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OPINION COMMITTEE

JOHNSON COUNTY

BILL MOORE
COUNTY ATTORNEY

RQ-0376-JC

FILE # ML-41969-01

I.D. # 41969

April 19, 2001

Honorable Susan Gusky, Chairperson
Opinion Committee
Attorney General's Office
P.O. Box 12548
Austin, Texas 78711-2548

C.M.R.R.R. #7000 0520 0023 2531 2880

RE: Request for an Attorney General's opinion concerning provisions (a) and (e) of Section 86.021 of the Texas Local Government Code and determination of which provision prevails if there is a direct conflict between the two provisions.

Dear Ms. Gusky:

I am writing to request an Attorney General's opinion interpreting Section 86.021 (a) and Section 86.021(e) of the Local Government Code and the Attorney General Letter Opinion No. 98-101 as applied to the question of which obligation supercedes the other when the obligation under Section 86.021(a) which states "A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable..." conflicts with provision (e) which mandates "The constable shall attend each justice court held in the precinct."

The Constable contends that if he attends every session of justice court, as mandated by Section 86.021 (e), that he will be forced to neglect his responsibilities of serving process under Section 86.021 (a). The Justice of the Peace recognizes this conflict; but, maintains that obligation under Section 86.021 (e) should take priority over the obligations of Section 86.021(a). The Justice

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**Request for A.G. Opinion regarding constable's
duties under Local Government Code Section 86.021**

of the Peace further insists that the Constable attend each session of the Justice Court.

Attorney General Letter Opinion No. 98-101 addresses the requirement of the constable to attend all session of a justice court. That opinion states that under Section 86.021(e) the constable is required to attend all sessions of justice court. How can that opinion be reconciled with 86.021(a) where the constable does not have enough resources, time or personnel to carry out both provisions (a) and (e) of Section 86.021?

The Justice of the Peace of Precinct #2 of Johnson County has requested that he County Attorney's Office submit this request for an Attorney General's Opinion.

Question

Does provision (a) or provision (e) of Section 86.021 of the Local Government Code take priority over the other provision in cases of direct conflict, and, if the Constable is required to attend all sessions of Justice Court, is the constable committing official misconduct if the constable is unable to perform one of the duties prescribed in Section 86.021 because the constable is performing another duty prescribed by Section 86.021?

I have enclosed a copy of the brief prepared in relation to the foregoing question. I would appreciate an answer to this question as soon as possible. I thank you in advance for your attention to this matter.

Sincerely,


Bill Moore

enclosure: Brief

cc: Judge Kathie Gabbert
Constable Adam Crawford

BRIEF

FACTUAL BACKGROUND

The Justice of the Peace of Precinct #2 has requested an opinion regarding the importance or priority of the Constable's duties as set forth in Section 86.021 of the Texas Local Government Code. The Constable does not want to commit official misconduct by refusing or neglecting to perform any duties imposed on him by law. The Justice of the Peace expects the Constable to attend each session of the Justice Court. The Justice of the Peace has asked if there is any duty listed in Section 86.021 that is more important than any other when each provision states a duty that the constable shall perform.

STATUTES IN QUESTION

Section 86.021 states:

- (a) A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer.

- (a) A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer. Notices required by Section 25.005, Property code, relating to eviction actions are process for purposes of this section that may be executed by a constable.

- (b) A constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by the code of Criminal Procedure or by any other law.

- (c) A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act or service anywhere in the county in which the constable's

precinct is located.

- (d) Regardless of the Texas Rules of Civil Procedure, all civil process may be served by a constable in the constable's county or in a county contiguous to the constable's county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit.
- (e) The constable shall attend each justice court held in the precinct.

SUPPORTING (RELATED) CASES & OPINIONS

Attorney General letter Opinion No. 98-101, in response to the question of whether a constable is required to attend the Justice court whenever it is in session, concluded that Local Government code Section 86.021 requires the constable of each precinct to attend each session of the Justice court for that precinct, whatever may be the purpose for which the court is sitting.

LEGAL ANALYSIS

When duties or responsibilities are stated for an elected official with "shall" rather than "may" said duty is mandatory and must be performed by said official. If more than one duty is listed, the duties are of equal importance and one duty cannot be given priority over another. However, fulfilling the requirement of Local Government Code Section 86.021(e), "The constable shall attend each Justice Court held in the precinct" would require the Constable to neglect executing and returning process, warrants, precepts and notices. Conversely though, if the constable fulfills his duty of executing and returning process, warrants, precepts and notices he must neglect his duty to attend each Justice Court session.

Attorney General letter Opinion No. 98-101 states that it is indeed the constable's duty to attend

each session of Justice Court, however, that opinion did not address the circumstance of a direct conflict between prescribed duties when the constable finds it is impossible to perform the duties set forth in Section 86.021 to the satisfaction of the Justice of the Peace and to simultaneously meet the needs of those seeking service of process, warrants, precepts and notices.

The constable and Justice of the Peace have differing views on the interpretation of Section 86.021 in regard to the importance or priority of Texas Local Government Code Sections (a) and (e). The Constable recognizes the “shall” of (a) and (e) as mandatory duties, yet interprets each section as being of equal importance, therefore, excusing possible tardiness or absence from Justice Court if carrying out his duties of executing or serving process, warrants, precepts and notices. The Justice of the Peace, though, interprets, Section 86.021(e) as not only mandatory but as having priority over Section 86.021(a), insisting that the Constable be present for each session of Justice Court. Is a constable subject to being jailed or fined for contempt of court, or subject to charges of official misconduct, for failure to be present at a court session? There is no law or Letter Opinion stating that there are exceptions to the Attorney General’s Letter Opinion No. 98-101 which asserts that the Constable shall attend all sessions of Justice Court.

We respectfully request that the Attorney General issue an opinion setting forth the priority of Texas Local Government Code Sections 86.021(a) and 86.021(e) when the time and resource requirements of fully performing the duties set forth in one of those sections is mutually exclusive of performance of the other duty. We further request that the Attorney General address the issue as to whether a constable is committing official misconduct or subjecting himself to charges of contempt of court if performing one mandated duty to the exclusion of another.