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Opinion Committee

RQ-848

FILE # ML-35695-95

I.D. # 35695

August 29, 1995

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711-2348

RE: Did Local Gov't Code § 158.001 as amended, properly allow Civil Service Commission to include Deputy Constables in definition of County employees?

Dear General Morales:

We request an opinion concerning the 1989 amendment to the Local Government Code, which stated that an "employee" is one "not authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right, **unless the person is included by a local civil service rule adopted under the procedures outlined in Section 158.009**". The highlighted portion appears to grant the local civil service commissions the power to include persons who exercise discretion in their own right (such as deputy constables) in regular civil service systems by adoption of a rule.

Issues

1. Does the 1989 amendment to Texas Local Government Code § 158.001 allow deputy constables to be included in regular civil service by the adoption of a rule defining them as

"employee".

2. Does the specific language excluding those authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right, override the general language allowing local civil service commissions to define covered employees?

Discussion

A. Deputy Constables Were Excluded From Coverage

Texas Local Government Code § 158.001, as amended in 1989, defines those covered by the County Civil Service Commission as follows:

"Employee" means 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, unless the person is included by a local civil service rule adopted under the procedures outlined in Section 158.009; or a person included in the coverage of a county civil service system as the result of an election held under Section 158.007. The term does not include a person who holds an office the term of which is limited by the constitution of this state.

In 1977 your office focused on the portion of the statute that says an employee is one "not authorized by statute to perform governmental functions involving an exercise of discretion in the persons's own right". The Attorney General issued an opinion interpreting that language to mean that Sheriff's deputies were not covered under County Civil Service. Att. Gen. Op. H-985. That opinion relied upon two Texas Supreme Court opinions to distinguish "employees" from "public officers". Green v. Stewart, 516 S.W.2d 133 (Tex. 1974); Aldine Indep. School Dist. v. Standley, 280 S.W.2d 578 (Tex. 1955). These decisions held that one is an officer rather than an employee if he exercises any sovereign function of government for the benefit of the public, largely independent of the control of others. Id at 135. Based on Green, supra, the Attorney General determined that Sheriff's deputies, by statute, exercise governmental functions independently of the control of the Sheriff, and therefore are not "employees" under the Civil

Service definition. Att. Gen. Op. H-985. That opinion also noted case law from other jurisdictions that held deputies with duties equal to those of the Sheriff's (such as Constables) are not covered by civil service.

Like Sheriff's deputies, Constable's deputies are state licensed peace officers, with statutory duties. Tex. Code Crim. Proc. § 2.12(2). They exercise discretion in performing statutory duties such as warrantless arrests, separate and apart from any instructions by the Constable. Tex. Code Crim. Proc. § 2.13; 14.01; 14.03; 14.04; 14.05. A recent Attorney General's opinion confirmed that deputy constables were to be treated like sheriff's deputies. Att. Gen. Op. DM-338. Constable's deputies, like Sheriff's deputies, did not meet the definition of "employee" for the County Civil Service system prior to the amendment in question because they are vested with sovereign functions of the government that involve an exercise of discretion in the person's own right. See Murray v. State, 67 S.W.2d 274, 276 (Tex. Crim. App. 1933).

B. Rules of Construction Do Not Permit Inclusion of Deputy Constables

The language of the 1989 amendment seems to grant the local civil service commission the right to include, as covered employees, persons authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right. The rules of statutory construction, however, create a different result. The primary rule of statutory construction is that the court must look to the intent of the legislature and must construe the statute so as to give effect to that intent. Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280 (Tex. 1993). The Court may not look beyond the words of the statute if the words are rational and unambiguous. Matter of Stone, 10 F.3d 285, 289 (5th Cir. 1994). Whenever there is a conflict between a general and specific provision of a statute, however, the specific one

prevails. Bexar County v. North East Indep. School District, 802 S.W.2d 854, 858 (Tex. App. -- San Antonio 1990, error denied). A broad clause in a statute is controlled by a restrictive clause in the same statute. Hammond v. City of Dallas, 712 S.W.2d 496, 498 (Tex. 1986).

In the instant case, there appears to be a conflict between the restrictive clause in the definition of "employee", and the broad clause that follows. First, the definition of employee is restricted to those not authorized to perform governmental functions in their own right. Then, the following clause appears to allow the local civil service commission to adopt a rule including those persons in the civil service coverage.

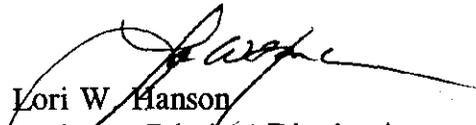
The legislative history is also in conflict. Senate Bill 1006 amended Tex. Local Gov't Code § 158.001 to allow the adoption of a rule redefining county employees. A review of the Committee's bill analysis indicates that the bill did not intend to change the law restricting a person who exercises discretion from being defined as an employee for purposes of the civil service system yet the bill was intended to allow local civil service commissions to include deputy constables within the civil service system. Since the restrictive clause was not removed, it should be read as controlling over the broad clause. See Bexar County, 802 S.W.2d at 857.

Conclusions

1. Deputy Constables should be treated as "public officers" rather than "employees" for purposes of determining coverage under the County Civil Service system. Deputy Constables, like Sheriff's deputies, are peace officers authorized by the State of Texas to perform governmental functions exercising their own discretion. As such, they do not qualify as "employees" under the restrictive clause of statute defining those covered by County Civil Service.

2. The statute itself is in conflict, therefore the Court must look to the legislative history. The legislative history is itself in conflict, so the rules of statutory construction control. Having restricted the definition of employee, the legislature cannot in the next clause broadly grant the right to include those specifically excluded. These conflicts must be resolved in favor of the restrictive provision, excluding deputy constables from civil service coverage.

Very truly yours,



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