

KIM BRIMER	§	IN THE DISTRICT COURT
	§	
V.	§	
	§	
STEPHEN C. MAXWELL, in his capacity as chairman of the Democratic Party of Tarrant County, BOYD L. RICHIE, in his capacity as chairman of the Texas Democratic Party, and WENDY DAVIS	§ § § § §	TARRANT COUNTY, TEXAS 236 TH JUDICIAL DISTRICT

COURT’S RULING INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the outset, this Court notes that the Texas Constitution expressly provides, in Art. III Section 19 that "no... person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

In 1964 the Texas Supreme Court held that Fort Worth City Councilman, Doyle Willis, who had been receiving \$10 per diem for each regular meeting up to \$520 per annum, plus necessary expenses, held a "lucrative office" under this constitutional provision in *Willis v. Potts*, 377 S. W.2d 622 (Tex. 1964), and since the term for which he had been elected to the Fort Worth City Council overlapped the State Senate term for which he sought election he was ineligible to serve, and therefore could not have his name appear on the ballot as a candidate for State Senator.

There is no dispute that Ms. Davis, as representative of Fort Worth City Council District 9 following her 2007 election and qualification for office in the term she was serving prior to her resignation, was entitled to and received an annual salary of \$25,000 and other

benefits for service as a City Council member, including office and staff, and therefore held a "lucrative office" under Art. III Section 19.

There is no dispute that the Fort Worth City Council term for which Ms. Davis was elected in 2007 and which she was serving prior to her resignation does, in fact, overlap with the State Senate term which she now seeks.

The Texas Supreme Court held in *Lee v. Daniels*, 377 S. W.2d 618 at 619 (Tex. 1964) when any person first qualifies for and begins holding a lucrative office under this State, Art. III Section 19 applies and that person is made ineligible to the Legislature during the entire term of said office and an "act of resignation at any point of time cannot make him eligible once more."

But in 1992, a sharply divided Texas Supreme Court, in *Wentworth v. Meyer*, 839 S. W.2d 766 (Tex. 1992), revisited the applicable constitutional language with respect to the overlapping terms, holding that the "term for which he is elected or appointed" contained in Art. III Section 19 should be construed in appropriate circumstances, to end upon the resignation of that office.

Although this Court has its own view of the rationale expressed in the *Wentworth* holding, as a District Court, this Court is bound to enforce the existing construction of the Texas Constitution as set forth by our Supreme Court, regardless of how this Court might have ruled were the interpretation an open question.

Accordingly, based upon the mandate of *Wentworth*, this Court finds, as a matter of law, that the fact that the city council term Ms. Davis was serving overlaps with the Senate term she now seeks, does not, in itself, disqualify her Senate candidacy.

Important and substantial legal questions have been raised concerning the timing and circumstances of her vacating her office following her resignation, and her filing for office for the State Senate.

Therefore, the Court turns to the circumstances of her resignation and replacement on the city council and her filing for the State Senate office and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Brimer is an individual who resides in Tarrant County, Texas, and is the incumbent and sole Republican candidate for State Senate District 10.
2. Maxwell is an individual who serves as Chairman of the Democratic Party of Tarrant County and is a proper party to this lawsuit.
3. Richie is an individual who serves as Chairman of the Texas Democratic Party and is a proper party to this lawsuit.
4. Davis is an individual who resides in Tarrant County, Texas, and is a proper party to this lawsuit.
5. On May 1, 1999, Davis was elected to the Fort Worth City Council (hereinafter "City Council").
6. On May 4, 1999, the vote for the May 1, 1999, election was canvassed by the City Council, and Wendy Davis was declared the elected representative of City Council District 9.
7. On May 25, 1999, Davis took the oath of office as the council member for City Council District 9.
8. Davis was re-elected as the City Council District 9 representative in 2001, 2003, 2005, and 2007.
9. On May 12, 2007, Davis was elected to the City Council for a two-year term. The vote for the May 2007 election was canvassed by the City Council at its May 22, 2007, meeting.
10. Davis took the oath of office as City Council District 9 representative on May 29, 2007, during the first City Council meeting after the meeting at which

the vote was canvassed.

11. As representative for City Council District 9, Davis was entitled to and received an annual salary of \$25,000 following her election and qualification for office in 2007, and received other benefits for service as a City Council member, including an office and staff. The salary was paid bi-monthly by way of direct electronic deposit from the City to Davis' bank account.
12. During the August 9, 2007, City Council meeting and within the City Council chambers, Davis announced that she intended to resign from the City Council and declared her candidacy to run for State Senate District 10.
13. Davis filed her Candidate/Officeholder Campaign Finance Report and Designation of Treasurer on August 9, 2007, with the Texas Ethics Commission.
14. Following Davis' announcement during the August 9, 2007, City Council meeting, Davis continued to serve in her elected City Council position after her announcement of her candidacy for the Texas Senate, retained her office and staff, drew her salary, and attended and participated as a voting member of the City Council at City Council meetings.
15. On November 6, 2007, the City of Fort Worth conducted a special election to fill the City Council District 9 seat for the remainder of Davis' final two-year term.
16. None of the candidates for City Council District 9 received a majority of the votes cast during the November 6, 2007 election. As a result, a runoff election was set for December 18, 2007.
17. On December 3, 2007 Davis filed with Art Brender (hereinafter "Brender"), the then-Chairman of the Democratic Party of Tarrant County, her sworn application to appear on the March 4, 2008, Democratic Party General Primary Ballot as a candidate for State Senate District 10.
18. On December 18, 2007, the run-off election for City Council District 9 was conducted, and Joel Burns (hereinafter "Burns") received a majority of the votes cast.
19. Following the December 18, 2007 runoff election, at a special City Council meeting on December 27, 2007, the City Council canvassed the election results of the runoff election and declared that Burns had won the election for the City Council District 9 seat and gave Burns a certificate of election.

20. At the special City Council meeting on December 27, 2007, Mayor Mike Moncrief advised Burns that the oath of office would be administered to Burns during the January 8, 2008, City Council meeting.
21. On December 31, 2007, via written correspondence directed to Brender, members of the public challenged Davis' eligibility as a candidate for State Senate District 10 and asked that Brender declare Davis ineligible for a place on the 2008 Democratic primary ballot.
22. On January 1, 2008 (New Year's Day), John Hill, a retired justice of the Second Court of Appeals, administered an oath to Burns at Burns' residence.
23. On January 1, 2008, Davis sent an email to Marty Hendrix, the City Secretary for the City of Fort Worth, containing a letter addressed to Mayor Moncrief, which indicated that Burns had taken an oath earlier in the day.
24. On January 1, 2008, Burns faxed to the City of Fort Worth a copy of the oath ("Oath") he had taken before retired Court of Appeals Justice Hill, along with an executed document entitled "STATEMENT OF ELECTED/APPOINTED OFFICER (*Pursuant to Tex. Const. art. XVI, §1(b), amended 2001*) ("Statement").
25. Retired Court of Appeals Justice John Hill neither sought nor obtained approval from the City Council or the City Attorney to administer an oath to Burns on January 1, 2008.
26. By letter dated January 2, 2008, Brender denied the challenge to Davis' candidacy for State Senate District 10 that was asserted by members of the public.
27. Prior to 6:00 p.m. on January 2, 2008, Davis filed a second candidacy application with Brender and paid a second filing fee to be placed on the Democratic primary ballot as a candidate for State Senate District 10.
28. On January 2, 2008, Davis delivered a letter to the City of Fort Worth in which she requested, based upon Burns' oath taken on January 1, 2008, that all pay otherwise due her from January 1, 2008 to January 8, 2008, be withheld from the direct deposit to her bank account. Davis also requested that she be notified if the City attempted to pay her for any dates between January 1, 2008 and January 8, 2008, so that she could reimburse the City of Fort Worth for those amounts.

29. On January 2, 2008, Davis turned in all items to the City of Fort Worth that had been issued her by the City, including her entry card pass, her parking passes, her Blackberry, and a printer.
30. On January 8, 2008, the City Council conducted its regularly scheduled meeting. This meeting was the first meeting after the meeting at which the City Council canvassed the vote from the run-off election of December 18, 2007.
31. After Mayor Mike Moncrief convened the regular meeting of the City Council on the evening of January 8, 2008, the first order of business of the City Council was a vote to approve minutes for several prior City Council meetings. The minutes show that the minutes for the prior meetings were approved by a unanimous vote of 8-0 and that Burns did not participate in the vote. The minutes also reflect that Davis was present.
32. After approving the minutes of prior City Council meetings, City Secretary Marty Hendrix, before the entire City Council, administered an oath of office to Burns, after which Burns assumed his place at the dais.
33. Chapter III, section 5 of the City Charter states, in pertinent part, as follows:

"At the first City Council meeting after the City Council meeting canvassing the election results, the elected members of the new Council shall meet at City Hall and take the oath of office."

* * * *

"The Council shall determine its own rules of procedure, and may punish its members for misconduct, and may compel the attendance of absent members."
34. On January 11, 2008, the City of Fort Worth paid Davis \$831.86 in compensation for via direct deposit into Davis' bank account. This amount included compensation up to and including January 4, 2008.
35. On June 23, 2008, Davis tendered to the City of Fort Worth a cashier's check in the amount of \$274.74, which she calculated to be the amount ~~representing compensation for the dates between January 1, 2007 and~~ January 4, 2008.
36. On March 4, 2008, Davis was on the ballot for the Democratic primary as the sole Democratic candidate for State Senate District 10.

37. On April 28, 2008, Richie filed with the Secretary of State of Texas the Official Canvass Votes Report of the March 4, 2008 Democratic Primary Election, which indicated that Davis received all of the votes cast.
38. On June 23, 2008, after the City received a public information request from a member of the public, Davis tendered to the City of Fort Worth a cashier's check in the amount of \$274.74, which she calculated to be the amount representing compensation for the dates between January 1, 2008 and January 4, 2008.
39. Brimer is the incumbent and Republican candidate seeking election to a new term for State Senate District 10 on the general election ballot in the November 4, 2008 general election.
40. Davis is the Democratic candidate seeking election to a new term for State Senate District 10 on the general election ballot in the November 4, 2008 general election.
41. The total amount of reasonable and necessary attorney's fees incurred by Brimer through the date of trial is \$37,500.00.
42. The total amount of reasonable and necessary attorney's fees that Brimer will incur in the event this cause is appealed to the Court of Appeals is \$25,000.00.
43. The total amount of reasonable and necessary attorney's fees that Brimer will incur in the event this cause is appealed to the Texas Supreme Court is \$20,000.00.
44. The total amount of reasonable and necessary attorney's fees incurred by Davis through the date of trial is \$33,300.00.
45. The total amount of reasonable and necessary attorney's fees that Davis will incur in the event this cause is appealed to the Court of Appeals is \$20,000.00.
46. The total amount of reasonable and necessary attorney's fees that Davis will incur in the event this cause is appealed to the Texas Supreme Court is ~~\$15,000.00 and an additional \$5,000.00 if that review is granted.~~
47. The total amount of reasonable and necessary attorney's fees incurred by Boyd L. Richie through the date of trial is \$8,250.00.

48. The total amount of reasonable and necessary attorney's fees that Boyd L. Richie will incur in the event this cause is appealed to the Court of Appeals is \$8,500.00.
49. The total amount of reasonable and necessary attorney's fees that Boyd L. Richie will incur in the event this cause is appealed to the Texas Supreme Court is \$5,000.00 and an additional \$8,500.00 if that review is granted.
50. The total amount of reasonable and necessary attorney's fees incurred by Stephen C. Maxwell through the date of trial is \$12,300.00.
51. The total amount of reasonable and necessary attorney's fees that Stephen C. Maxwell will incur in the event this cause is appealed to the Court of Appeals is \$13,000.00.
52. The total amount of reasonable and necessary attorney's fees that Stephen C. Maxwell will incur in the event this cause is appealed to the Texas Supreme Court is \$6,500.00 and an additional \$13,000.00 if that review is granted.

CONCLUSIONS OF LAW

1. As the City Council District 9 representative, Davis held a "lucrative office" as defined under Article III, Section 19 of the Texas Constitution.
2. If elected to the Texas Senate, District 10, Davis's term of office would begin in January, 2009.
3. The term of office for Fort Worth City Council, District 9 for which Davis was elected in May 2007 ends in May 2009.
4. Following Davis's resignation from her City Council District 9 office on August 9, Davis continued to hold office under the "hold over" provision of Texas Constitution Art. XVI, Section 17.
5. The Fort Worth City Council lawfully called an election to elect Davis's successor during the November 6, 2007 election and following a runoff election on December 18, 2007, the City Council at a special meeting on December 27, 2007 canvassed the results of the runoff election, declared that Joel Burns had won the election to complete Davis's unexpired term of office and gave Burns a certificate of election.
6. On January 1, 2008, Davis's successor, Joel Burns, took an oath of office as Davis's successor lawfully administered to him by a retired Chief Justice of

the Second Court of Appeals and filed same with the City of Fort Worth secretary, thereby becoming duly qualified and succeeding Davis as City Council Representative District 9.

7. Davis's January 2, 2008 Application to be on the Democratic Primary Ballot for Texas Senate, District 10 complied with and was a valid application under the Texas Election Code.
8. Having resigned her City Council, District 9 office with her successor having duly qualified, Art. III, Section 19 of the Texas Constitution, does not render Davis ineligible to run as a candidate for State Senate District 10 for the November 2008 Texas General Election.
9. Davis is eligible to have her name on the ballot for the November 2008 Texas General election as a candidate for State Senate District 10.
10. Even if Davis continued to hold office as a holdover until the January 8, 2008 Fort Worth City Council meeting where her successor received the oath required under the Fort Worth City Charter, Davis's holding office for those additional seven days was *de minimus* and does not render her ineligible to seek election to State Senate District 10 in the November 4, 2008 general election and, if elected, hold that office which term begins in January 2009.
11. Considering the important, legitimate, and significant legal issues raised by the facts and the law applicable to this case, it would be inequitable to assess attorneys' fees and costs against any party. Therefore, each party shall bear their own attorneys' fees and costs in this case.

Underpinning this ruling is the fundamental principle that this Court is required to apply the law of Texas as it currently exists as interpreted by the Texas Supreme Court, and not the law as this or any other District Court might believe it ought to be. While I have applied existing law as it is, I do feel compelled to note the striking and apparent contradiction between the actual language of our state constitution in Art. III Section 19 regarding the disqualifying effect of overlapping terms, and the interpretation of that language by our Supreme Court in the *Wentworth* decision sixteen years ago.

Simply put, in the view of this District Judge, there is and was no ambiguity requiring judicial interpretation in this Constitutional provision--a point persuasively made by both ~~Chief Justice Phillips and Justice Doggett in their *Wentworth* dissenting opinions.~~ Moreover, in light of the plain Constitutional language, the *Wentworth* decision has at least the appearance of judicial activism, perhaps even to the point of an unwise incursion into a legislative role where our Courts should not tread.

In light of the public interest in a swift resolution of this dispute, and with the full cooperation and agreement of the parties and counsel, this Court has expedited this

proceeding well beyond any previous case before it. This will allow the parties to seek appellate review of today's rulings on a meaningful timetable that should not frustrate the needs of the litigants for appellate review, and the public interest in a swift and final resolution. In this context, I note my own hope that, whether in this dispute or some future action, the Texas Supreme Court has an occasion to revisit its holding in the *Wentworth* case.

Signed this 22nd day of July, 2008.



JUDGE PRESIDING