (1981), at 2.

This interpretation coincides with the longstanding rule followed by Texas courts that "[p]olitical parties . . . are in no sense governmental instrumentalities." *Waples v Marrast*, 108 Tex. 5, 184 S.W. 180, 184 (1916), quoted in *Koy v Schneider*, 110 Tex. 369, 218 S.W. 479, 480 (1920). As the Texas Supreme Court later explained, Texas law does not create political parties as state or governmental agencies. *Carter v Tomlinson*, 149 Tex. 7, 227 S.W.2d 795, 799 (1950).[2] Consequently, "officers of a political party . . . are not regarded as public or governmental officers." *Id.* On the contrary, the prevailing rule is that, under the terms of the Texas Constitution:

> [O]fficers of a political party . . . are not public or governmental officers, even when provided for by statutory law.

Wall v Currie, 147 Tex. 127, 213 S.W.2d 816, 819 (1948).

These principles were applied in a more recent Attorney General opinion. *See* TEX. ATT'Y GEN. OP. No. JC-0562 (2002). There, the question was whether a city council member would be subject to the resign-to-run provisions in Article XI, § 11(b), and Article XVI, § 65(b), of the Texas Constitution if, with more than a year remaining in her council term, the councilmember became a candidate for precinct chair of a political party. Subsection (b) of Section 11 of Article XI subjects city officials to the automatic resignation provisions of Section 65(b) of Article XVI, and the latter subsection (b) establishes resignation rules for those holding office who become a candidate for an "office of profit . . . under the laws of this State or the United States other than the office then held." (emphasis added).

The Attorney General concluded that "a position within a political party is not a public office." TEX. ATT'Y GEN. OP. No. JC-0562, at 3 (emphasis added). Accordingly, seeking the party precinct chair position did not constitute seeking an "office . . . under the laws of this State" within the meaning of Section 65(b) of the Article XVI, with the result that the resign-to-run constitutional provision was not triggered.

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[2] The decisions of the Supreme Court of the United States in *Smith v Allwright*, 321 U.S. 649 (1944), and later related cases are not in conflict with this principle. Their holdings were not based on Texas law or the Texas Constitution. Rather, such decisions were based on the question of state action under the Fifteenth Amendment to the United States Constitution. Besides, the circumstances addressed in those cases are not applicable to the current situation of Texas political parties.

The same result is required, for the same reasons, in determining whether holding the position of TDP Chair constitutes holding an "office . . . under this State" within the meaning of Article XVI, § 40(d), and Article III, § 19. That is to say, holding the position of TDP Chair is not holding a public office under either Article XVI's Section 40(d) or Article III's § 19, because the position of TDP Chair is not an "office under this State."

The key phrases— concerning which offices trigger the rule to vacate— are effectively identical. They address essentially the same subject matter. They are governed by the same broad— and long unquestioned— principle that political party offices are not public offices vested with sovereign powers.

The construction of constitutional provisions are governed by the same rules of interpretation as statutes and codes. TEX. ATT'Y GEN. OP. No. GA-0293 (2005), at 2. And the rule of interpretation for statutes and codes is that the use of substantially similar words in different provisions that nonetheless address similar subject-matter means that the words have the same meanings in those different provisions. *Presidio I.S.D. v Scott*, 309 S.W.3d 927, 930 n.3 (2010), citing *Brown v Darden*, 121 Tex. 495, 50 S.W.2d 261, 263 (1932). Hence, "office under this State" in the two constitutional provisions under consideration must be given the same interpretation and that interpretation must be consistent with the interpretation given virtually identical terms in such other constitutional provisions as Article XVI, §§ 30 and 65(b). In short, the position of state party chair is not a public office under the Texas Constitution.

IV. Conclusion

Based on the foregoing matters, the applicable law in this situation is unusually clear. A state legislator may hold the position of TDP Chair without triggering the resignation requirement of Section 40(d) of Article XVI or the eligibility requirement of Section 19 of Article III.

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