



Montgomery County, Texas

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OPINION COMMITTEE

November 9, 2012

FILE # ML-47170-12
I.D. # 47170

RQ-1099-BA

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P O Box 12548
Austin, TX 78711-2548

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7009-0820-0001-8324-2439

Re: Request for an opinion regarding special and temporary justices

Dear Attorney General Abbott:

Your opinion is being requested regarding the payment of certain special and temporary justices. The questions presented are:

1. Can the County Judge appoint more than one special or temporary justice to serve when a justice is temporarily unable to perform official duties?
2. Can the County Judge appoint a special or temporary justice to serve "at large" for any justice court in a county?
3. Can the temporary justice(s) be a sitting justice of the peace?
4. Can the temporary justice(s) be a sitting justice of the peace in the same county?
5. If the answer to # 4 above is "yes," can additional compensation be given to that temporary justice(s) as outlined under section 27.055(b) of the Government Code without violating section 152 of the Local Government Code?
6. If the special or temporary justice can be a sitting justice of the peace, can the temporary justice(s) be compensated as outlined under section 27.055(b) of the Government Code without violating section 27.054 of the Government Code?
7. Can a justice of the peace hold more than one office, as provided by Article 16, Section 40 of the Texas Constitution, when the offices being held are both for justice of the peace?

Factual Background

The Montgomery County commissioners court has approved contracts with five (5) separate persons to "render temporary judicial services to County in its Justice of the Peace Courts, following appointment by the Montgomery County Judge pursuant to Texas Government Code §27.055." The contract further states that these services shall be performed "as necessary and as requested by any Justice of Peace of Montgomery County, and only when an elected Justice of Peace of Montgomery County is unable to perform official duties due to absence, recusal, illness, injury, or other disability." The temporary justice "shall act as the presiding judge and shall

perform official bench duties for the Assigned Court, including but not limited to, docket calls, hearings, trials, and the issuance of judgments, orders, and/or writs.” The temporary justice also “shall obtain and maintain all qualifications necessary to lawfully perform the services hereunder, including those qualifications outlined in Texas Government Code §27.055(c).”

One of the above referenced contracts is with a retired justice of the peace of Montgomery County, who presently serves as a municipal judge for a city in Montgomery County. Two of the above contracts are with justices of the peace in Montgomery County. Two of the above contracts are with justices of the peace in counties other than Montgomery County.

Legal Arguments and Authorities

1. The contracts in question cite the authority granted in Section 27.055 of the Texas Government Code. Subsection (b) of that code states: “If a justice is temporarily unable to perform official duties because of absence, recusal, illness, injury, or other disability, the county judge may appoint a qualified person to serve as temporary justice for the duration of the disability.”

Can the County Judge appoint more than one special or temporary justice to serve when a justice is temporarily unable to perform official duties as provided in §27.055 of the Texas Government Code?

2. §27.055(a) of the Government Code states: “If a justice of the peace is disqualified from a civil case, is sick, or is absent from the precinct, the parties may agree on a person to try the case. If the parties fail to agree at the first term of the court after service is perfected, the county judge shall, on application of the justice or either party, appoint a qualified person to try the case. The disqualification, absence, or illness of the justice and the selection by agreement or appointment of another person to try the case shall be noted on the docket of the justice.”

The contracts in question provide that the temporary justice “shall perform services as a temporary judge in any assigned Montgomery County Justice of the Peace court (hereinafter referred to as “Assigned Court”), as necessary and as requested by any Justice of Peace of Montgomery County, and only when an elected Justice of Peace of Montgomery County is unable to perform official duties due to absence, recusal, illness, injury, or other disability.” *Emphasis added.*

Can the County Judge appoint a special or temporary justice to serve “at large” for any justice court in a county?

3. Of the five contracts in question, four are with sitting justices of the peace.

§27.052 of the Government Code speaks to the vacancy or absence of a justice of the peace. It states: “If the office of justice of the peace is vacant in a precinct or if the justice is absent or unable or unwilling to perform his duties, the nearest justice in the county may temporarily perform the duties of the office.” §27.054(a) provides that “a justice of the peace may hold court for any other justice in any county at the request of that justice.” These specific references in the Government Code lead to the conclusion

that a sitting justice of the peace can exchange benches, but may not serve at the request of the County Judge as provided in §27.055 of the Government Code.

Can the temporary justices retained by the County in the above-referenced contracts be sitting justices of the peace?

4. Provided the answer to #3 above is "yes," the question still remains as to whether a temporary justice appointed under §27.055 of the Government Code can be a sitting justice of the peace in the same county as the desired appointment. §27.052 of the Government Code speaks to the vacancy or absence of a justice of the peace. It states: "If the office of justice of the peace is vacant in a precinct or if the justice is absent or unable or unwilling to perform his duties, the nearest justice in the county may temporarily perform the duties of the office." *Emphasis added.*

Can the temporary justice(s) be a sitting justice of the peace in the same county?

5. Challenges exist if the answer to #4 above is "yes." Local Government Code §152.011 mandates that a "commissioners court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds." A procedure for setting the salaries of elected officials is outlined in §152.013 of the Local Government Code. The code provides for public hearings, notices in newspapers, and adoption of the salary of an elected official all as part of the budget process. The detailed procedures provided in §152 of the Local Government Code indicate there is no provision for pay outside of this process.

If the answer to # 4 above is "yes," can additional compensation be given to that temporary justice(s) as outlined under section 27.055(b) of the Government Code without violating section 152 of the Local Government Code?

6. Government Code §27.054 provides for an exchange of benches. Government Code §27.055 provides for special and temporary justices. If the special or temporary justice is a sitting justice of the peace, does a conflict exist with regards to pay for that justice? Government Code §27.055(b) states that "the commissioners court shall compensate the temporary justice by the day, week, or month in an amount equal to the compensation of the regular justice." *Emphasis added.* Government Code §27.054(c) states "a justice who exchanges benches with another justice is not entitled to receive compensation from the commissioners court of the county in which the regular justice serves."

The existence of two separate sections of the code leads to a conclusion that there is a distinct difference between an exchange of benches (for a sitting justice of the peace) and a special or temporary justice (for a justice of the peace no longer in office). This distinction implies that a sitting justice of the peace cannot serve as a special or temporary justice since the former "is not entitled to receive compensation from the commissioners court of the county in which the regular justice serves" and the latter shall be compensated by the commissioners court by the day, week, or month in an amount equal to the compensation of the regular justice.

If the special or temporary justice can be a sitting justice of the peace, can the temporary justice(s) be compensated as outlined under section 27.055(b) of the Government Code without violating section 27.054 of the Government Code?

7. Article 16, Section 40 of the Texas Constitution provides that "no person shall hold or exercise at the same time, more than one civil office of emolument." Exceptions are made for several offices, including that of justice of the peace. It has been discussed that the contracts in question are appropriate for a sitting justice of the peace to receive additional compensation for acting as a temporary justice because of the dual office-holding provision of the Texas Constitution that specifically exempts justice of the peace from that provision. It has also been discussed that, since the currently elected justice of the peace is still holding his office, there can be no dual office-holding of that elected office and the offices of the temporary justices the County is contracting.

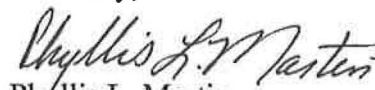
Can a justice of the peace hold more than one office, as provided by Article 16, Section 40 of the Texas Constitution, when the offices being held are both for justice of the peace?

Conclusion

Based upon any applicable existing Attorney General Opinions, as well as the foregoing statutory and constitutional provisions, your assistance is being requested on the issues brought forth above.

Thank you for your time and attention to this matter. If you have any questions, or need any additional information, please feel free to contact me.

Sincerely,


Phyllis L. Martin
Montgomery County Auditor

/s

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