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January 17, 1983

The Honorable Ruth Clayton
Tax Assessor-Collector
Hays County
San Marcos, Texas 78666

Election Law Opinion DAD-73
RE: Texas Election Code
procedure(s) to follow
when a voter's registration
is challenged.

Dear Ms. Clayton:

You have requested an opinion regarding the proper procedure to follow when a registered voter of the county challenges the registration of one or more voters. Specifically, you ask that the following questions be addressed:

1. Whether notice to the challenged voter may be given by a means other than through the U. S. Postal Service;
2. Whether an individual may challenge voters en masse with a single affidavit; and
3. What documents are acceptable as proof of citizenship?

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 ("the Code").

Articles 5.17a and 5.18a, subd. 5, are the two provisions of the Code which govern the challenge of a registrant's eligibility to remain registered.

Article 5.17a of the Code states in pertinent part:

(2) Challenge of registered voter. Any registered voter shall have the right to challenge the registration of any other registered voter in his county by filing with the registrar of voters a sworn statement setting out the grounds for such challenge. The registrar shall give notice to the person whose registration has been challenged, and a hearing shall be held and a ruling made thereon. Either party to the controversy may appeal from the decision of the registrar to a district court of the county of registration within thirty days after the registrar's decision, and the decision of the district court shall be final. A challenged voter may continue to vote until a final decision is made canceling his registration.

(3) Jurisdiction of district court; trial of appeal. The district courts of this State shall have jurisdiction to hear and determine appeals from decisions of the registrar refusing an application for registration and from decisions of the registrar either canceling or refusing to cancel a registration. The trial in the district court shall be de novo.

In contrast, Article 5.18a, subd. 5(b) and (c) of the Code states the following procedure to challenge a registered voter:

(b) Upon receiving information indicating that a registrant has a residence other than that shown on the registrant's registration records, or that indicates the existence of any grounds of disqualification other than death, the registrar shall send a notice to such person by forwardable mail at the permanent residence address or, if provided, the mailing address on the registrant's registration application and any new address of the registrant, if known, requesting a verification of the registrant's current residence address, or other relevant information which would be determinative of the registrant's current residence and current registered status, and providing information of the necessity for the registrant to amend the registration records subsequent to a change in legal residence or to provide information establishing his right to retain his current registered status. The notice shall state that the registrant's registration will be cancelled if the registrar does not receive an appropriate reply within 60 days from the date on which the notice is mailed. If the registrant replies to the notice, the registrar shall take the appropriate action indicated by the reply. If no reply is timely received, the registrar shall cancel the registration.

Notice of such cancellation shall be sent to the registrant at the new address, if it is known; otherwise, it shall be sent to the residence or mailing address on the registration records. If the notice mailed to the permanent residence address on the registrant's application is returned to the registrar with no forwarding address information available, the registrar shall cancel the registration.

(c) In the event the registrar cancels a voter's registration pursuant to Paragraph (b) of this subdivision, such voter may, within 10 days after the date of cancellation by the registrar, request, in writing, a hearing before the registrar. The registrar, upon notice to the voter, shall conduct a hearing within five days of receipt of the request from the voter, or at any later time upon the consent of the voter. The registrar shall then determine whether to cancel the registration. The voter may appeal from a decision to cancel his registration to a district court of the county of registration within 29 days after the registrar's decision, and the decision of the district court shall be final. A voter who appeals a cancellation of his registration under the provisions of this paragraph may continue to vote until a final decision is made cancelling his registration.

LEGISLATIVE HISTORY

Article 5.17a was added to the Code in 1966. The legislative history of Senate Bill 1 (which introduced the text of Article 5.17a) does not reveal any guiding discussion, analysis, or legislative intent. The substantive language of the instant article has been amended only once. In 1981, the last sentence of the original article which required a district court to give priority to an appeal of a registrar's decision if an election was pending within sixty days was repealed.

Article 5.18a, subd. 5 of the Code was added to the Code in 1975. The bill (Senate Bill 300) was in response to a 1971 Corpus Christi, three-judge federal court decision that declared Texas' system of annual voter registration violative of the equal protection clause of the 14th Amendment of the U.S. Constitution. [Beare v. Smith, 321 F.Supp. 100 (D.C. Tex. 1971), aff'd Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974).]

S.B. 300 provided a permanent voter registration system under which each voter would be issued a new registration certificate every two years. This renewal procedure served

to purge the registration rolls and to ensure that all persons who had moved corrected their registration. That portion of Senate Bill 300 adding Article 5.18a received preclearance from the U.S. Department of Justice on December 10, 1975.

STATUTORY ANALYSIS

Juxtaposition of Article 5.17a and Article 5.18a, subd. 5(b) of the Code reveals similar and yet distinct procedures required to challenge a registered voter. The challenge procedure authorized by Article 5.17a is initiated by filing a "sworn statement which sets out the grounds for such challenge." Id. In comparison, Article 5.18, subd. 5(b) provides a more relaxed standard for commencing a challenge based solely on ". . . information that any ground of disqualification exists other than death. . ." Id. Both provisions, however different in their approach, require that any challenge be based solely on a ground which, if proven, would render an individual's registration void.

The primary distinction between these two provisions is the detailed due process requirements provided for in Article 5.18a, subd. 5(b), versus the general notice requirement of Article 5.17a.

It is my opinion, adopted today by administrative rule, that the due process requirements of Article 5.18a, subd. 5 of the Code are to be incorporated in a challenge procedure initiated under Article 5.17a where the latter article does not specify the procedure to be followed.^{1,2}

¹The due process now required in a sworn challenge filed pursuant to Article 5.17a of the Code is as follows:

- a. The registrar must give 60 days notice to the challenged registrant before a hearing may be held by the registrar, unless the registrant requests an earlier hearing date.
- b. The notice must be by forwardable mail at the permanent address or, if provided, at the mailing address listed on the registrant's registration application and any new address of the registrant, if known.
- c. The notice shall state the ground(s) for challenge of the registrant, and shall set a date for a hearing not less than 60 days from the date on which the notice is mailed. The notice shall also state that the registrant may request an earlier hearing date.

PROPER CHALLENGE

The Code prescribes the qualifications and disqualifications for voting and for registration in Articles 5.01, 5.02 and 5.10a. An individual may register who:

1. is a citizen of the United States;
2. is a resident of the county;
3. is 17 years and 10 months of age or older;
4. has not been determined to be incompetent by a court;
and
5. has not been convicted of a felony without having his rights of citizenship restored.

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- d. If the registrant appears at the hearing, the registrar shall take the appropriate action indicated by the registrant's reply to the challenge.
 - e. If the registrant does not appear at the hearing, the registrar shall conduct the hearing and make a ruling on the challenge.
 - f. If the notice mailed to the permanent residence address on the registrant's application is returned to the registrar with no forwarding address information available, the registrar shall cancel the registration.

Notice of the cancellation shall be sent to the registrant at the new address, if it is known; otherwise, it shall be sent to the residence or mailing address on the registration records.

- g. In the event the registrar cancels a voter's registration pursuant to f. above, the voter may, within 10 days after the date of cancellation by the registrar, request in writing, a hearing before the registrar. The registrar, upon notice of the voter, shall conduct a hearing within five days of receipt of the request from the voter, or at any later time upon the consent of the voter.
- h. Either party to the controversy may appeal the registrar's decision to a district court of the county of registration within 30 days. The district court's decision will be final.
- i. A challenged voter may continue to vote until a final decision is made cancelling his registration.

When a registered voter has been challenged under either Article 5.17a or 5.18a, subd. 5(b), the affiant or person giving information must state a ground for the challenge. Id. Furthermore, it is my opinion that when a registered voter is challenged under Article 5.17a, the affiant must swear or affirm that, based upon the affiant's personal knowledge, the challenged voter does not possess a specific qualification for remaining registered. Only then must the voter registrar mandatorily institute the challenge proceedings.

In passing, it should be noted that the affidavit provided to you in the present situation does not set out a ground upon which a voter's registration may be cancelled.

ISSUES ANSWERED

The three questions which you posed may be answered as follows:

1. Notice to a challenged voter must be by forwardable mail.

²This Office has previously incorporated the notice requirement of Articles 5.18a and 5.18c when a cancellation occurs under a particular provision of the Code that is silent as to notice. See: Title I, Texas Administrative Code, Section 81.54: Notification Procedures.

³The affiant states an inability to locate the birth records of certain registered voters on the computer list of the Texas Bureau of Vital Statistics. The inability to locate an individual's birth record is not proof of lack of citizenship; nor is it a ground upon which a registered voter may be challenged.

The affidavit states the failure to list one's maiden name on a voter registration application as a ground for disqualification. Such an omission renders an application incomplete but not void. V.A.T.S. Texas Election Code, art. 5.13b, subd. 1. However, even though the registrar erroneously processes the incomplete application, the individual still becomes a bona fide registered voter. Id. at art. 5.01 et. seq. Omission of a maiden name on a voter registration is not handled through a mandatory challenge to a voter's right to remain registered, but, as a discretionary correction of errors on the certificate as provided in Article 5.16a, subd. 1 of the Code.

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2. It is my opinion that a single affidavit filed as a challenge of more than one voter is acceptable if: (1) the affidavit properly identifies each challenged voter; and (2) the affidavit states a challenge, based upon personal knowledge, that each challenged voter does not possess a specific qualification for remaining registered.
3. Regarding your last question, the following is a nonexclusive prima facie list of citizenship documents:
 - a. U.S. citizen (born in the U.S.) - a birth certificate;
 - b. Naturalized U.S. citizen (born outside the U.S. to non-U.S. parents) - naturalization papers; and
 - c. Derivative U.S. citizen (born outside the U.S. to a U.S. parent or parents) - certificate of citizenship.

Finally, all U.S. citizens may present a valid U.S. passport as proof of citizenship. 3 C. Gordon & H. Rosenfeld, Immigration Law and Procedure § 11.8 et. seq. (1982).

This nonexclusive list is offered only to assist the registrar and the challenged voter in satisfying a challenge based on citizenship. There may be other documents that will satisfy a challenge on this ground of disqualification.

SUMMARY

First, it is my opinion, that when a registered voter is challenged by the affidavit procedure under Article 5.17a, the affiant must swear or affirm that, based upon the affiant's personal knowledge, the challenged voter does not possess a specific qualification for remaining registered. Only then must the voter registrar mandatorily institute the challenge proceedings.

Secondly, it is my opinion that the enclosed affidavit is insufficient to challenge registered voters since the affidavit does not set out a ground upon which a voter's registration may be cancelled.

Thirdly, it is my opinion, which I adopt today as an administrative rule, that the due process requirements of Article 5.18a, subd. 5(b) of the Code are to be incorporated

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in a challenge procedure initiated under Article 5.17a where the latter article does not specify the procedure to be followed.

Sincerely,


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Secretary of State

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