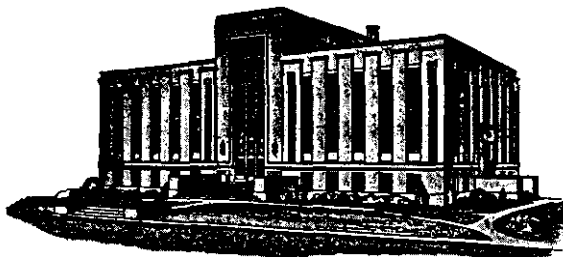
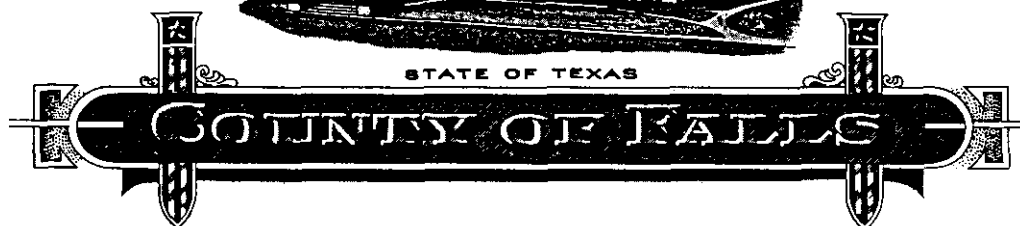


THOMAS B. SEHON
DISTRICT ATTORNEY
LYLE V. GRIPP
ASSISTANT DISTRICT ATTORNEY



FALLS COUNTY COURTHOUSE
P.O. BOX 413
(254) 883-1416
FAX: (254) 883-1418



MARLIN, TEXAS
76661

April 26, 1999

RQ-0060-JC

Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711

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FILE # ML-40804-99 APR 27 1999
I.D. # 40804 Opinion Committee

Dear Sir or Madame:

A Falls County constable was elected to his position in 1996. The constable assumed his next term of office on January 1, 1997. He filed for, ran for, and was elected as a school board trustee later in 1997. An apposite attorney-general's opinion is No. JM-519 (1986). Therein, the opinion states, "...if a constable announces his candidacy or becomes a candidate for the office of school trustee when his unexpired term as constable exceeds one year, he thereby automatically resigns the office of constable..." It would appear, then, that the automatic resignation by the constable has occurred, under TEX. CONST. Art.16, Section 65.

The Falls County Commissioners Court has not officially acknowledged the vacancy or appointed a successor. Therefore, under TEX. CONST. Art.16, Section 17, the constable has continued and is continuing to perform his official duties. A question has arisen as to whether the Falls County Commissioners Court must appoint a successor.

TEX. LOCAL GOV'T CODE, Art. 87.041 (11) states, "The commissioners court of a county may fill a vacancy in the office of ...constable." The word "[May]" ordinarily connotes discretion or permission, and it will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in that sense..." State v. Garza, 913 S.W. 2nd 560, 563 (Tex. Crim. App., 1996).

The case of Nalle v. Taco Bell Corp., 914 S.W.2nd 658, 687 (Tex. App. Austin 1996, pet'n denied) states, "...[t]he word 'may' means possibility, permission, liberty, or power; it does not indicate a mandatory requirement, "citing Black's Law Dictionary 979 (6th ed.1990). In relying on

Merriam-Webster's Collegiate Dictionary 718-719 (10th ed. 1994), one court defined "may" as "(1) have the ability to, (2) be free, (3) used to indicate possibility or probability..." Simms v. Lakewood Village Prop. Owners, 895 S.W. 2nd 779, 783 (Tex. App.- Corpus Christi 1995, no pet'n). Finally, in Bloom v. Texas State Bd. Of Examiners of Psychologists, 492 S.W. 2nd 460, 462 (Tex. 1973), the court stated, "The correct meaning of the word 'may' is ...discretion."

TEX. LOCAL GOV'T CODE, Art. 87.041 (b) states "The commissioners court shall fill a vacancy by a majority vote of the members of the court who are present and voting." The word "shall" in that sentence would appear to apply to the manner of filling the vacancy, and not a duty to fill the vacancy.

Two other questions which have arisen concern the liabilities of the commissioners court should the court opt not to fill the vacancy. Do the court, its members, and Falls County itself incur extra liability if the holdover constable were to commit a tort? Are the individual commissioners and the county judges liable under TEX. LOCAL GOV'T CODE Art. 87.013 for not filling the vacancy?

As to TEX. LOCAL GOV'T CODE, Art. 87.013, there are only three causes which can justify removing an elected county official. "Where power is granted by statute or constitution to remove a public officer for certain specified causes, the power of removal is limited to the causes specified..." State ex rel. Eidson v. Edwards, 793 S.W. 2nd 1(Tex. Cr. App.,1990). If the commissioners court has no affirmative duty to fill a vacancy, it would appear that neither "incompetency" nor "official misconduct" would apply. By the same type of reasoning, it would appear that any increase of tortious liability by the commissioners court would be minimal unless the court knew or should have known of any prior torts committed by the holdover constable.

In summary, here are the three questions which I am submitting to you:

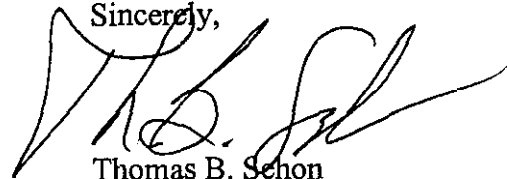
(1) Under TEX. LOCAL GOV'T CODE Art. 87.041, is the commissioners court required to fill a vacancy in a constable's office created by the constable's being elected as school board trustee?

(2) If the commissioners court does not fill that vacancy, and the holdover constable continues to serve, do the court, its individual members, and the county incur greater liability for any torts committed by the constable?

(3) If the commissioners court does not fill the vacancy, and the holdover constable continues to serve, do the court, its individual members, and the county incur liability under TEX. LOCAL GOV'T CODE, Art. 87.013?

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. B. Schon', written in a cursive style.

Thomas B. Schon

Falls County District Attorney

TBS:eg

cc: Honorable Robert Stem
Honorable Mike Meyer
Honorable James Maxey