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Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
VIA EMAIL: opinion.committee@oag.texas.gov

RE: Who is qualified as a 'Retired Judge' for appointment as a visiting judge in the absence of the constitutional county judge under Tex. Gov't Code §26.023.

Dear Attorney General Paxton and Opinion Committee:

Requested Opinion

This letter requests a formal written opinion on whether, under Tex. Gov't Code §26.023, a former constitutional county judge, retired as such, is eligible to be appointed as a visiting judge if they do NOT meet the definition of a "retired judge" under Tex. Gov't Code §74.041(6).

Factual Scenario

Tex. Gov't Code Chapter 26 Subchapter C. Appointment of Visiting Judges in Certain Counties applies to Lampasas County in that there is no statutory county court at law or statutory probate court; and all duties of the county court devolve on the county judge. On occasion the elected county judge may be absent from the county or absent because of physical incapacity and will seek to appoint a visiting judge to sit in all matters docketed on the county court's dockets. While any number of contested issues may appear on a constitutional county court's docket, the majority of the matters ruled on are limited to bail bond issues, appointment of counsel, and agreed pleas. The acts of a visiting judge, appointed but not qualified under Tex. Gov't Code §26.023, are void because they have no authority to act. A constitutional county judge from another county may be appointed to serve in the absence of the Lampasas County judge, but it is difficult for a neighboring county judge to schedule and serve as such due to the duties in their own counties. Retired Judges who are qualified to serve as a visiting judge in a district or statutory court are in very high demand throughout the state and are better utilized to address the backlog in those courts brought on by COVID.

Anticipating the occasional absence from the county on docket dates, the Lampasas County Judge would like to appoint a former constitutional county judge to sit in matters on the county court's docket during said absence. Although the proposed former constitutional county judge is retired under the Texas District and County Retirement System (TCDRS) and highly experienced in county court judicial matters, they are not a "retired judge" as defined by §74.041(6).

Applicable Statutes

Tex. Gov't Code Chapter 26 CONSTITUTIONAL COUNTY COURTS

Sec. 26.021. APPLICATION OF SUBCHAPTER. This subchapter applies only to a county in which:

- (1) there is no statutory county court at law or statutory probate court; and
- (2) all duties of the county court devolve on the county judge.

Sec. 26.023. APPOINTMENT FOR ABSENCE OF JUDGE. (a) The county judge may appoint a retired judge or a constitutional county judge from another county as a visiting judge when the county judge is absent from the county or absent because of physical incapacity. (b) The visiting judge shall sit in all matters that are docketed on any of the county court's dockets and has the powers of the county judge in relation to the matter involved. . . .

Tex. Gov't Code Chapter 74 COURT ADMINISTRATION ACT

Sec. 74.041. DEFINITIONS. In this chapter: . . .

- (3) "Retiree" means a person who has retired under the Judicial Retirement System of Texas, the Judicial Retirement System of Texas Plan One, or the Judicial Retirement System of Texas Plan Two. . . .
- (6) "Retired judge" means: (A) a retiree; or (B) a person who served as an active judge for at least 96 months in a statutory probate or statutory county court and has retired under the Texas County and District Retirement System. . . .

Relevant Court Opinion

Lackey v. State, 322 S.W.3d 863 (Tex. App.—Texarkana 2010)

While not directly addressing the specific question of a retired former constitutional county judge appointed to sit under §26.023, the court held that an appointed judge was not qualified and that the appointed judge's orders should be set aside as void, relying on §74.041 for the definition of a "retired judge" in a footnote.

Questions

To be a qualified as a "retired judge" for appointment as a visiting judge under Tex. Gov't Code §26.023, must the judge meet the definition under Tex. Gov't Code §74.041(6)?

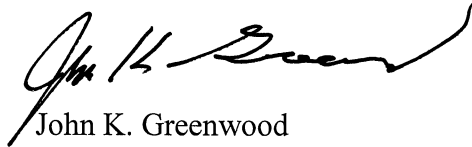
If Tex. Gov't Code §74.041(6) is not applicable, what is the definition of a "retired judge" under Tex. Gov't Code §26.023?

Summary

Regularly called dockets are necessary to assure the swift and orderly disposition of cases. Rural county dockets are generally small, but passing a docket because of the occasional unavoidable absence of a county judge may delay the disposition of cases for weeks and sometimes months. The ability to appoint former constitutional county judges who are not "retired judges" as described under §74.041(6) may be a convenient and efficient solution, but if not qualified under §26.023, all the visiting judge's rulings, orders, and judgments would be void, resulting in additional litigation, costs, and delay of justice. Tex. Gov't Code Chapter 26 does not contain a definition of "retired judge" while the definitions under §74.041 appears to be limited by the language "In this chapter:"

We look forward to your response and appreciate your time and efforts in addressing this request.

Respectfully submitted



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