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OPINION COMMITTEE



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March 11, 2004

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43578-04
I.D. # 43578

Re: Request for Attorney General Opinion on the issues of (1) whether Hidalgo County deputy district clerks are covered under the county civil service plan, and (2) if not, whether the Hidalgo County Commissioners Court may amend the civil service plan to include deputy district clerks

To the Honorable Attorney General Abbott:

This is to request an opinion on the issues of whether Hidalgo County deputy district clerks are covered by the Hidalgo County Civil Service Plan, and, if not, whether the Hidalgo County Commissioners Court may amend the County's civil service plan to include deputy district clerks.

FACTS

The facts presented to this office are as follows. Hidalgo County District Clerk Omar Guerrero terminated the employment of several deputy district clerks; the former deputy district clerks allege their termination was without cause. They applied for an administrative hearing before the Hidalgo County Civil Service Commission, pursuant to the County's Civil Service Commission Rules. The Commission questions whether deputy district clerks are covered by the Plan; if not, the Commissioners Court questions if it may amend the County's civil service plan to include deputy district clerks.

BRIEF

The two statutes relevant to these issues are in conflict; one purports to grant the District Clerk complete control over the employment of deputy district clerks, while the county civil service statute appears to include deputy district clerks, as county employees, under county civil service rules, meaning that their employment

cannot be terminated without notice and a hearing at which the employer must demonstrate cause for termination.

Relevant Statutes

Government Code Section 51.136: Deputy District Clerks in Hidalgo County

Section 51.316 of the Government Code provides as follows:

(a) In Hidalgo, Jefferson, and Nueces counties, the district clerk may apply in writing to the district judges in the county to appoint a deputy district clerk or an assistant. The application must state the number of deputies or assistants to be appointed and the probable receipts and disbursements of the office. If a majority of the judges approve the appointment, they shall certify the list to the commissioner's court. The application and the order approving the application must be recorded in the minutes of the district court.

(b) A deputy clerk or assistant appointed under this section shall perform the duties required by the district clerk and serves at the pleasure of the district clerk. A deputy clerk or assistant may not be employed except as provided by this section.

(c) An assistant appointed under this section must take the oath prescribed for officers of this state.

(d) The salary of an assistant appointed under this section shall be paid out of the general fund or the officers' salary fund of the county. The salary of a court clerk, index clerk, or clerk handling the jury shall be paid out of the general fund or the jury fund.

TEX. GOV'T CODE ANN. § 51.319 (Vernon 1998).

Local Government Code Chapter 158 Governing County Civil Service Plans

Hidalgo County's Civil Service Plan was enacted through the provisions of Chapter 158 of the Local Government Code. Section 158.002 provides as follows:

A county with a population of 200,000 or more may, in accordance with this subchapter, create a county civil service system to include all the employees of the county who are not exempted from

the system by the express terms or the judicial interpretations of this subchapter or by the operation of Subchapter B.¹

TEX. LOC. GOV'T CODE ANN. § 158.002 (Vernon 1999). The county civil service commission has the power to adopt rules regarding the definition of a county employee. TEX. LOC. GOV'T CODE ANN. § 158.009(a)(2) (Vernon 1999). Section 2.18 of the Hidalgo County Civil Service Commission Rules defines "employee" as "any person employed by the County and/or the District"², with several exclusions that are not relevant to this inquiry. See Hidalgo County Civil Service Rules § 2.18 (attached as Appendix 1).

Thus, the Government Code states that deputy district clerks in Hidalgo County serve at the pleasure of the District Clerk, while the Local Government Code seems to encompass deputy district clerks as county employees covered under county civil service plans, meaning they cannot be terminated without notice and a hearing at which evidence of cause for termination is adduced.

Guidance on Resolving This Conflict

Chapter 311 of the Texas Government Code contains the Code Construction Act. See TEX. GOV'T CODE ANN. § 311.001 (Vernon 1998). It provides that if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails. TEX. GOV'T CODE ANN. § 311.025(a) (Vernon 1998).

This section was employed in *Clark v. Young*, 787 S.W.2d 166 (Tex. App.—Fort Worth 1990, writ denied), to resolve a similar issue. Clark was the court coordinator of a district court. After the judge of that court was defeated in his bid for reelection, the new judge terminated Clark's employment without cause. Clark filed a grievance with the Tarrant County Civil Service Commission, which held that she should be reinstated. The judge brought a declaratory action, and the trial court found that court coordinators were not subject to civil service.

The Fort Worth Court of Appeals agreed. Relying upon Government Code Section 311.025, the Court reasoned that, because the statute creating the position of court coordinator was enacted after the statute under which the Tarrant County Civil Service plan had been expanded, the court coordinator statute trumped the relevant civil service statute. The court coordinator statute provides that

¹ Subchapter B relates to civil service systems of a sheriff's department. See TEX. LOC. GOV'T CODE ANN. §§ 158.031-040 (Vernon 1998).

² "District" is defined as Hidalgo County Drainage District No. 1. See Hidalgo County Civil Service Commission Rules, §2.14A (included in Appendix 1).

“coordinators serve at the pleasure of the appointing judge, meaning that they may be removed without cause, and without notice and hearing.” *Id.* at 168-9.

Under Section 311.025, we must determine when each relevant statute was enacted. Government Code Section 51.316, which specifically relates to deputy district clerks in Hidalgo and two other counties, was enacted in 1985 in its current form; the statute specifically provides that “[a] deputy district clerk or assistant appointed under this section shall perform the duties required by the district clerk and serves at the pleasure of the district clerk.” *See* Act of May 22, 1985, 69th Leg., R. S., 1985 Tex. Gen. Laws 1982-3; TEX. GOV’T CODE ANN. § 51.316 (Vernon 1998).³

Chapter 158 of the Local Government Code was enacted in 1987; however, this was a non-substantive recodification of the prior law, found in article 2372h-6 of the Texas Revised Civil Statutes, which was enacted in 1971. *See* Act of May 14, 1971, 62nd Leg., R.S., 1971 Tex. Gen. Laws 1151-4, *amended by* Act of May 26, 1973, 63rd Leg., R.S., 1973 Tex. Gen. Laws 1262; Act of May 12, 1977, 65th Leg., R.S., 1977 Tex. Gen. Laws 654; Act of May 19, 1977, 65 Leg., R.S., 1977 Tex. Gen. Laws 864; Act of May 25, 1985, 69th Leg., R.S. 1985 Tex. Gen. Laws 2510-1; *repealed and recodified by* Act of May 1, 1987, 70th Leg., R.S. 1987 Tex. Gen. Laws 943-7.

Therefore, Section 51.316 of the Government Code is the more recent legislative enactment, and it must control over chapter 158 of the Local Government Code.

Furthermore, Section 311.026(b) of the Code Construction Act provides that “[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.” TEX. GOV’T CODE ANN. § 311.026(b) (Vernon 1998). Section 51.316 of the Government Code is clearly a special or local provision that applies only to Hidalgo, Jefferson and Nueces Counties; Chapter 158 is a general provision that was enacted after Section 51.316. Therefore, under this rule of construction, Section 51.316 must prevail over Chapter 158.

³ The law from which this section was derived (which related to deputy district clerks generally, not specifically to those in Hidalgo County and two other counties) also provided that deputy district clerks served at the discretion of the district clerk. *See* Act of May 9, 1939, 46th Leg., 1st C. S., 1939 Tex. Gen. Laws 743 (“The District Clerk shall have the right to discontinue the services of any assistant employed in accordance with the provisions of this Article . . .”); *see also* Act of April 17, 1941, 47th Leg., R.S., 1947 Tex. Gen. Laws 241 (containing same language)(found in article 3912e, §19h-2, of the Texas Revised Civil Statutes, which was repealed when the Government Code was enacted in 1985). Therefore, deputy district clerks have historically served at the pleasure of the District Clerk.

As a result, deputy district clerks in Hidalgo County are statutorily excluded from coverage under the County's civil service plan. Furthermore, because they are statutorily excluded from inclusion in a county civil service plan, it follows that the Hidalgo County Commissioners Court may not include deputy district clerks under the County's civil service plan by simply amending the plan's definition of "employee" to specifically include them.

Given the importance of a definitive answer to this question, your opinion on this matter is respectfully requested. Should you require further information, please do not hesitate to call. Thank you for your prompt attention to this matter.

Respectfully,



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Criminal District Attorney
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cc: Jerry Munoz, Counsel for Hidalgo County Civil Service Commission

Valorie Glass, Counsel for Hidalgo County

Fernando Mancias, Counsel for Applicant

Sergio Valdez, Counsel for Applicant

APPENDIX 1

- 2.08 Commissioners Court means the Commissioners Court of Hidalgo County, Texas, in its capacity as the governing authority, as applicable, for the County and/or the District, established pursuant to the constitution and laws of the State of Texas. (Amended June 12, 2002)
- 2.09 Compensatory Leave is accrued by an employee when the employee works in excess of the employee's scheduled work hours. (Adopted June 19, 1995)
- 2.09A Contributed Sick Leave Hours means the number of Sick Leave hours contributed by an employee to the Sick Leave Pool during the Enrollment Period as a condition to such employee's participation in the Sick Leave Pool for the following calendar year. The minimum number of Sick Leave hours to be contributed by an employee during the Enrollment Period is twenty-four hours, and the maximum number of hours is forty hours. (Adopted March 28, 2002)
- 2.10 Conviction or conviction means a final, non-appealable finding of guilt by either a judge or jury, or a suspension of sentence, probation or deferred adjudication. (Adopted December 13, 1995)
- 2.11 County means Hidalgo County, Texas, as organized and existing under the constitution and laws of the State of Texas. (Adopted May 10, 1995)
- 2.12 Court Leave is a benefit granted to an employee for jury service and to appear as a witness for the County. Court leave is only granted for the actual time served as a juror or witness. (Adopted June 19, 1995)
- 2.13 Department means a county, district, or precinct office, agency, or board that has jurisdiction and control of designated governmental functions. (Adopted May 10, 1995)
- 2.14 Department Head means an individual appointed as a supervisor of a department by one of the following: the Governing Authority; County Judge; a designated representative of the Governing Authority; or an Elected Official. (Amended June 12, 2002)
- 2.14A District means the Hidalgo County Drainage District No. 1. (Adopted June 12, 2002)
- 2.15 Educational Leave, as defined in Sections 7.173 through 7.177 hereof, is a benefit available only to eligible employees in the Head Start Program. (Adopted September 20, 1995)
- 2.16 Elected Official means an individual elected to a position created by the constitution or by statute. The term of an Elected Official is limited by the constitution. (Adopted May 10, 1995)
- 2.17 Emergency Appointment means an individual hired by the County or District to fill a position on an emergency basis, so long as the position to be filled has already been budgeted and approved by the Governing Authority. For purposes of these Rules, an "Emergency Appointment" is a special subcategory of a Temporary Employee.

The following factors must exist to justify classification as an "Emergency Appointment:" (i) the appointment requires work of a specialized nature; (ii) the work is not of a type regularly performed by others employed by the County and/or District; (iii) the work is not of a type that the requesting Elected Official/Department Head, in the exercise of reasonable and prudent personnel management practices, could have foreseen; (iv) the work is expected to be fully completed in six months or less; and (v) that when the work is completed, the Elected Official/Department Head requesting such "Emergency Appointment" will not, in the reasonably foreseeable future, again have the need for the same or similar services. Each Elected Official/Department Head, in coordination with the Secretary, shall require each person selected to fill an "Emergency Appointment" acknowledge, in writing, prior to employment, that such person is being employed on a temporary basis and for a limited duration, generally not to exceed six months.

In addition to the foregoing, when an Elected Official/Department Head: (i) has received written notice that federal and/or state funding is in jeopardy unless certain types of regular County and/or District positions are filled immediately; or (ii) learns that an employee in a currently filled position will be absent from work for an indefinite period of time, generally not to exceed six months, due to illness or injury of the employee, or the employee's spouse, child or parent (as those terms are defined in Rule 7.92), and the Elected Official/Department Head is either required by law or elects to continue such person's employment during such absence from work; the Elected Official/Department Head may temporarily fill such vacancies as an Emergency Appointment without meeting the other criteria required for such an appointment, so long as the Elected Official/Department Head certifies such fact, in writing, to the Secretary prior to filling such vacancies. Persons employed to fill such vacancies must also acknowledge, in writing, that such person is being employed on a temporary basis and for a limited duration, generally not to exceed six months. The Elected Official/Department Head should also promptly request any vacancies which, under the circumstances, need to be filled on the termination of such temporary appointments be advertised as provided in Chapter III of these rules. (Amended November 12, 1997; Amended December 9, 1998; Amended June 9, 1999)

The Elected Official/Department Head shall fill an Emergency Appointment with either an existing employee or from qualified applicants who have an Application on file in the office of the Human Resources Director. (Amended November 12, 1997)

The Secretary shall establish procedures which insure that the Commission receives, on a quarterly basis, statistical information concerning the frequency and areas in which Emergency Appointments are being used in the County and/or District. (Adopted August 9, 1995)

2.18 Employee,³ [whether the term is capitalized or not], unless the context clearly indicates otherwise, means any person employed by the County and/or District. The term "employee" excludes:

- a. persons who are exempt from the System under Texas Local Government Code § 158.013 (an elected or appointed officer under the Texas constitution, employees of the criminal district attorney's office, and the official shorthand reporter of a court);
- b. persons who are authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right, except for deputy sheriffs and deputy constables, who shall be considered Employees;
- c. a person who holds an office the term of which is limited by the Texas constitution;
- d. the personal secretary and the chief administrative assistant/deputy of each elected official and appointed official under the Texas constitution;
- e. justice of the peace and staff, county court at law and district court staff, including bailiffs and court coordinators and assistant bailiffs and assistant court coordinators (Amended November 15, 2000);
- f. adult and juvenile probation officers and employees of the adult and juvenile probation offices;
- g. the county auditor, assistant or deputy county auditors and employees of the county auditor;
- h. the head or chief of each Department (Amended December 13, 1995); and

³ Amended November 12, 1997

- i. the following positions in the Hidalgo County Sheriff's Department: Commander of Criminal Enforcement and Commander of Detention (Amended June 12, 2002)

2.18A Enrolled Employee means an employee who, in any calendar year, has elected to participate in the Sick Leave Pool, and who, during the Enrollment Period, meets all requirements of Section 7.210 of these Rules with respect to the following calendar year, or with respect to an employee who elects to participate in the Sick Leave Pool after twelve months of County and/or District employment, for the remainder of the calendar year following enrollment. (Adopted March 28, 2002)

2.18 B Enrollment Period with respect to the Sick Leave Pool means: (a) during the month of November in each calendar year; or during the twelfth month of County and/or District employment for employees who, based on length of County and/or District service, are not eligible to enroll in the Sick Leave Pool during the preceding November. (Adopted March 28, 2002)

2.19 Family and Medical Leave means leave available to "eligible employees" pursuant to a leave program adopted by the Governing Authority which complies with 29 U.S.C. 2601-2654, as amended. (Adopted June 19, 1995)

2.19A Governing Authority means the Commissioners Court, in its capacity, as applicable, of the County and/or the District. (Adopted June 12, 2002)

2.20 Head Start Administrative Staff means Head Start Program employees who are not classified as Head Start Center Staff. (Adopted September 20, 1995)

2.21 Head Start Center Staff means Head Start Program employees who are assigned to work at the Head Start Program centers whose primary job responsibilities involve the delivery of services to clients. The Head Start Program Director is responsible for classifying employees as Head Start Center Staff. (Adopted September 20, 1995)

2.22 Head Start Policy Council means the Head Start Policy Council established by the County under the Head Start Program. (Adopted September 20, 1995)

2.23 Head Start Program means the federal grant program administered by the County under 42 U.S.C.A Section 9831, et. seq., as amended, and implementing regulations and guidelines. (Adopted September 20, 1995)

2.24 Head Start Program Director means the person selected by the Governing Authority and Head Start Policy Council as Head Start Program Director. For purposes of these rules, the Head Start Program Director is a Department Head. (Adopted September 20, 1995)

2.25 Holidays means authorized days off from work as declared by the Governing Authority. (Adopted June 19, 1995)

2.25A. Internal Announcement Procedure means the advertising procedure used to advertise a Vacancy when the Vacancy is to be filled from qualified individuals who are already employed by the County and/or District. When the Internal Announcement Procedure is used, the Human Resources Director screens only the Applications received from existing County and/or District employees for the Vacancy and forwards the names of those applicants meeting minimum qualifications to the Elected Official/Department Head. If the Elected Official/Department Head notifies the Human Resources Director that the Elected Official/Department Head was unable to make a selection from the applicants submitted, the Elected Official/Department Head may request the Human Resources Director to screen such other Applications available in the Human Resources Director's files received from qualified individuals who did not specifically apply for the Vacancy, and if such Applications are determined to exist, the Human Resources Director shall