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OPINION COMMITTEE

June 28, 2006

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

RQ-0504-GA

FILE # ML-44871-04
I.D. # 44871

Dear Attorney General Abbott:

Please see the attached brief addressing the issue of whether the Commissioners Court has the authority to delegate non-statutorily assigned duties to other elected county officials. Kerr County is currently involved with one issue relative to the County Treasurer, but our Commissioners Court has expressed an intent to "reorganize" thereby involving multiple elected county officials. I respectfully request in the interest of judicial efficiency that the Attorney General's office address this issue in terms of all elected county officials instead of focusing only on the treasurer. Thank you for your time and consideration.

Yours truly,

Rex Emerson



KERR COUNTY ATTORNEY

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COUNTY COURTHOUSE, SUITE BA-103 · 700 MAIN STREET · KERRVILLE, TEXAS 78028

June 28, 2006

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

ISSUE:

Whether the Commissioners Court has the authority to delegate non-statutorily assigned duties to other elected county officials.

FACTS:

There are multiple County elected officials voluntarily performing non-statutorily assigned duties. One such official, the Treasurer, informed the Court that due to the growth of the County and lack of resources she is no longer willing to perform the personnel/human resources duties for the county as of a date certain. The County Judge asserts that the Commissioners Court acting in its legislative capacity has the implied powers to assign duties and responsibilities for non-statutorily delegated functions to other elected officials and therefore the Treasurer cannot unilaterally decline to perform the delegated duty. Our Commissioners Court has indicated an imminent "general reorganization" that will repeatedly raise this issue with multiple elected county officials.

AUTHORITY:

Our Constitution establishes the Commissioners Court as the county's principal governing body. *Tex. Const. Art. V, sec. 18*. The Commissioners Court may exercise only those powers that are expressly conferred by the constitution and laws of this state or are necessarily implied from such express powers. *See Tex. Const. art. V, sec. 18(b)*; *see also, Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). Constitutional or statutory provisions conferring authority upon the Commissioners Court should be broadly and liberally construed to determine the scope of the express and necessarily implied power. *Cosby v. County Commissioners of Randall County*, 712 S.W.2d 246 (Tex. App. Amarillo 1986, writ ref'd n.r.e). Where a right is conferred or a duty imposed, the Commissioners Court is given broad discretion to accomplish the purposes intended. *Anderson v. Wood*, 152 S.W.2d 1084 (Tex. 1941); however, where the power sought to be exercised has no legal basis, the Commissioners Court has no implied authority to act. *See Canales v. Laughlin, supra*.

The Commissioners Court has implied authority to employ experts to provide services that are necessary to the performance of official duties. See *Adams v. Seagler*, 250 S.W. 413(Tex. 1923); *AG Op. No JM-1074 (1989)* In carrying out the general purposes for which it was created, the commissioners court may employ agents to do things that are not specifically required of other officers. *Von Rosenberg v. Lovett*, 173 S.W.508(Tex.CivApp.-Austin 1914, writ ref'd).

In *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77(Tex.1997) the Supreme Court addressed the issue of whether the Commissioners Court could divest the county treasurer of payroll preparation responsibilities and transfer these duties to the county auditor. The Court's analysis addressed the issue of the Constitution establishing the elected office of treasurer and giving the legislature the responsibility to prescribe treasurer duties. The Court found that because the Legislature had not assigned payroll preparation responsibilities, the Commissioners Court acting in its legislative capacity may delegate responsibilities to an appropriate county official. The Court then found that the auditor was an appropriate county official to whom responsibilities could be delegated because the auditor had statutory authority to perform the clerical functions associated with payroll preparation. The Court stated: The Legislature assigned the County Treasurer certain core functions. The Commissioners Court cannot allocate the County Treasurer's core functions to any other officer, including the County Auditor. If the Legislature does not assign a duty to the County Treasurer, that duty is not one of the County Treasurer's core functions. The Commissioners Court may, within its discretion, assign non-core functions to other county officials the Legislature authorizes to perform those functions. See 940S.W.2d at 82. The Commissioners Court acting in its legislative capacity may delegate non-statutorily assigned responsibility to an appropriate county official. See *Tex. A.G. Op. DM-440(1997)* An "appropriate county official" as defined above is one having the statutory authority to perform the clerical functions. see id.

The Attorney General, in *JC-0389(2001)*, addresses whether a Commissioners Court is required to pay the same salary to each of the county's constables. The facts as discussed indicated that different constables were performing varied duties in cooperation with the Commissioner Court. Two of the constables lived in rural areas and "perform many duties in addition to serving process and attending justice court hearings." The constables voluntarily agreed to be First Responders for law enforcement and were compensated appropriately for their additional duty. The Commissioners Court has some authority to decide which county officer should perform a specific county function and to compensate them accordingly. See id.

In AG opinion *JM-1281(1990)*, the Attorney General addressed the issue of whether a Commissioners Court may appoint a licensed attorney to advise the sheriff or an individual commissioner. The writer specifically discusses the duties required by law and the interaction between the Commissioners Court and the county attorney. In the analysis, Attorney General quotes Opinion *LA-24(1973)* :

"The Constitution, Article 5, Section 18 speaks to the matter of county and district attorneys representing the interests of the State, not the County, in matters before district and county courts. In the absence of a statute commanding it, or an agreement between him and the Commissioners Court calling for it, a county or district attorney has no obligation or right to defend county interests in court,..." Id.

The Texas Constitution establishes multiple elected county offices and gives the legislature the responsibility to prescribe each elected official's duties. The legislatively prescribed duties are commonly referred to as "core functions" of the elected official. Enumerated duties lawfully assigned by the legislature may not be taken away from the elected official by the Commissioners Court. The Commissioners' Court cannot deprive an officer of the authority, rights and duties which inhere in his office, nor require him to delegate the same to another person selected by it; nor can it displace an officer by authorizing another person to perform duties devolved upon him by statute. *Aldrich v. Dallas County*, 167 S.W.2d 560, 565(Tex.Civ.App.-Dallas 1942, writ *dism'd*); *Tex AG Op. JM-1074(1989)* The Commissioners Court may not arrogate or intrude upon the statutory duties of other officers under the guise of its general powers. *See Bastrop County v. Hearn*, 8 S.W.302(Tex.1888); *Vondy v. Commissioners Court of Uvalde County*, 714 S.W.2d 417(Tex.App.-San Antonio 1986, writ *ref'd n.r.e.*); *Commissioners Court of Harris county v. Fullerton*, 596 S.W.2d 572(Tex.Civ.App.-Houston[1st Dist]1980, writ *ref'd*) The Commissioners Court implied authority to hire agents and experts is subject to this limitation as well. *See, e.g., Terrell v. Greene*, 31 S.W.631(Tex.1895); *Seagler v. Adams*, 238 S.W.707(Tex.Civ.App.-Galveston 1922), *aff'd*, 250 S.W.413(Tex.1923)

ARGUMENT:

A Commissioners Court is a court of limited jurisdiction and may only exercise those powers that the state constitution and statutes confer on it, either explicitly or implicitly.

An elected official fulfills a position created by the state constitution and subject to the core duties delegated by the legislature. The Legislature is defined in the Constitution as the House and Senate in Austin and while the Commissioners Court may perform some legislative functions, the Court is subordinate to the Legislature and is not the legislature as defined by Constitution.

An elected official is elected by the citizens of the county to perform duties parallel to and complimentary with those of the Commissioners Court. The elected official is not an employee of the Commissioners Court and performs his/her duties autonomous from the court subject to the budgetary allocation of resources by the court.

The County Judge in this case has based his conclusion that the Court may require the Treasurer to perform non-statutorily duties on the Titus Case cited above. It is my opinion that case is distinguishable from the current issue. Titus states that the Commissioners Court may assign non-core functions to other county officials the Legislature authorizes to perform those functions. The appropriate county official in Titus was the auditor, an appointed county employee, familiar with the details of the procedures, and not an elected official as in the current case. "Official" may be defined as one who holds a public office; one authorized to act for a corporation or organization, esp. in a subordinate capacity." Blacks Law Dictionary, 7th Edition 1999 The Court stated that "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *See Aldine Ind. School District v. L.B. Standley* 280 S.W.2d 578, 583(Tex.1955). An elected official (public

officer) is distinguished from an employee by several factors: a) county officials can only be removed by jury trial in the District Court; b) dual office holding limits; c) accounting for official fees; d) the official oath; e) duration of tenure employment; and f) application of nepotism statutes. See Brooks Texas Practice Series Part II. Chapter 7.1. Public officials not qualified as "elected officials" are generally deemed "members of the administrative personnel under the Commissioners Court." The Court in *Carver v. Wheeler*, supra, held, in a case concerning the compensation fixed by the Commissioners Court for the treasurer, that the relationship between a public officer and the government is not that of employer and employee. 200 S.W. 537(Tex.Civ.App-Amarillo 1918, no writ).

Attorney General Opinion *JC-0389* cited above may be distinguished on the fact that the Constables voluntarily assumed additional duties. There is no indication that the Commissioners Court forced additional duties upon the elected official.

Attorney General Opinion *JM-1281* specifically states in the absence of a statute or an agreement between the commissioners court and the County Attorney the County Attorney has no obligation to defend county interests. It may logically be inferred from such statement that the County Attorney may agree to represent the County, but the Commissioners Court does not have the power to delegate such duty to the county attorney.

Should the Attorney General broadly prescribe the Courts' implied powers to include elected officials as "appropriate county officials", there will not be a county balance of power nor will there be any statutory protection for the accomplishment of enumerated duties assigned to the elected official. The Court could theoretically assign so many duties to an elected official that the elected official could literally be too occupied making sure the bathrooms are clean and the lawn mowed to accomplish his/her statutory duties. The Court assignment and accomplishment/non-accomplishment of such duties would become a political nightmare.

SUMMARY:

The Commissioner Court's authority is specifically limited to the powers expressly conferred by Constitution or statute. Although the elected officials may voluntarily perform non-statutory duties, there is not an enumerated authority giving the Court power to delegate duties to other elected officials. The Court's sole control of other elected officials is through budgetary disbursement. The Commissioner Court's implied powers to perform its ministerial duties do not confer the power to delegate duties to other elected officials. The Court's implied powers authorize the Court to employ experts and other personnel as needed by the county; however the county elected officials are not employees of the court. If the court were to be given the power to delegate duties to elected officials it could be too burdensome thereby severely restraining the elected officials' autonomy to accomplish his/her constitutional and statutory duties.