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January 13, 1939

Mr. W. B. Lane
County Auditor, Dimmit County
Carizzo Springs, Texas

Dear Mr. Lane:

Opinion No. 0-96
Re: Power of Commissioners' Court
to appoint special auditor in
counties of less than 25,000
population

Your letter of January 12, 1939, requests an opinion from this Department on the following questions:

"1. Does the Commissioners' Court of a county of less than 25,000 population according to the last United States Federal census have the authority to employ a special auditor or auditors for the purposes specified in Articles 1645, 1646 and 1646a without obtaining the approval or permission of the County Judge or the District Judge?

2. In the event you answer to the above in the affirmative, is it necessary that the above mentioned auditor or auditors be a resident of the county in which he is appointed?"

Articles 1645 and 1646 deal strictly with the appointment of a regular county auditor. Article 1645 deals with the appointment of a county auditor in a county having a population of 35,000 or over, according to the last Federal census or having a tax valuation of fifteen million dollars or over. Article 1646 provides for the appointment of an auditor in a county having a population of less than 35,000 and provides that for good cause shown, the Commissioners' Court can enter an order upon the Minutes of said court and can cause said order to be certified to the District Judges

having jurisdiction in the county and such District Judges shall, if such reason be considered good and sufficient, appoint a county auditor in line with the method prescribed by Article 1647.

The questions propounded by you clearly remove the necessity for a consideration of Articles 1645, 1646 and 1647, and it is apparent that the purpose of your inquiry is to determine whether or not a Commissioners Court in a county of less than 25,000 inhabitants has the authority to appoint a special auditor. This being so, your situation is to be controlled by Articles 1641 and 1646a of the Revised Civil Statutes of Texas.

To arrive at a clear understanding of Articles 1641 and 1646a, it will be necessary to review the history of such articles. By Chapter 80, Acts of the Regular Session of the 38th Legislature, Articles 1459a and 1459b were added to the Revised Civil Statutes of 1911. These articles were brought forward in the Revised Civil Statutes of 1925 as Article 1641.

By Chapter 67, Acts of the Regular Session of the 39th Legislature, Article 1459c was added to the Revised Civil Statutes of 1911. This Article reads as follows:

"The Commissioners' Court of any county under 25,000 population according to the last United States census may make an arrangement or agreement with one or more other counties whereby all counties, parties to the arrangement or agreement, may jointly employ and compensate a special auditor or auditors for the purposes specified in Articles 1459a and 1459b. The County Commissioners' Court of every county affected by this article may have an audit made of all of the books of the county or any of them at any time they may desire, whether such arrangements can be made with other counties or not; provided the District Judge or Grand Jury may order said audit if either so desires."

affected

This article has been brought forward as Article 1646a. This article now provides that "... may jointly employ and compensate a special auditor or auditors for the purposes specified in Articles 1645 and 1646." This is, no doubt, an erroneous reference as to article numbers, for in the original Article 1459c of the Revised Civil Statutes of 1911, it was provided that: "... may jointly employ and compensate a special auditor or auditors for the purposes specified in Articles 1459a and 1459b, which articles compose the present Article 1641. This being true, Article 1646a of our present statutes should pro-

vide that the Commissioners Court "... may jointly employ and compensate a special auditor or auditors for the purposes specified in Article 1641."

Article 1641 of the Revised Civil Statutes of 1925 reads as follows:

"Any commissioners court, when in its judgment an imperative public necessity exists therefor, shall have authority to employ a disinterested, competent and expert public accountant to audit all or any part of the books, records, or accounts of the county; or of any district, county or precinct officers, agents or employes, including auditors of the counties, and all governmental units of the county, hospitals, farms and other institutions of the county kept and maintained at public expense, as well as for all matters relating to or affecting the fiscal affairs of the county. The resolution providing for such audit shall recite the reasons and necessity existing therefor such as that in the judgment of said court there exists official misconduct, willful omission or negligence in records and reports, misapplication, conversion or retention of public funds, failure in keeping accounts, making reports and accounting for public funds by any officer, agent or employe of the district, county or precinct, including depositories, hospitals, and other public institutions maintained for the public benefit, and at public expense; or that in the judgment of the court, it is necessary that it have the information sought to enable it to determine and fix proper appropriation and expenditure of public moneys, and to ascertain and fix a just and proper tax levy. The said resolution may be presented in writing at any regular or called session of the commissioners court, but shall lie over to the next regular term of said court, and shall be published in one issue of a newspaper of general circulation published in the county; provided if there be no such newspaper published in the county, then notice thereof shall be posted in three public places in said county, one of which shall be at the court house door, for at least ten days prior to its adoption. At such next regular term said resolution shall be adopted by a majority vote of the four commissioners of the court and approved by the county judge. Any contract entered into by said commissioners court for the audit provided herein shall be made in accordance with the statutes applicable to the letting of contracts by said court, payment for which may be made out of the public funds of the county in accordance with said statutes. The authority conferred on county auditors contained in this title as well as other provisions of statutes relating to district, county and

precinct finances and accounts thereof shall be held subordinate to the powers given herein to the commissioners' court."

Thus it can be seen that Articles 1641 and 1646a of the Revised Civil Statutes of 1925 deal with the right of the Commissioners Court to provide for an audit by an accountant or a special auditor.

Bearing in mind that the present Article 1641, composed as it is of Articles 1459a and 1459b of the Revised Civil Statutes of 1911, was passed by the 38th Legislature at its regular Session and the present Article 1646a, formerly Article 1459c of the Revised Civil Statutes of 1911, was passed by the regular session of the 39th Legislature, it is logical to assume that such article 1646a must be construed as a liberalization statute. This opinion is expressed by Judge Jackson of the Amarillo Court of Civil Appeals in the case of Cochran County vs. West Audit Company, reported in 10 S. W. (2) 229. The Court says:

"Under Article 1646a we are inclined to the view that the Commissioners' Court of Cochran County would be authorized to employ an auditor without a rigid compliance with Article 1641."

The writer is lead to the opinion that the Legislature in the passage of Article 1646a had no intention or desire to repeal Article 1641 or any part thereof, but rather to liberalize the compliance with Article 1641 if events and circumstances justify the Commissioners' Court in acting in such a manner as to dispense with the strict requirements of Article 1641.

You are, therefore, respectfully advised that it is the opinion of this Department that a Commissioners' Court of a county of less than 25,000 population, according to the last United States Federal census, has the authority to employ a special auditor or auditors without obtaining the approval or permission of the County Judge.

Article 1641 specifically provides that the action of the Commissioners' Court must be by a majority of the four members of the Commissioners' Court and approved by the County judge. This provision is not contained, however, in Article 1646a, nor does Article 1646a require the approval of the District Judge. It merely provides that in the event the Commissioners' Court does not appoint a special auditor that the District Judge or the Grand Jury may order such audit if either desires that the same be had.

Mr. W. B. Lane, January, 13, 1939, Page 5

You are further advised that it is the opinion of this Department that it is not necessary that the special auditor provided for by Article 1646a be a resident of the county in which he is appointed.

Trusting that this satisfactorily answers your inquiry, I am

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Lloyd Armstrong*
Assistant

LA:BT

APPROVED:

Gerald B. Mann
ATTORNEY GENERAL OF TEXAS