



ID#15259
MBJ

TARRANT COUNTY

OFFICE OF THE
CRIMINAL DISTRICT ATTORNEY

RD-342

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JUSTICE CENTER
401 W. BELKNAP
FORT WORTH, TX 76196-0201

February 28, 1992

Honorable Dan Morales
Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Re: Coverage of a "Subchapter A"
county civil service system,
and the civil service
commission's authority to
adopt subpoena power.

Dear General Morales:

We write to ask your opinion on the following issues:

1. Does a county civil service system resulting from an expansion election under Subchapter A, Chapter 158, Local Government Code, include as "employees" peace officers and other "officers" employed by the County's elected officials?
2. Does such a system apply to employees of the Sheriff who are not "officers"?
3. May a County Civil Service commission "adopt" Section 143.009, Local Government Code, or other laws that contain subpoena power? If it does, may it exercise the subpoena power and penalize by fine and incarceration witnesses who fail to appear?

Coverage of a Subchapter A Civil Service System: "officers" are excluded by law.

A discussion of the coverage of civil service must begin with analysis of who is an "officer" and who is an "employee".

Feb 11 92

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Honorable Dan Morales
February 28, 1992
Page TWO

This has become muddled following amendments to the Local Government Code, since the Code uses the term "employee" without regard to the distinction that terms of "officers" are governed by the constitution and those of "employees" are governed by statute. The operative distinction is that an "officer" is one who obtains his or her position by appointment or election and who is authorized to perform governmental functions in his or her own right involving some exercise of discretion, whereas "employees" do not have such power or discretion. Green v. Stewart, 516 S.W.2d 133 (Tex. 1974); Op. Tex. Att'y Gen. No. H-985 (1977). Officers must take the constitutional oath of office, Tex. Const. art. 16 § 1, and their term is limited to two years by Article 16, § 30 of the Texas Constitution, unless otherwise set out in the Constitution. This includes law enforcement officers. Op. Tex. Att'y Gen. No. H-1027 (1977).

The rule in Texas remains at-will employment. McLendon v. Ingersoll-Rand Co., 807 S.W.2d 577 (Tex. 1991). An elected officer has "virtually unbridled authority in hiring and firing". Irby v. Sullivan, 737 F.2d 1418, 1421 (5th Cir. 1984); Renken v. Harris County, 808 S.W.2d 222, (Tex. App.- Houston [14th Dist.] 1991, no writ). This is an important part of the official's powers. It is of special interest to those who--like the sheriff--may be held liable for the acts of their deputies that deputies be chosen with the full faith of the elected official and released when this faith has vanished.

A limited exception to at-will employment by government officials exists in counties covered by civil service systems. Tarrant County has, by election, expanded the coverage of its system to cover the "employees," except licensed attorneys [who, we note, are usually assistant district attorneys and thus "officers"], of the office of district or criminal district attorney, the adult and juvenile probation officers and their assistants [although employees, they were previously exempt because they were under the control of the judiciary, Op. Tex. Att'y Gen. No. H-619 (1975)], personnel in the county auditor's office, including all assistant county auditors [although the first assistant auditor is an "officer", not "employee" (Op. Tex. Att'y Gen. No. H-619)], and all other employees [but presumably

Honorable Dan Morales
February 28, 1992
Page THREE

not "officers"] of the county not included in the coverage of the system and not specifically exempted by Section 158.013 or Subchapter B. § 158.007 Local Gov't Code. Section 158.013 exempts assistant district attorneys, investigators, and other employees of a district or criminal district attorney, except as provided by Section 158.007, the official shorthand reporter of a court, and elected and appointed officers under the constitution. Subchapter B refers to employees of the sheriff's department. Sections 158.007 and 158.013 circularly define, and are defined by, each other.

The statute's litany of coverage omits deputies of constables and deputies of the sheriff [perhaps because they are so clearly "officers"] while listing previously excluded probation officers and assistant auditors. In a statute that carefully included by list persons previously excluded from civil service coverage, the absence in Subchapter A of deputies and other employees of the sheriff is striking. [The sole mention of sheriff's deputies is to point out that they are covered under Subchapter B. See Reviser's note 3, § 158.007. (Tarrant County does not have a subchapter B system).]

Parts of the statute contradict other language in the same statute that excludes all "officers". The language of the statute provides that an "employee" is a person who obtains a position by appointment and who is not authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right (the traditional definition), unless the person is included by a local civil service rule adopted under the procedures outlined in Section 158.009. A local system cannot change who holds an office the term of which is constitutionally limited. Thus while the statute appears to include certain "officers" as "employees" if an expansion election is held, it goes on to clearly exclude them, stating: The term does not include a person who holds office the term of which is limited by the constitution of this state. (emphasis added) § 158.001 (2) Local Gov't Code. This exclusion of officers is repeated in § 158.013 (c). Thus, whatever else "employee" may be defined as, it does not include persons whose term is limited by the constitution.

Honorable Dan Morales
February 28, 1992
Page FOUR

Prior to the expansion election held in November 1988, there was no question that peace officers, as officers, were exempt from coverage of the civil service system. Op. Att'y Gen. H-985 (1977). Sheriff's deputies are still "officers", as are deputy constables and district attorney's investigators, and other peace officers. See Arts. 2.12 and 2.13, Code of Crim. Proc. Sheriff's deputies, moreover, serve at the pleasure of the sheriff, Local Gov't Code § 85.003 (b), as deputies of the constables do at the pleasure of the constable. Renken v. Harris County, et al, supra, and as all personnel of the criminal district attorney do at the pleasure of the criminal district attorney. Gov't Code § 41.105.

The term of a deputy sheriff, deputy constable, or district attorney's investigator is limited to two years by operation of Art. 16 § 30 of the Texas Constitution. Since this language applies to all officers not otherwise listed in the Constitution, anyone who is an "officer" is excluded from the coverage of the Subchapter A system by 158.001.

This bar to including police officers in a civil service system was previously considered and a constitutional amendment was adopted to permit a civil service system to include municipal police officers who are covered by the two year term limit. Art. 16 § 30 (b). This constitutional amendment applies only to municipal officers, not to county officers. In the absence of a county-applicable constitutional amendment like Art. 16 § 30 (b), the expansion election adds certain "employees," but can not and does not bring under the civil service umbrella those who are "officers". Accordingly, it is our opinion that all county peace officers are exempt by law from the jurisdiction of the Tarrant County Civil Service Commission. [We note that not all officials are in agreement with this position. The Sheriff and the Acting Chief Deputy have never taken and do not now take this position. On the other hand, some of our Constables do take this position.]

Sheriff's non-officer employees.

The Local Government Code provides two types of civil service systems for counties: one for most employees of the

Honorable Dan Morales
February 28, 1992
Page FIVE

county (A) the other for the Sheriff's department (B). As Tarrant County does not have a Subchapter B system, we do not consider whether such a system could lawfully cover "officers"; it is clear, however, that, if enacted, it would cover non-officer employees. Our question in this regard is whether non-officer sheriff's employees (such as jailers) are covered by the Subchapter A system of a county that does not have a Subchapter B system.

Although argument can be made on both sides of this issue, we believe that the Subchapter B system is the exclusive system available to our county's sheriff's deputies and employees. This does not leave the employees without a remedy, since it is the employees who choose whether or not to vote in a Subchapter B system. The statute makes clear that if created and in effect, the Subchapter B system has exclusive jurisdiction over the employees of the sheriff's department. § 158.040 Local Gov't Code. But, in a statute that lists so many others in the expansion coverage, the absence of the sheriff's department, except to indicate that Subchapter A does not cover those specifically exempted by Subchapter B, § 158.007, indicates an intention that the sheriff's personnel be treated as a unit. The language that the Subchapter B system if "in place" is exclusive admittedly supports the converse argument, that it is not exclusive unless the system is operational. However, this interpretation would result in uncovered "officers" working side by side with covered jailers.

The need for a sheriff's workforce to be treated as a unit is recognized by Subchapter B. Permitting partial coverage fractions, rather than unifies, the sheriff's department. We request that you give your opinion regarding whether, in the absence of a Subchapter B system, jailers and other non-officer "employees" of the Sheriff are covered by Subchapter A.

Authority of system to expand on enumerated powers.

Subchapter A permits the civil service commission to "adopt or use as a guide any civil service law or rule of the United States, this State, or a political subdivision in this state to

Honorable Dan Morales
February 28, 1992
Page SIX

the extent that the law or rule promotes the purposes of this subchapter and serves the needs of the county." § 158.009. The Tarrant County Civil Service Commission believes this delegation is to be taken literally and has accordingly voted itself subpoena power. [More precisely, it has indicated a desire to do so. It 'adopted' the power (in the form granted to municipal systems at § 143.009 local government code) without notice in the middle of a contested hearing, having not first placed the matter on an Open Meetings posting. Presumably it would post and vote as required before attempting to exercise such authority.]

We believe that the legislative grant of authority to adopt or use other rules as a guide can not literally authorize a commission to grant itself subpoena power that is not specifically set out in its own enabling legislation. Subpoenas may only be issued by those empowered to do so by statute. 97 C.J.S. Witnesses § 22. The extent of subpoena and enforcement power is limited to that which is set out in an express statutory grant of such authority. 97 C.J.S. Witnesses 5.

Agencies may not enact rules that exceed their statutory authority or that are inconsistent with that authority. Bexar County Bail Bond Board v. Deckard, 604 S.W.2d 214 (Tex. Civ. App.--San Antonio 1980, no writ.). Every county, city, and quasi-governmental agency could argue that subpoena power would be helpful and consistent with the agency's mission, since subpoenas would permit the gathering of virtually any information. However, subpoena power is not a power that is taken so lightly as to permit agencies to adopt it by fiat. If not granted specifically by the legislature it does not exist. To find otherwise is to permit an unlawful delegation of legislative power, in violation of the doctrine of separation of powers.

Local interpretative of this authority has varied: the prior commissioners construed the rules to permit the commission to compel attendance by persons who are themselves civil service employees, but not to permit the compulsion of elected officials or persons who are not themselves covered under the system. The present commissioners desire authority to compel any person,

Honorable Dan Morales
February 28, 1992
Page SEVEN

employed by the county or not, officer or not. The commission can to some extent make up for its lack of subpoena power by liberally admitting hearsay testimony, which it has often done.

Believing that no agency can grant itself subpoena power, we further believe that it can not enforce any subpoena it issues by incarcerating or fining the target of the subpoena. The power to enforce a subpoena by fine or incarceration is a power of the legislature, to grant or withhold as it sees fit.

Summary.

For the reasons set out above, we respectfully request that you find as follows:

1. A civil service system enacted pursuant to Subchapter A of local Government Code § 158 does not cover "officers", including deputies of the sheriff or constables, district attorneys investigators, and other peace officers.

3. A civil service system enacted pursuant to Subchapter A of Local Government Code § 158 in a county which could have a Subchapter B separate sheriff's department system does not apply to any employees or deputies of the Sheriff, whether or not there exists a Subchapter B system in the county.

4. A Subchapter A civil service system may use the laws and rules of other civil service systems as a general guide in enacting its own rules, but it may not vote itself subpoena power by adopting such other rules, nor may it enforce subpoena power

Honorable Dan Morales
February 28, 1992
Page EIGHT

since it is not specifically granted it by the legislature.

Respectfully Submitted,



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