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OPINION COMMITTEE

JOHN S. HOLLEMAN

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Polk County, Texas

FILE # ML-44517-6A

I.D. # 44517

November 22, 2005

Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

RQ-0420-GA

Re: Request for Attorney General Opinion

Dear General Abbott:

Pursuant to Section 402.043 of the Texas Government Code, I submit the following questions and brief to your office for consideration:

Questions Presented

1. Does a county auditor's violation of his oath of office, as set forth in Section 84.007(b)(2) of the Local Government Code, constitute "official misconduct" under Local Government Code, Section 84.009(2)?
2. What remedies are available to rectify a county auditor's violation of his oath of office established by Section 84.007(b)(2) of the Local Government Code?
3. Will a county auditor's subsequent divestment of any personal interest in an existing contract with a county "cure" a prior violation of the auditor's oath of office as established under Section 84.007 (b)(2) of the Local Government Code?

Relevant Facts

On February 17, 2004, Polk County entered into a lease agreement with 512 West Church, Inc. (Exhibit "A") for the lease of a commercial building which presently houses various county departments. B.L. Dockens ("Dockens") is president of 512 West Church, Inc. and executed said lease agreement as "President Lessor." Dockens had previously been appointed Polk County Auditor by the judges of the 411th and 258th District Courts on January 1, 2003 for a two year term (which was later extended for a second two year term on January 1, 2005). Subsequent to the execution of Exhibit A, a complaint was lodged with the judges of the 411th and 258th District Courts by an

elected county commissioner asserting that Dockens had violated the provisions of Section 84.007(b)(2) by becoming “personally interested in a contract with the county” and calling for his removal. By letter dated November 2, 2005 (Exhibit “B”), Dockens informed the judges of the 411th and 258th District Courts of his intent to divest himself of any direct or indirect interest in the property subject to the lease agreement and the lease agreement with the county.

Brief

Texas Local Government, § 84.007(b) provides:

“(b) The county auditor must take the official oath and a written oath that lists the positions of public or private trust previously held and the length of service in each of those positions and that states:

- (1) that he has the qualifications required by this chapter; and
- (2) *that he will not be personally interested in a contract with the county.*”

Pursuant to prior Attorney General Opinions V-381, WW-1241; and the reasoning of Attorney General Opinion GA-0360, it appears that Dockens may have violated his oath of office by becoming “personally interested in a contract with the county.”¹

Section 84.007(b) is silent as to what remedy, if any, is available to address a violation of the auditor’s oath of office. Texas Local Government Code, § 84.009 provides:

REMOVAL. (a) A county auditor may be removed from office and a successor appointed if, after due investigation by the district judges who appointed the auditor, it is proven that the auditor:

- (1) has committed official misconduct; or
- (2) is incompetent to faithfully discharge the duties of the office of county auditor.

(b) The district judges who appointed a county auditor under Section 84.002(b)(2) or Section 84.008 may discontinue the services of the auditor after the expiration of one year after the date of the appointment if it is clearly shown that the auditor is not necessary and the auditor's services are not commensurate with the auditor's salary.

Id. The term “official misconduct” is not defined in Section 84 of the Local Government Code but is defined elsewhere as “intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.” Tex. Loc. Gov’t Code Ann., Sec. 87.011(3)(Vernon 2003). Arguably, the violation of a statutorily prescribed oath is tantamount to a violation of “a duty imposed on the officer by law” and as such would constitute “official misconduct” under Section 84.009. However, Section 84.009,

¹A second issue may arise from the fact that Dockens renewed his oath when he was reappointed county auditor on January 1, 2005 while the commercial lease agreement with the county was in force and effect.

by using the discretionary term "may," does not appear to mandate a removal of the auditor by the district judges when confronted with an auditor's official misconduct. Section 84 does not appear to offer any alternative remedies short of removal.

Accordingly, to the extent that Dockens proposes to "cure" a possible violation of his oath by divesting himself of any interest in the lease agreement, the statute is silent as to whether this would be an appropriate remedy or whether further action by the district judges may be required or warranted.

As a result of the foregoing, I respectfully request your opinion as to whether a violation of the Auditor's oath constitutes "official misconduct" pursuant to Section 84.009, what remedies, if any, are available to address a violation of the Auditor's oath in this circumstance and whether and auditor's subsequent divestment of any personal interest in a contract with the county may cure any previous violation of the auditor's oath of office.

Sincerely,



JOHN S. HOLLEMAN
Criminal District Attorney

JSH/rr
Encl.

CC:

Hon. Robert Hill Trapp
Hon. Elizabeth E. Coker