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ATTORNEY GENERAL OF TEXAS

March 1, 2019

The Honorable David Whitley
Texas Secretary of State
Post Office Box 12697
Austin, Texas 78711-2697

Opinion No. KP-0242

Re: Whether the Secretary of State is the “returning officer” under article III, subsection 13(a) of the Texas Constitution, and, if not, which officer serves in that role in a single-county legislative district (RQ-0247-KP)

Dear Secretary Whitley:

Your predecessor asked about the meaning of the phrase “returning officer” as used in article III, subsection 13(a) of the Texas Constitution.¹ Subsection 13(a) provides:

When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the *returning officer* of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose.

TEX. CONST. art. III, § 13(a) (emphasis added). He questioned whether the Secretary of State is the returning officer under this subsection, and, if not, which officer serves in that role in a single-county legislative district.² Request Letter at 1.

Article IV, section 3 of the Constitution, which addresses election returns for executive branch officers, describes returning officers as those prescribed by law to complete, seal, and transmit the election returns to the Secretary of State. *See* TEX. CONST. art IV, § 3; *see also id.* art. XVII, § 1(c) (providing that with regard to elections for proposed constitutional amendments, the “returning officer in each county shall make returns to the Secretary of State”). The interpretive commentary to article III, subsection 13(a) submits that the “returning officer mentioned in the section is the officer who was in charge of the returns of the previous election.” TEX. CONST.

¹Letter from Lindsey Aston, Gen. Counsel, Sec’y of State, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 29, 2018), <https://texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²Article III, subsection 13(a) authorizes the returning officer to order an election in certain instances, but it does not create a duty for the returning officer to do so. A prior opinion of this office explained that the authorization given to the returning officer “is a permissive one: the returning officer may order the election but it is not mandatory that he do so.” Tex. Att’y Gen. Op. No. WW-728 (1959) at 2.

art. III, § 13 interp. commentary; *see also* *Trimmier v. Carlton*, 296 S.W. 1070, 1076 (Tex. 1927) (explaining that the county judge was the returning officer based on a statute requiring that the judge canvass the votes and declare the result).

The Election Code currently provides that for each election for a district office “the county clerk of each county in the territory covered by the election shall prepare county election returns.” TEX. ELEC. CODE § 67.007(a); *see also id.* § 67.017(a) (requiring the county clerk to prepare a report of the votes received in each precinct after each election for state senator and state representative). Furthermore, the county clerk must deliver those returns to the Secretary of State in the manner directed. *Id.* § 67.007(d); *see also id.* § 67.017(b) (requiring the county clerk or the presiding officer to deliver the report of precinct results to the Secretary of State). In conjunction with this duty, the Legislature directed the Secretary of State to provide the county clerks with an official form for reporting election returns. *Id.* § 67.009(a). Thus, pursuant to section 67.007 of the Election Code, the county clerk prepares and submits election returns for a county district office and is therefore the returning officer for purposes of article III, subsection 13(a).³ *Id.* § 67.007(a), (d); *see also* TEX. CONST. art. V, § 20 (describing the county clerk as an officer); Tex. Att’y Gen. Op. No. KP-0060 (2016) at 2. The Secretary of State is not the returning officer but receives the election returns from the returning officers in each county holding an election.

³The request letter notes that many counties in Texas have county elections administrators who perform “the duties and functions placed on the county clerk” under the Election Code. TEX. ELEC. CODE § 31.043(2); *see* Request Letter at 2. While the county elections administrator may have authority pursuant to this statute to prepare and submit election returns as delegated by the county clerk, the county elections administrator is not an “officer.” *See Krier v. Navarro*, 952 S.W.2d 25, 29 (Tex. App.—San Antonio 1997, pet. denied) (concluding that a county elections administrator “is but an agent or employee of the county” and does not hold a public office). Thus, a court is unlikely to conclude that a county elections administrator is the returning officer under article III, subsection 13(a) of the Texas Constitution.

S U M M A R Y

Article III, subsection 13(a) of the Texas Constitution provides that when vacancies occur in the Legislature, the returning officer of the district in which such vacancy occurred possesses authority to order a special election if the Governor does not do so within a set time. Pursuant to section 67.007 of the Election Code, the county clerk prepares and submits election returns for a single-county legislative district and is therefore the returning officer for purposes of article III, subsection 13(a).

Very truly yours,



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