



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 196

March 25, 1994

Whether a person appointed by a judge to perform the duties of a district attorney under Local Government Code section 87.017(a), and who is a candidate for that office, may describe himself as the holder of the office of district attorney in campaign literature. (AOR-221)

The Texas Ethics Commission has been asked whether a person appointed by a judge to perform the duties of a district attorney under Local Government Code section 87.017(a), and who is a candidate for that office, may describe himself as the holder of the office of district attorney in campaign literature. Specifically, the questions are whether the person may use the phrase "keep [name of candidate] district attorney" and the phrase "I am [name of candidate], your district attorney."

Section 255.006 of the Election Code provides, in part, as follows:

- (a) A person commits an offense if the person knowingly enters into a contract or other agreement to print, publish, or broadcast political advertising with the intent to represent to an ordinary and prudent person that a candidate holds a public office he does not hold at the time the agreement is made.
- (b) A person commits an offense if the person knowingly represents in a campaign communication that a candidate holds a public office he does not hold at the time the representation is made.

If a candidate were not the district attorney at the time the representation was made, knowingly stating "I am [name of candidate], your district attorney" in a campaign communication would be an offense under section 255.006(b). Similarly, the phrase "keep [name of candidate] district attorney" would represent to an ordinary and prudent person that the candidate holds the office of district attorney.

The requestor has submitted several appellate court decisions dealing with the authority of a person appointed during the pendency of a removal suit to perform the duties of the office and the validity of that person's official acts. *Garcia v. Laughlin*, 285 S.W.2d 191 (Tex. 1955); *Dismuke v. Reid*, 188 S.W.2d 255 (Tex. Civ. App.—Beaumont 1945, no writ.); *Ormes v. Quinn*, 113 S.W.2d 242 (Tex. Civ. App.—El Paso 1938, no writ.); *Kelley v. Reeves*, 292 S.W. 654 (Tex. Civ. App.—Texarkana 1927, writ ref'd). Those matters are not at issue here. The only question before us is whether a person appointed to perform the duties of a district attorney under Local Government Code section 87.017(a) "holds" that office for purposes of section 255.006. The Texas Constitution provides how a person may acquire the office of district attorney and how a vacancy may be filled. A person may acquire that office by election in the general election for state and county officers. Tex. Const. art. V, § 21; art. XVI, § 65. The power to fill a vacancy in the office of district attorney is constitutionally vested in the governor with the advice and consent of the senate. Tex. Const. art. IV, § 12. We conclude that a person "holds" the office of district attorney when elected to that office as provided by the constitutional and statutory provisions governing the general election for state and county officers, or when appointed by the governor with the advice and consent of the senate to fill a vacancy in that office.

When a petition for the removal of an officer is filed in district court the judge may issue an order for citation of the officer, ordering the officer to appear and answer the petition. Local Gov't Code §§ 87.015, 87.016. After

issuing the order for citation, the judge may temporarily suspend the officer and appoint another person to perform the duties of the office. *Id.* § 87.017. Trial of the issue may result in the officer's removal or may establish the suspended officer's right to hold the office. However, an officer may be removed only after following a trial by jury. Tex. Const. art. V, § 24; Local Gov't Code § 87.018. Should the trial result in the officer's removal, the resulting vacancy is filled pursuant to section 12 of article IV of the Texas Constitution, and the person appointed to fill the vacancy need not be the person appointed under section 87.017 of the Local Government Code. Accordingly, the person appointed by the judge does not have a right to the office in the sense of an elected or constitutionally appointed district attorney.

Since removal of a district attorney requires a jury trial and since a suspended officer may be reinstated after trial, we conclude that the office of district attorney is not vacant during the pendency of a removal trial.¹ We further conclude that because the constitution provides for the governor to fill a vacancy in the office of district attorney, the judge's appointment of a person to perform the duties of the district attorney temporarily is not the equivalent of an appointment to that office. Under the Texas Constitution, a person may become a district attorney only by election or by appointment of the governor with the advice and consent of the senate. Therefore, while the person appointed by the judge under section 87.017(a) has the right and duty to perform the duties of the district attorney during the pendency of the removal trial, he is not the district attorney, and does not "hold" that office within the meaning of Election Code section 255.006. Accordingly, a candidate appointed to perform the duties of a district attorney under Local Government Code section 87.017(a) may not describe himself in campaign literature as the holder of the office.

SUMMARY

Under Election Code section 255.006, a candidate appointed pursuant to Local Government Code section 87.017(a) to perform the duties of a district attorney may not describe himself in campaign literature as the holder of the office of district attorney.

¹ Even if the office is vacant, a person appointed to perform the duties of the office under section 87.017 of the Local Government Code does not "hold" the office of district attorney. Therefore, our response to this issue is not affected by the status of the case against the elected district attorney.