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OPINION COMMITTEE



FILE # ML-45130-07

I.D. # 45130

KERR COUNTY ATTORNEY

REX EMERSON

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

February 15, 2007

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

RQ-0572-GA

Re: Request for Opinion

Dear General Abbott:

Pursuant to Section 402.043 of the TEXAS GOVERNMENT CODE, I am requesting an opinion from your office regarding the following:

The Kerr County Sheriff is in the process of establishing written procedures for the issuance or denial of a certificate of proficiency pursuant to TEX. OCCUPATIONS CODE §10701.357, which permits the head of a state or local law enforcement agency to establish written procedures to allow an honorably retired peace officer carry a firearm, if the retired officer meets various criteria and demonstrates proficiency with the weapon.

In the process of establishing these criteria, our sheriff has discovered that various provisions in a relatively new federal statute, the "Law Enforcement Officers Safety Act of 2004" (18 USC 44, §926C), allowing retired peace officers to carry a concealed firearm conflict with portions of the referenced Texas statute, making it unclear which law should prevail in drafting these procedures.

The following discrepancies are of particular concern to the Kerr County Sheriff in drafting the procedures:

1. TEX. OCCUPATIONS CODE permits a retired officer who *is receiving retirement benefits* to qualify for a certificate allowing him to carry a firearm [§10701.357(c)]. The federal law, on the other hand, allows a retired peace officer to qualify to carry a concealed weapon even if he is not currently receiving retirement benefits, as long as he "*has a nonforfeitable right to benefits*" under the retirement plan of the agency." [18 USC 44 §926C(c)(4)].

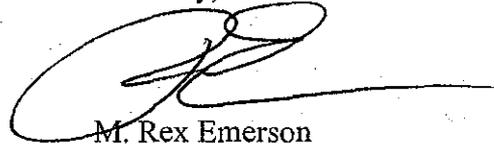
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2. TEX. OCCUPATIONS CODE provides that a certificate issued under Section 10701.357 expires on the *second* anniversary of the date the certificate is issued. The federal law provides that a certificate issued pursuant to 18 USC 44 §926C expires on the *first* anniversary of the issuance of the certificate.

The sheriff has asked whether the federal statute preempts state law, and if so, whether he may establish and implement written procedures that comply with this federal law when such policies would, of necessity be in direct conflict with the referenced state law on the issue.

The attached brief addresses the issues raised and provides argument and authorities for my conclusions stated therein. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'M. Rex Emerson', with a long horizontal flourish extending to the right.

M. Rex Emerson
Kerr County Attorney

Enclosures

cc: Kerr County Sheriff

ISSUE NO. 1:
ARE 18 USC 44 §926C AND TEX. OCCUPATIONS CODE 1701.357 IN CONFLICT?

ISSUE NO. 2:
WHERE FEDERAL LAW AND STATE LAW BOTH PROVIDE FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO ESTABLISH PROCEDURES TO ALLOW RETIRED PEACE OFFICERS TO CARRY WEAPONS, AND THE TWO LAWS CONTAIN CONFLICTING PROVISIONS, WHICH LAW PREVAILS?

Argument and Authorities:

Federal and Texas state law both provide for a method by which retired peace officers may obtain authorization to carry a weapon. Texas law provides in pertinent part as follows:

The head of a ... local law enforcement agency may allow an honorably retired peace officer an opportunity to demonstrate weapons proficiency [under certain conditions.] ... The [law enforcement] agency shall establish written procedures for the issuance or denial of a certificate of proficiency under this section. The agency shall issue the certificate to a retired officer who satisfactorily demonstrates weapons proficiency ...[and] provides proof that the officer is receiving retirement benefits on the basis of service with a state or local law enforcement agency, and satisfies written procedures established by the agency. ... A certificate issued under this section expires on the second anniversary of the date the certificate was issued.

TEX. OCCUPATIONS CODE §1701:357. Federal law provides as follows on the same subject:

Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying [specified] identification may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce... . A used in this section, the term "qualified retired law enforcement officer" means an individual who retired in good standing from service with a public agency as a law enforcement officer ... [and] has a nonforfeitable right to benefits under the retirement plan of the agency... . The identification required by this subsection [includes] a certification by the State in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State to meet the standards established by the State for training an qualification

for active law enforcement officers to carry a firearm of the same type as the concealed firearm.

18 USC 44 §926C.

The Kerr County Sheriff has asked this office for direction and assistance in drafting its written procedures to allow retired deputies and other law enforcement officers to carry weapons, and has raised several questions regarding how apparent conflicts between these two laws are to be resolved:

1. May the procedures be written to permit a retired peace officer to carry a weapon although he has not yet begun receiving retirement benefits, if he has a "nonforfeitable right" to these benefits? There are many retired officers who have not yet reached the age at which they may receive retirement benefits, and would therefore qualify only under the federal law. State law prohibits certification of retired officers unless they are currently *receiving* retirement benefits.
2. What time period should the certification cover? State law requires that the certificate be effective for a period of two years from its date of issuance. Federal law, which explicitly purports to override state law, requires the certificate to expire on the first anniversary of its issue.
3. Federal law specifically refers to authorization for a retired officer to carry a concealed weapon, while state law merely refers to issuance of a certificate of proficiency. Do the two laws refer to the same subject matter, or can the two laws be harmonized by interpreting the federal law to apply solely to the right of a retired peace officer to carry a concealed weapon and the state law to permit such retired officers to carry a weapon in full view, just as active law enforcement officers are authorized to do?

Generally statutes are to be interpreted so that they can be harmonized, if possible. *See, e.g., Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988). These statutes could be harmonized by interpreting state law as suggested in question #3; however, we find no suggestion that state law intended retired officers to be permitted to appear in public in civilian clothes carrying a clearly visible holstered firearm. Although

this may have been common in the Old West, in modern times it is not permitted anywhere in this state or the country, that we are aware of.

If this harmonizing interpretation is not correct, then the statutes are directly in conflict with respect to the length of certification and to the issue of current receipt of retirement benefits. After considerable research, we are unable to come to a definitive conclusion on how these conflicts should be resolved. The subject of federal/state law conflicts is Byzantine at best. In addition to a "vast federal common law of preemptions, supremacy and borrowed state law" [*The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 Tex. L. Rev. 1743(1992), at 1744], there are a number of seemingly conflicting doctrines that have been established by the federal courts, with little or no apparent rhyme or reason about which should be applied under what circumstance:

Federal-state conflicts present federal questions, of course, and the Supreme Court is energetically providing answers. That means that today when courts try to resolve conflicts of governance between a state and the nation they have to deal with a vast federal common law of preemptions, supremacy and borrowed state law. All of this jurisprudence is special to the field. It has little resemblance to the Court's other conflicts jurisprudence – or indeed, to any general thinking about choice of law.

The taxonomy is daunting. There are – bear with me – cases of *express preemption*, and therefore *implied preemption*, the latter including cases of so-called *conflict preemption* and of *field preemption*. And then there seems to be an entirely separate class of cases of *supremacy*. Besides all this, there are second-order doctrinal accretions – magic words. We find the nation doing baroque things like *striking the policy balance*, *occupying the field*, or *leaving the field unattended*. We find state law *standing as an obstacle*, or the state *discriminating against a federal cause of action*, having an *otherwise vald* excuse, or acting *outside the preempted field*.

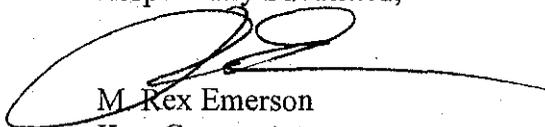
Id., at 1744-1747, citations omitted.

Even if the answer were clear that federal law should preempt state law in this case, we submit that as a local prosecutor's office, we have no authority to direct the sheriff to disregard state law. Conversely, we similarly have no authority to direct the

sheriff to apply state law where the federal law specifically states that it applies “notwithstanding any other provision of the law of any State or any political subdivision thereof” (18 USC 44 §926C).

WHEREFORE, PREMISES CONSIDERED, the undersigned County Attorney respectfully requests that the Texas Attorney General review both laws and advise us as to the appropriate rules for the Kerr County Sheriff to adopt in its written procedures regarding the questions posed herein.

Respectfully Submitted,



M. Rex Emerson
Kerr County Attorney



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Assistant County Attorney

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