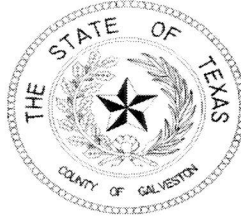


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GALVESTON COUNTY



Office of County Auditor

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REQUEST FOR OPINION

To: Office of the Attorney General, Opinion Committee
From: Randall Rice CPA, County Auditor
Galveston County Auditor's Office
Date: May 31, 2022
Subject: Request for Texas Attorney General Opinion

RQ-0462-KP

FILE# ML-49130-22
I.D.# 49130

I. Introduction

In campaigning for the Office of County Treasurer, a candidate ran on the platform of eliminating the Office and was subsequently successful in winning the primary election held March 1, 2022. As there is no opposing candidate for the general election, the winning primary candidate is the presumptive winner in the upcoming November general election. The question has arisen as to whether the candidate who ran on the platform of eliminating the Office of County Treasurer and won is required to renounce their salary and, if so, whether such requirement violates the candidate's First Amendment protections.

II. Applicability of the Texas Local Government Code Section 152.052

My reason for seeking an opinion is in regards to the following two questions:

- (1) Whether Section 152.052 of the Texas Local Government Code requires an elected official who ran for office on the platform of eliminating said office to file an affidavit stating that the official is choosing to not be paid for the official's services; and
- (2) if so, whether Section 152.052 of the Texas Local Government Code violates the elected official's First Amendment protections, as the statute as applied results in content-based discrimination.

Section 152.052(a) (c) of the Texas Local Government Code provides:

- (a) Within five days after the date an elected county or precinct officer takes office, the officer *shall* file an affidavit with the county payroll officer stating that the officer *elects* not to be paid for the officer's services, if during the person's campaign for election to the county or precinct office, the person publicly advocated the abolition of the office. The affidavit must include a statement by the officer describing the method by which the officer intends to seek to obtain the abolition of the office for which the officer was elected and the date by which

it is proposed to be accomplished.

- (c) If an officer covered by Subsection (a) or any other elected county or precinct officer files an affidavit with the county payroll officer stating that the officer elects not to be paid for the officer's services, the county payroll officer may not issue a paycheck to the officer.¹

III. Language of Section 152.052

The Texas Legislature's use of the phrases "shall file an affidavit" and "elects not to be paid" in Section 152.052 creates a conflicting result of which requires clarification from your office.

Where the text of a statute is clear, text is determinative of the Legislature's intent.² Accordingly, when construing a statute, "the words [the Legislature] chooses should be the surest guide to legislative intent."³ Statutes are to be contextually read "to give effect to every word, clause, and sentence, because every word or phrase is presumed to have been intentionally used with a meaning and a purpose."⁴ Words not statutorily defined bear their common, ordinary meaning unless a more precise definition is apparent from the statutory context or the plain meaning yields an absurd result.⁵

Considering these principles, one must discern what the Legislature meant by the use of the words "shall" and "elects" as they appear in Section 152.052. The Texas Legislature defines the word "shall" as "imposing a duty", unless the context in which it appears necessarily requires a different construction or unless a different construction is expressly provided in the statute.⁶ Texas courts, too, "generally construe the word 'shall' as mandatory unless legislative intent suggests otherwise."⁷

The word "elect(s)" is not defined in Section 152.052, nor is it defined elsewhere in Texas law. Accordingly, the Legislature is presumed to have intended the word to bear its common, ordinary meaning. Merriam-Webster defines the word "elects" as to "make a selection of . . . to choose (something, such as a course of action) especially by preference."^{8,9}

¹ TEX. LOC. GOV'T CODE § 152.052(a), (c) (emphasis added).

² *State v. Shumake*, 199 S.W.3d 279, 284 (Tex.2006) ("[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen."); see also *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex.2006).

³ *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).

⁴ *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) (internal quotations omitted).

⁵ *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 765 (Tex.2014); See also *Fort Worth Transp. Auth.*, 547 S.W.3d at 838 (To determine a [statutory] term's common, ordinary meaning, [Courts] typically look first to dictionary definitions.")

⁶ TEX. GOV'T CODE ANN. § 311.016; see also *Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 131 (Tex.2018) ("By its plain and common meaning, 'shall' denotes mandatory action.")

⁷ *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999).

⁸ *Elects*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/elects> (last visited April 14, 2022). See also *Elect*, Burton's Legal Thesaurus (Lexis 2021). "Elect' (*Choose*), verb adopt, decide, determine in favor of, distinguish by special selection, eliminate the alternatives, exercise an option, exercise discretion, make a choice, make a selection, name, opt for, pick, prefer, select, settle on, will."

⁹ Courts may consult standard or legal dictionaries in determining the fair, objective meaning of undefined statutory terms. See *Watkins v. State*, 619 S.W.3d 265 272–73 (Tex. Crim. App. 2021). The word "elect(s)" is not defined by Black's Law Dictionary.

Reading Section 152.052 as interpreted above creates a potentially conflicting result: “. . . the officer” has a duty to “file an affidavit with the county payroll officer stating that the officer” selects or chooses by preference “not to be paid for the officer’s services if, during the person’s campaign for election to the county or precinct office, the person publicly advocated the abolition of the office.”¹⁰ But if the officer’s preference is to receive the salary of the office, does he have a duty to file the affidavit or does he have a choice to receive the salary?

Because the word “shall” can be non-mandatory where the context in which it appears necessarily requires a different construction,¹¹ was the legislature’s use of the word “elects” sufficient context to conclude that the word “shall” in Section 152.052 allows an official who publicly advocated for the abolition of an office to freely choose whether or not to receive that office’s salary once elected?

IV. First Amendment Concerns

If your office determines that issue one does require an elected official to renounce their salary while in office, does Section 152.052 of the Texas Local Government Code violate the elected official’s First Amendment protections as the statute creates content-based discrimination on campaign speech?

The First Amendment of the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹² The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office.¹³

The First Amendment prevents the government from restricting expression because of its message, its ideas, its subject matter, or its content.¹⁴ “Content-based regulations are presumptively invalid.”¹⁵ A government regulation of speech is content-based if the regulation on its face draws distinctions based on the message the speaker conveys.¹⁶ To determine the constitutionality of a content-based regulation, the government must show that the regulation is necessary to serve a compelling government interest and that the regulation is narrowly drawn to achieve that end.¹⁷

Section 152.052 is a content-based regulation because it draws distinctions between those who advocate for the abolishment of the office during their campaign for election to the office and those who do not. Only the former must do the job unpaid if elected. This distinction is unquestionably based upon a particular message a candidate expresses as the statute only penalizes elected candidates who advocated for the abolishment of the office of which they ran for *during* their campaign for election to the office. The statute does not apply equal penalties to all candidates who run for office generally, nor does it apply to candidates who are elected to office and upon assuming the office advocate for or work towards its abolishment.

¹⁰ See LOC. GOV’T § 152.052.

¹¹ TEX. GOV’T CODE ANN. § 311.016.

¹² U.S. Const. amend. I.

¹³ *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638 (2022).

¹⁴ *Police Department of the City of Chicago et al., v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁵ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

¹⁶ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹⁷ *Ark. Writer’s Project, Inc. v. Ragland*, 481 U.S. 221, 222 (1987).

V. Conclusion

It is for these reasons that Section 152.052 appears to be presumptively unconstitutional as a content-based regulation which burdens a candidate's freedom to express a political viewpoint. It discriminates against individuals who take a specific position during their campaign for election by denying them a salary upon assuming office.

The burdens on such a candidate would not be insignificant. Constitutional offices may not be abolished by the candidate, nor by statute. Instead, they may only be abolished via constitutional amendment. To accomplish this takes time and an elected official subject to Section 152.052 would fulfill the duties of the elected office without compensation for their time or efforts during the indeterminate period it will take to actually abolish the office.¹⁸ And if the candidate fails to abolish the office, he or she would continue to perform the duties of office unpaid for the entire term.

VI. Request

I therefore request you render an opinion whether an elected county official who ran on the platform of eliminating the office is required to renounce their salary and, if so, whether such requirement violates the elected individual's First Amendment protections. If you conclude the statute does not violate the elected individual's First Amendment protections, what is the compelling government interest of which Section 152.052 is narrowly tailored to achieve?

I appreciate your review of this matter and look forward to your opinion. If additional information is required, please do not hesitate to contact me.

Respectfully,

Randall Rice CPA
Galveston County Auditor

¹⁸ See *Moncrief v. Gurley*, 609 S.W.2d 863, 865 (Tex. Civ. App. – Fort. Worth 1980, writ ref'd n.r.e.); *Cowell v. Ayers*, 220 S.W. 764 (Tex. 1920).