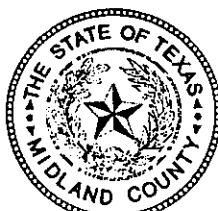


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MAR 07 2000

ATTORNEY GENERAL



RUSSELL W. MALM
MIDLAND COUNTY ATTORNEY

200 W. Wall St., Suite 104
Midland, Texas 79701
(915) 688-1086
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MAR - 7 2000

OPINION COMMITTEE

March 3, 2000

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MAR - 7 2000

OPINION COMMITTEE

FILE # MR-41305-00

I.D. # 41309

The Honorable John Cornyn
Attorney General
209 W. 14th St.
Austin, TX 78701

Re: Attorney General Opinion Request

Dear Attorney General Cornyn:

Enclosed please find a request for an Attorney General Opinion. My office sent to you a request concerning the same issues on March 1, 2000. The enclosed request includes material that was not included in the previous request. Please substitute the enclosed request in place of the previous request.

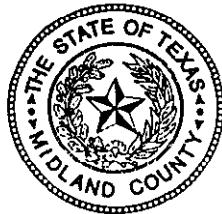
Thank you for your assistance. Please do not hesitate to call if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell W. Malm".

Russell W. Malm

RWM/cb



RUSSELL W. MALM
MIDLAND COUNTY ATTORNEY
200 W. Wall St., Suite 104
Midland, Texas 79701
(915) 688-1086
FAX (915) 688-1092

March 3, 2000

The Honorable John Cornyn
Attorney General
209 W. 14th St.
Austin, TX 78701

Dear Attorney General Cornyn:

In my capacity as Midland County Attorney, and under the authority of *Tex. Gov't. Code §402.043*, I ask your opinion in regards to the following legal questions.

The Midland County Sheriff, along with a number of other Texas Sheriffs, has organized a group known as "Sheriffs Of Texas Agreed Response" (hereafter "STAR"). STAR is a law enforcement tactical response team. The Midland County Sheriff, along with the other participating law enforcement personnel, have been conducting training activities for STAR. One of the stated purposes of STAR is "to form a mutual aid law enforcement tactical response team to cooperate and provide a ready response to situations necessary to protect health, life and property in the county or municipalities because of disaster, riot, or threat of concealed explosives, or unlawful assembly characterized by force and violence or the threat of force and violence by three or more persons acting together or without lawful authority where situations are beyond the capabilities of normally equipped and trained law enforcement agency personnel."

Originally, Sheriff's desiring to participate in the STAR program were required to sign the agreement attached as Exhibit "A." This agreement was drafted by a Texas attorney. That agreement states that it is done pursuant to the powers granted under Article XI, Section 5 of the Texas Constitution, Article 791 of the Texas Government Code, and Chapter 362 of the Texas Local Government Code. The Midland County Judge questions the legal authority of a Sheriff to contract with other counties and conduct such operations. The Midland County Judge also believes that the concept of the STAR program is in conflict with the Emergency Management System set up by Chapter 418 of the Government Code. The Midland County Sheriff believes that he and other Texas Sheriffs have the legal authority to participate in such a program.

The Midland County Sheriff has advised me that the agreement attached as Exhibit "A" is no longer being used by parties participating in STAR. Sheriff's or other law enforcement

agencies wishing to participate in the STAR program are now being required to sign the agreement attached as Exhibit "B."

Both the Midland County Judge and the Midland County Sheriff have asked that I seek your opinion on the STAR program. The related questions to which they seek answers are as follows:

1. Does a Texas Sheriff have authority to contract with the Sheriffs of other Texas Counties or with Municipalities for the purposes as described in the introductory paragraph of Exhibit "A", without the approval of the Commissioners Court of his County?

2. Does a Texas Sheriff have authority, without the consent of the Commissioners Court of his County, to temporarily provide law enforcement assistance, in the form of manpower and resources, to another Texas Sheriff at the request of the other Texas Sheriff and under the direction and authority of the requesting Sheriff for the protection of life and property in the requesting Sheriff's county, during times of natural or man made disasters?

3. Does a Texas Sheriff have the authority to direct his deputies to train with law enforcement personnel from other law enforcement agencies at locations outside of the Sheriff's county?

4. Does a Sheriff of a Texas county have authority to sign an agreement with the Sheriff of another Texas county, without the approval of the Commissioners Court of either county for the purposes addressed in questions two and three above?

5. Does the action of forming and operating STAR, or the taking of any of the other actions described in the first four questions, constitute a violation or conflict with the Emergency Management System set up by State and Federal Law?

I will address each of these questions separately and in the order listed above.

1. Does a Texas Sheriff have authority to contract with the Sheriffs of other Texas Counties or with Municipalities for the purposes as described in the introductory paragraph of Exhibit "A", without the approval of the Commissioners Court of his County?

The general rule is that a Texas Sheriff lacks authority to perform his peace-keeping duties beyond the territorial limits of the county." *35 Texas Practice: County and Special District Law*, Brooks §20.8; *Alred v. Mantague*, 26 Tex. 732 (1863); *Box v. Oliver*, 43 S.W.2d 979 (Tex. Civ. App.-Waco 1931, no writ); *Jones v. State*, 9 S.W. 53 (Tex. Civ. App. 1888, no writ); *Henson v. State*, 120 Tex. Cr. R. W.2d 463 (1932); *Op. Tex. Att'y Gen. No. H-1016* (1977). Art. 2.13 of the Texas Code of Criminal Procedure states that "it is the duty of every peace officer to preserve the peace within his jurisdiction." *Tex. Code Crim. Pro. Art. 2.13*. At common law, a Sheriff did not have jurisdiction beyond the boundaries of his county. The Texas Constitution provides for the office of Sheriff and gives to the Legislature the right to prescribe his duties. *Henson v. State*, 49 S.W.2d 463 (Tex. Crim. App. 1932). The Court of Criminal Appeals stated in *Henson* as follows:

"The opinion is expressed that the statutes quoted and those to which reference has been made evidence the intention of the Legislature to confine the jurisdiction of the Sheriff to his county, except in so far as the authority to execute warrants of arrest in any county of the state is conferred by article 222, C.C.P. The Sheriff is a conservator of the peace in his county. It is his duty to preserve the peace within his jurisdiction. In performing this duty he may, in meeting with resistance in the discharge of any duty imposed upon him by law, summon citizens of his county to overcome the resistance.

On the other hand, the Code of Criminal Procedure permits a peace officer in possession of an arrest warrant to execute the warrant in any county in the State of Texas. *Tex. Code Crim. Pro. Art. 15.06*. Furthermore, although the statutory language is uncertain, a Sheriff or Constable may execute any process anywhere in the state." *35 Texas Practice: County and Special District Law, Brooks* §20.8. Rule 15 of the Texas Rules of Civil Procedure simply provides that all writs and process shall be directed to any Sheriff or any Constable within the State of Texas. The Code of Criminal Procedure also requires the Sheriff or Constable to execute 'all lawful process issued to him by any magistrate or court.

Additionally, the Texas Code of Criminal Procedure provides that "a peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony, a violation of Title 9, Chapter 42, Penal Code, a breach of the peace, or an offense under Section 49.02, Penal Code." *Tex. Code Crim. Pro. Art. 14.03*. That section requires a peace officer making an arrest under it shall, as soon as practicable after making the arrest, notify a law enforcement agency having jurisdiction where the arrest was made.

The original STAR agreement, attached as Exhibit "A" refers to §362.002 of the Texas Local Government Code, which states as follows:

- (a) A county, municipality, or joint airport may, by resolution or order of its governing body, provide for, or authorize its chief administrative officer, chief of police, or marshal to provide for, its regularly employed law enforcement officers to assist another county, municipality, or joint airport. This assistance may be provided only when the mayor or other officer authorized to declare a state of civil emergency in the other county, municipality, or joint airport considers additional law enforcement officers necessary to protect health, life, and property in the county, municipality, or joint airport because of disaster, riot, threat of concealed explosives, or unlawful assembly characterized by force and violence or the threat of force and violence by three or more persons acting together or without lawful authority.
- (b) A county, municipality, or joint airport may, by resolution or order of its governing body, enter into an agreement with a neighboring municipality, joint airport, or contiguous county to form a mutual aid law enforcement task force to cooperate in criminal investigations and law enforcement. Peace officers

employed by counties, municipalities, or joint airports covered by the agreement have only the additional investigative authority throughout the region as set forth in the agreement. The agreement must provide for the compensation of peace officers involved in the activities of the task force.

(c) A law enforcement officer employed by a county, municipality, or joint airport that is covered by the agreement may make an arrest outside the county, municipality, or joint airport in which the officer is employed but within the area covered by the agreement. The law enforcement agencies of the area where the arrest is made shall be notified of the arrest without delay, and the notified agency shall make available the notice of the arrest in the same manner as if the arrest were made by a member of that agency.

This section does not, by its terms, allow a Texas Sheriff to enter into an agreement such as the one attached as Exhibit "A." The section appears to only authorize a Commissioners Court of a County to enter into such an agreement.

The original STAR agreement also refers to Chapter 791 of the Government Code in its preamble. Chapter 791 is the Interlocal Cooperation Act. §791.011(a) authorizes a local government to contract or agree with another local government to perform governmental functions and services in accordance with Chapter 791. §791.011(d) states that an interlocal contract must be authorized by the governing body of each party to the contract. §791.027 provides that a local government may provide emergency assistance to another local government if, in the opinion of the presiding officer of the governing body of the local government desiring emergency assistance, a state of civil emergency exists, and the presiding officer requests the assistance, and before the emergency assistance is provided, the governing body of the local government that is to provide the assistance authorizes that local government to provide the assistance by resolution or other official action. That section, by its own language, however, does not apply to emergency assistance provided by law enforcement officers under Chapter 362, Local Government Code. It does not appear that Chapter 791, by its terms, authorizes a Texas Sheriff to enter into an agreement such as the one attached as Exhibit "A."

The original STAR agreement also refers in its preamble to Article XI, Section 5 of the Texas Constitution. That section is titled "Cities of 5,000 or more population; adoption or amendment of charters; taxes; debt restrictions." Article XI, Section 5 does not appear to apply to the situation the agreement addressed, and it is believed to be a typographical error.

2. Does a Texas Sheriff have authority, without the consent of the Commissioners Court of his County, to temporarily provide law enforcement assistance, in the form of manpower and resources, to another Texas Sheriff at the request of the other Texas Sheriff and under the direction and authority of the requesting Sheriff for the protection of life and property in the requesting Sheriff's county, during times of natural or man made disasters?

In *Tex. Atty. Gen. Op. DM-77* (1992), the Attorney General was presented with the question whether the Midland County Sheriff had authority to engage in law enforcement activities outside Midland County. The Attorney General ruled that "a Sheriff has no general

authority to investigate criminal activities outside of the geographical boundaries of the county for which he is elected. His authority to make warrantless arrests outside his county is circumscribed by the conditions imposed in article 14.03(d) of the Texas Code of Criminal Procedure."

It is the position of the Sheriff of Midland County that there is a clear distinction between the situation addressed in *DM-77* and the STAR program. The distinction has to do with who is responsible for and in charge of the activities for which the law enforcement assistance is being provided. The situation at issue in *DM-77* involved out of county "reverse-sting" operations under the control of the Midland County Sheriff. Under the STAR program, the manpower or other resources being provided to the requesting Sheriff, will be temporarily under the direction of the requesting Sheriff in the requesting Sheriff's county. The activities in the county of the requesting Sheriff, therefore, will not involve a Sheriff conducting and directing law enforcement activities outside of the geographic boundaries of his county.

In *Weber v. City of Sachse*, 591 S.W.2d 563 (Tex. Civ. App.--Dallas 1979, no writ), the Court of Appeals discussed a Sheriff's law enforcement discretion regarding deployment of his deputies. The case concerned a suit by incorporated municipalities seeking a writ of mandamus compelling the Sheriff to patrol within their boundaries. The county had elected to patrol only the unincorporated areas of the county. The court held that the Sheriff could not be compelled to provide patrols as requested because his decisions as to the deployment of law enforcement officers within the county are left to his discretion and judgment. See also, *Tex. Atty. Gen. JM-57* (1983).

The Texas Code of Criminal Procedure provides that "whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance; and all persons summoned are bound to obey. *Tex. Code Crim. Pro. Art. 2.14*. See also ("Further, all persons summoned by peace officers must assist them to overcome resistance when discharging a duty imposed upon them by law.")

3. Does a Texas Sheriff have the authority to have his deputies train with law enforcement personnel from other law enforcement agencies at locations outside of the Sheriff's county?

I have not found any statutes, reported cases or Attorney General Opinions that directly addresses this question. There are, however, a number of statutes, cases and Attorney General Opinions that discuss in general the respective authority of elected officials and Commissioners Courts over the employees of elected officials.

District, county, and precinct officers who require the services of deputies, assistants, or clerks must apply to the Commissioners Court for authority to appoint such personnel. *Tex. Local Gov't Code §151.001*. After receipt of the application, the Commissioners Court must determine the number of employees that may be appointed and shall authorize their appointment. *Tex. Local Gov't Code §151.002*. After the court has authorized the appointment, the District, county, or precinct officer may appoint the number of personnel authorized. *Tex. Local Gov't*

Code §151.003. The Commissioners Court is specifically prohibited, however, from attempting to influence the appointment of any person to an employee position authorized by the court. *Tex. Local Gov't Code §151.004.* In *Tex. Atty. Gen. Op. JM-521* (1986), the Attorney General held that because the Commissioners Court has no power to interfere in the hiring decisions made by other county officers, it may not require those county officers to terminate an employee who becomes a candidate for partisan political office. However, the authority of a Commissioners Court to set county compensation does not include the authority to set the office hours of other county officials and their employees. *Tex. Atty. Gen. Op. JC-0131*(1999).

The authority of a county officer is limited to those powers expressly conferred by statute or constitution or necessarily implied therefrom. *Crosthwait v. State*, 138 S.W.2d 1060, 1061 (Tex. 1940). Each county official has the implied authority to set the working conditions for his or her own employees. As a general rule, neither the Commissioners Court nor other officers may set working conditions for other offices. *Tex. Atty. Gen. Op. JC-0131*(1999); *Tex. Att'y Gen. Op. JM-1099* (1989) ("The powers of county officers, including the county Sheriff, over personnel matters is also quite extensive, subject to appropriate constitutional and statutory restraints."); *Tex. Atty. Gen. Op. JM-521* (1986) (Commissioners Court may not set the working conditions of other county officials). In *JM-1031*, the Attorney General concluded that the power of a county officer to close his or her office includes the power to authorize employees to be paid for the time they were unable to work because of an office closure.

Because of the unique structure of county government in Texas, an elected county official holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. *Tex. Atty. Gen. Op. JM-1099* (1989); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

4. Does a Sheriff of a Texas county have authority to sign an agreement with the Sheriff of another Texas county for the purposes of the activities discussed in question number two, without the approval of the Commissioners Court of his county?

My research did not uncover any statutes that specifically give to Sheriff's the authority to sign an agreement in such a circumstance. There are several statutes, however, that do give Sheriff's the right to sign agreements in certain situations. For example, *Texas Family Code §261.3019* states that the Department of Protective and Regulatory Services shall enter into two or more agreements with Sheriffs under which the Sheriff or law enforcement agency shall conduct investigations of reports of abuse. *Texas Government Code §511.012* provides for Sheriffs of Texas Counties to sign agreements for the transferring and receiving of prisoners. *Texas Health and Safety Code §774.003* authorizes a Commissioners Court to provide emergency ambulance service by entering an agreement with a Sheriff's office. *Texas Local Government Code §351.0415* authorizes a Sheriff to contract with another person to operate a jail commissary.

In *Anderson v. Wood*, 152 S.W.2d 1084 (Tex.1941), the Texas Supreme Court held that "the Commissioners' Court. . . . is the general business and contracting agency of the county, and it alone has authority to make contracts binding on the county, unless otherwise specifically provided by statute. . . . On the other hand, a Sheriff has no authority to make contracts that are

binding on the county, except where he is specially so authorized to do by statute.” The Attorney General expanded upon this case in *Tex. Atty. Gen. Op. 90-095* by stating that “Section 18, of article V, of the Texas Constitution does not repose sole authority in the Commissioners Court to contract on behalf of the county. Rather, section 18 has been construed to confer sole authority on the Commissioners Court to enter into contracts binding on the county, unless a statute specifically provides otherwise.”

5. Does the action of forming and operating STAR, or the taking of any of the other actions described in the first four questions, constitute a violation or conflict with the Emergency Management System set up by State and Federal Law?

Chapter 418 of the Texas Government Code is known as the “Texas Disaster Act of 1975.” A “Disaster” is defined by the Act as meaning “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.” *Tex. Gov’t. Code §418.004*. Subchapter E of the Act, §418.102, et. seq., is titled “Local And Interjurisdictional Emergency Management”. Each county shall maintain an emergency management program or participate in a local or interjurisdictional emergency management program that has jurisdiction over and serves the entire county or interjurisdictional area. This program is the first channel through which a municipal corporation shall request assistance when its resources are exceeded. *Tex. Gov’t. Code §418.102*. The governor may recommend that a political subdivision form an interjurisdictional agency jointly with one or more other political subdivisions if he finds that the establishment and maintenance of a joint program or participation in it is made necessary by circumstances or conditions that make it unusually difficult to provide disaster mitigation, preparedness, response, or recovery services under other provisions of this chapter. *Tex. Gov’t Code §418.014*. Each county shall provide an office and a liaison officer to coordinate with state and federal emergency management personnel. *Tex. Gov’t Code §418.105*. Each local and interjurisdictional agency shall prepare and keep current an emergency management plan for its area. *Tex. Gov’t Code §418.106*. A political subdivision may make appropriations for emergency management services, may make agreements for the purpose of organizing emergency management service divisions, and may render aid to other subdivisions under mutual aid agreements. *Tex. Gov’t Code §418.107*. The presiding officer of the governing body of a political subdivision may declare a local state of disaster. Such a declaration of local disaster activates the recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. *Tex. Gov’t Code §418.108*. A county may provide mutual aid assistance on request from another governmental entity with the approval and consent of the presiding officer of that entities governing body. *Tex. Gov’t Code §418.109*.

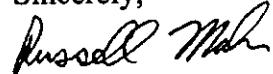
Title 37 of the Texas Administrative Code contains regulations concerning Emergency Management Operations. Rule 7.25 states that requests for assistance must be made by the chief elected official of the city or county or by another official specifically authorized by them. Rule

7.42 states that requests for recovery assistance or a gubernatorial disaster declaration must be made in writing by the local chief elected official to the Governor of Texas.

Where a statutory power is granted and the method of its exercise is prescribed, that method excludes all others and must be followed. *Tex. Atty. Gen. Op. JC-0082* (1999); See *Foster v. City of Waco*, 255 S.W. 1104, 1105 (Tex. 1923); *Cole v. Texas Army Nat'l Guard*, 909 S.W.2d 535, 539 (Tex. App.-Austin 1995, writ denied); *Tex. Att'y Gen. Op. Nos. JC-0011* (1999) DM-424 (1996).

Thank you for your assistance and attention to this matter. Please do not hesitate to contact me at any time if you have any questions or require any additional information or briefing on this matter.

Sincerely,



Russell W. Malm

cc: Bill Morrow
Gary Painter