

COMMITTEE REPORT

The Honorable David Dewhurst
Lieutenant Governor of the State of Texas

01-10-05
(Date)

Sir:

We, the Senate Committee on State Affairs, to which was referred the contest of the general election for State Senator from Senate District 6 have had the contest under consideration and we are instructed to report it back with the recommendation attached hereto.

The Committee recommendations were reported by the following vote:

	Aye	Nay	PNV	Absent
Duncan, Chairman	✓			
Williams, Vice-Chairman	✓			
Armbrister	✓			
Ellis	✓			
Fraser	✓			
Harris	✓			
Madla	✓			
Nelson	✓			
Shapiro	✓			

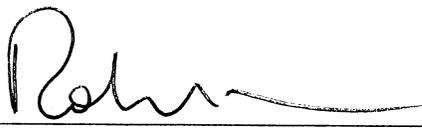
Total:

9 Aye

0 Nay

0 PNV

0 Absent



Senator Robert Duncan, Chairman



Teddy Carter, Committee Clerk

REPORT OF THE SENATE COMMITTEE ON STATE AFFAIRS
REGARDING THE SENATOR OF DISTRICT 6

We, the Senate Committee on State Affairs, to whom was referred the election contest of Susan Delgado, Contestant, and Mario V. Gallegos, Jr., Contestee, pending before the Senate of the State of Texas report as follows:

I. PROCEEDINGS OF THE COMMITTEE

On December 16, 2004, the Committee requested written briefs by both parties. In compliance with the Committee's order, Contestant's brief was filed on December 23, 2004, Contestee's brief was filed on December 29, 2004, and Contestant's reply brief was filed on January 5, 2005. The Committee conducted a public hearing on January 10, 2005, to investigate the factual and legal issues of the election contest for the election of a State Senator from Senate District 6.

As both parties were given the opportunity to provide their arguments in writing, neither party provided testimony or oral argument before the Committee. After discussing the briefs filed by the parties, the Committee made conclusions of law regarding this matter. A copy of the Conclusions of Law is attached to this report.

II. RECOMMENDATION OF THE COMMITTEE

The Committee finds that the Contestant has failed to state the grounds necessary to maintain an election contest, therefore, the Committee recommends that the contest for Senate District 6 be dismissed.

REPORT OF THE SENATE COMMITTEE ON STATE AFFAIRS
REGARDING THE SENATOR OF DISTRICT 6
FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

Contestant initiated a proceeding in Harris County District Court against the Contestee on August 26, 2004.¹ Approximately one week later, Contestant amended her petition adding the Secretary of State and the Harris County Clerk as parties.² The purpose of these additions was to enjoin these election officials from printing Contestee's name on the November 2004 general election ballot.³

Following the November 2 election, at a hearing in district court on November 8, 2004, each of the parties provided numerous reasons why the proceeding should be dismissed. Among these reasons were: (1) the Texas Senate had exclusive jurisdiction over the matter; (2) Contestant lacked standing to bring the matter as she was a losing candidate in the election; and (3) the matter was moot since the election had already been held.⁴ The judge dismissed the case on November 8, 2004, without indicating a basis for dismissal.⁵ The dismissal was not appealed.

Pursuant to the Election Code, Contestant filed a petition with the Secretary of State initiating this election contest in the Senate on November 4, 2004. On November 9, 2004, the Secretary of State delivered the original petition to Lt. Governor David Dewhurst. Contestee filed his answer on November 10, 2004. Contestant filed her affidavit of inability to pay costs on November 15, 2004.

On November 19, 2004, Lt. Governor David Dewhurst appointed Senator Jeff Wentworth as the Master of Discovery in the contest and referred the contest to the Senate Committee on State Affairs.

On December 3, 2004, the Master of Discovery issued a report finding that Contestant's petition did not meet the grounds necessary to maintain an election contest and recommended

¹ In the Matter of Delgado v. Gallegos, Cause No. 2004-46092 (164th Dist. Ct. 2004). Contestant had standing in the district court case because she filed an application to run as a write-in candidate in Senate District 6 on August 9, 2004. See Second Amended Petition at 2, In the Matter of Delgado v. Gallegos, Cause No. 2004-46092 (164th Dist. Ct. 2004).

² Plaintiff's Amended Petition, In the Matter of Delgado v. Gallegos, Cause No. 2004-46092 (164th Dist. Ct. 2004).

³ *Id.*

⁴ Briefs in Support of Pleas to the Jurisdiction, In the Matter of Delgado v. Gallegos, Cause No. 2004-46092 (164th Dist. Ct. 2004).

⁵ Order Granting Pleas to the Jurisdiction, In the Matter of Delgado v. Gallegos, Cause No. 2004-46092 (164th Dist. Ct. 2004).

that the Committee not hear testimony or other evidence presented in person by the parties.⁶ On December 4, 2004, Contestant filed an amended petition. In response, by letter to the Committee dated December 7, 2004, the Master of Discovery stated that the amended petition still failed to state the grounds necessary to maintain an election contest. On December 10, 2004, Contestant filed her second amended petition.

On December 16, 2004, the Committee ordered the parties to file briefs on the issue of jurisdiction.⁷ The parties filed timely briefs on December 23, 2004 (Contestant's Memorandum in Support), December 29, 2004 (Contestee's Brief on Jurisdiction), and January 5, 2005 (Contestant's Reply Brief).

II. FINDINGS OF FACT

The Committee makes no findings of fact.

⁶ Report of the Master of Discovery to the Senate Committee on State Affairs (Dec. 3, 2004).

⁷ Order for Written Briefs (Dec. 16, 2004).

III. CONCLUSIONS OF LAW

1. Constitutional Basis for Election Contests and Member Qualifications

Section 8, Article III, Texas Constitution, provides:

Each House shall be the judge of the qualifications and election of its own members; but contested elections shall be determined in such manner as shall be provided by law.

This article of the Constitution establishes two separate and distinct subjects which may be addressed by the Legislative Houses: one for qualification of its members and another for election contests. The Constitution clearly provides that election contests are governed as provided by law. For an election contest in the Legislature, this law is provided under Chapters 221 and 241, Election Code.

The matter before the Committee, as filed by Contestant, is an election contest. Accordingly, we are bound by the statutory provisions in Chapters 221 and 241, Election Code, and make our recommendation in accordance with those statutory provisions.

2. Election Contest Before the Texas Senate

As provided in Section 221.002(c), Election Code:

(c) The senate has exclusive jurisdiction of a contest of a general or special election for state senator.

It is under this authority, as well as the procedures set forth in Chapter 241, that a contestant may bring an election contest before the Texas Senate. A person is only eligible to bring such a contest in the Texas Senate if the person was a candidate in the election.⁸

The scope of an election contest, however, is limited by the statute. Section 221.003(a), Election Code, specifically provides:

- (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
- (1) illegal votes were counted; or
 - (2) an election officer or other person officially involved in the administration of the election:
 - (A) prevented eligible voters from voting;
 - (B) failed to count legal votes; or
 - (C) engaged in other fraud or illegal conduct or made a mistake.

This provision limits the scope of an election contest to the outcome of an election. Both judicial and legislative precedents interpreting this language have concluded that matters that do not involve the actual mechanics of an election are not proper inquiries for a tribunal in an

⁸ See TEX. ELEC. CODE §§ 241.002, 232.002 (Supp. 2004).

election contest.⁹ The House Committee on Privileges and Elections, in *Patrick v. Cartwright*, specifically found that an election contest was not the proper forum for determining the eligibility of a candidate to hold office.¹⁰ The full House adopted the Committee report by a vote of 137 in favor, none opposed, and 12 members present but not voting.¹¹

The legislative precedent and the plain language of the statute make it clear that election contests by their very nature are challenges to the mechanics of holding an election. A determination of the issue of eligibility of a candidate does not involve the mechanics of an election and is therefore an inappropriate inquiry for an election contest.

3. Authority to Expand Scope of Contest Does Not Extend to Eligibility

Contestant contends that this Committee can expand the scope of the election contest under Section 221.003(c), Election Code, which provides:

(c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

However, no code or other statutory provision has been found or cited to the Committee which expands the scope of an election contest to include an eligibility challenge based on residency.

Contestant contends that Section 145.005, Election Code, serves to expand the scope of the inquiry. Section 145.005, Election Code, provides::

EFFECT OF VOTES CAST FOR DECEASED OR INELIGIBLE CANDIDATE. (a) If the name of a deceased or ineligible candidate appears on the ballot under this chapter, the votes cast for the candidate shall be counted and entered on the official election returns in the same manner as for the other candidates.

(b) If the deceased or ineligible candidate receives the vote required for election, the resulting vacancy shall be filled in the regular manner.

(c) If the deceased or ineligible candidate and another candidate tie for the most votes in an election in which a plurality vote is sufficient for election, the other candidate is considered to be elected if more than one candidate is tied with the deceased or ineligible candidate, the winner of the election shall be determined by resolving the tie between the other candidates in the regular manner for resolving a tie vote in the election.

(d) In a race in which a runoff is required, if the deceased or ineligible candidate received the vote that would entitle the

⁹ See *Harrison v. Jay*, 271 S.W.2d 388, 389-90 (Tex. 1954); *Goodman v. Wise*, 620 S.W.2d 857, 860 (Tex. Civ. App.--Corpus Christi, 1981, writ ref'd n.r.e); *Frias v. Board of Trustees of Ector County ISD*, 584 S.W.2d 944, 946-47 (Tex. Civ. App.--El Paso, 1979) cert denied, 444 U.S. 996; *Stelzer v. Huddleston*, 526 S.W.2d 710, 714 (Tex. Civ. App.--Tyler, 1975, writ dismiss'd); *Bigley v. Kuempel*, report of the Special Committee on Election Contests, Jan. 14, 1985; *Patrick v. Cartwright*, report of the House Committee on Privileges and Elections, Jan. 10, 1979.

¹⁰ *Patrick v. Cartwright*, report of the House Committee on Privileges and Elections, Jan. 10, 1979.

¹¹ House Journal at 110 (Jan. 15, 1979).

candidate to a place on the runoff election ballot or tied for that number of votes, the candidates in the runoff shall be determined in the regular manner but without regard to the votes received by the deceased or ineligible candidate.

Contestant's contention, however, does not have merit. While Section 145.005 does address the counting of votes of a deceased or ineligible person on a ballot, the provision does not address the issue of determining whether a candidate is ineligible. This section does not expand the scope of inquiry in an election contest to include a determination of a candidate's eligibility.

4. Actions by Election Officials

Contestant contends her claims fall within the scope of Section 221.003(a), Election Code, because the election officials illegally printed Contestee's name on the ballot and counted illegal votes cast for him. These claims are based on the assertion that Contestee was ineligible to hold office because of residency. Although Contestant instituted proceedings relating to the Contestee's eligibility in the Harris County District Court before the election, as of election day, the matter had not been resolved by the district court. Moreover, several days after the election, those proceedings were dismissed. There was no appeal of that decision. Since there was neither an administrative declaration of Contestee's ineligibility as required by Section 145.003, Election Code, nor a final judgment of ineligibility as required by Section 145.004, Election Code, the election officials had no basis for omitting Contestee's name from the ballot or any justification for not counting the votes cast for him.

5. Issue of Illegal Votes

Contestant also contends that eight illegal votes were cast in the election and that as such her claims fall within the scope of Section 221.003(a), Election Code. The official canvass of the election results of Senate District 6, as determined by the Secretary of State, reveal that Contestee received over 68,000 more votes than the candidate with the next highest votes. Even assuming, *arguendo*, that the facts as stated in the Contestant's pleadings are true, as a matter of law, they fail to support a claim that the outcome of the election was not the true outcome as required by Section 221.003(a).¹²

Contestant further claims that all votes cast for Contestee are illegal because the Contestee is ineligible to hold office on account of residence. However, according to Contestant's own allegations, no determination of eligibility was made before this election contest. A determination of eligibility is not a proper inquiry in an election contest.¹³

¹² See *Little v. Alto Independent School District of Alto, Cherokee County* 513 S.W.2d 886, 891-92 (Tex. Civ. App--Tyler, 1974, writ dismissed); *Fugate v. Johnston*, 251 S.W.2d 792, 794-95 (Tex. Civ. App--San Antonio, 1952, no writ).

¹³ See *supra* Conclusion of Law 3.

6. Eligibility of a Legislator May Be Challenged in Court

Contestant contends that, under Section 8, Article III, Texas Constitution, the Texas Senate is the only forum in which she may challenge the qualifications of a person to serve in this body. Texas courts, however, have held to the contrary, allowing courts to issue writs of mandamus to compel removal from the ballot persons who are not eligible to be elected to the Legislature.¹⁴ These cases involved challenges made during the primary election.¹⁵ More recently, however, a Texas court heard a challenge to the ballot placement of a senatorial candidate after the primary, but before the November general election.¹⁶ This clearly shows that a district court is the proper venue for such a challenge if the challenge is made in a timely manner.

Although Contestant filed suit at the end of August 2004, she was unable to obtain a hearing before the court until after the election was over. The district court, without comment, dismissed the case. The dismissal was not appealed.

IV. RECOMMENDATION

For the foregoing reasons, the Committee recommends that the election contest for Senate District 6 be dismissed.

¹⁴ Kirk v. Gordon, 376 S.W.2d 560, 561-62 (Tex. 1964); Burroughs v. Lyles, 181 S.W.2d 570, 575 (Tex. 1944).

¹⁵ *Id.*

¹⁶ Nixon v. Slagle, 885 S.W. 2d 658 (Tex. App.--Tyler, 1994, no writ).