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June 3, 1991

RQ 105

The Honorable Dan Morales
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Opinion Committee

Attn: Opinions Committee

Re: Abolition of the office of Kerr County Weigher

Dear General Morales:

The Commissioners' Court of Kerr County is considering abolition of the office of Kerr County Weigher. They have requested an opinion from this office as to whether the office can be abolished and, if so, the procedures required for abolition. I have researched the matter and have concluded that the court has the authority to abolish the office. I have also come to the conclusion that the procedures for abolition, although not set out by law, should comply with the Open Meetings Act, the Voting Rights Act, and should include a public hearing.

The origin of the office of Kerr County Weigher is shrouded in obscurity. The first reference to county weighers, that we can find, appears in the minutes of the court dated July 24, 1919. At that time a public weigher for each justice precinct was appointed by the court. Minutes of the Kerr County Commissioners' Court, Volume G, Page 402 (July 24, 1919). This action was taken in accordance with art. 7828 (repealed) which was in effect at the time. Id. See also, Historical Note, Tex. Rev. Civ. Stat. Ann. art 5683 (Vernon 1958). The next reference is in the election records of the general election of 1926. The records show that a single office of Kerr County Weigher appeared on the ballot.

The office of County Public Weigher is not a constitutional office. Tex. Atty. Gen. Ops. H-995 (1977) and WW-1110-A (1962). The creation of the elected office of County Public Weigher has always been within the discretion of the commissioners' court. Tex. Agric. Code § 13.253 (Vernon 1982); Tex. Rev. Civ. Stat. art. 5683 (repealed); Tex. Rev. Civ. Stat. art. 7828 (repealed). The discretionary nature of the office is underscored by the continued existence of appointed county weighers. Tex. Agric. Code § 13.252 (Vernon 1982); Tex. Rev. Civ. Stat. art 5681 (repealed); Tex. Rev. Civ. Stat. art. 7828 (repealed).

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Nonetheless, since September 1, 1981, the legislative provision for elected county public weighers has been contained in § 13.253 of the Agriculture Code. Tex. Agric. Code § 13.253 (Vernon 1982). It is a settled principle that an office comes into existence only when created in the prescribed manner, and continues only so long as the law to which it owes its existence remains in force. 60 Tex. Jur. 3d, Public Officers and Employees, § 20, 24 (Bancroft-Whitney 1988). When that law is abrogated, the office *ipso facto* ceases to exist, unless perpetuated by virtue of some other legal provision. *Id.* The present county weigher was elected in November, 1988, and took office on January 1, 1989. It is clear, therefore, that, whatever the historical nature of the office, he holds it subject to the authorization and requirements of § 13.253 of the Agriculture Code.

Under § 13.253, the commissioners' court of a county, by order, may provide for the election of a public weigher. Tex. Agric. Code § 13.253(a) (Vernon 1982). Therefore, although provided for by statute, the office is actually created in a particular county only by the calling of an election by the commissioners' court or by appointment by the Texas Department of Agriculture. Tex. Agric. Code § 13.252 and § 13.253 (Vernon 1982). There is no language to suggest that the legislature has done more than authorize the creation of the office, and neither code provision mandates the creation of the office, whether elective or appointive. *Id.*

In the absence of legal inhibition, the governing body under which an officer holds office may abolish the office even during the term of an incumbent. 60 Tex. Jur. 3d, Public Officers and Employees, § 25 (Bancroft - Whitney 1988). Since the office was created by the court in providing for the election of the office, the court has the authority to abolish the office.

Assuming that the court has the power to abolish the office, the next question is that of procedure. No procedures are provided for by statute.

Obviously, the first step would be to place the matter on the court's agenda, in accordance with the Open Meetings Act. Since it is an elective office, a public hearing should be set. After the public hearing, the court should then be able to abolish the office, subject to preclearance by the United States Department of Justice under the Voting Rights Act.

I appreciate your time, and request that a formal opinion be rendered. If the office can be abolished, we will need the clarification of the law so that the Justice Department can have sufficient information for preclearance.

Very truly yours,



David Motley

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