



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

February 17, 1939

Hon. T. L. Blanton
County Attorney
Shackelford County
Albany, Texas

Dear Sir:

Opinion No. O-263

Re: (1) Amount of total salary, including ex-officio, for county judge of Shackelford County
(2) Legality of county judge vote on his ex-officio compensation

We are in receipt of your request for our opinion as to the maximum legal salary Shackelford County may allow its county judge and whether it is lawful under Article 3895, R. C. S., as amended, for said county judge to break a tie upon the amount of compensation he should be awarded by the Commissioners' Court.

You state that Shackelford County has a population of approximately 7,000, according to the last preceding Federal census.

Article 3895, *supra*, reads as follows:

"The Commissioners' Court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the Commissioners' Court shall allow compensation for ex-officio services when, in their judgment, such compensation is necessary, provided, such compensation for ex officio services allowed shall not increase the compensation of official beyond the maximum of compensation and

excess fees allowed to be retained by him under this chapter. Provided, however, the ex officio herein authorized shall be allowed only after an opportunity for a public hearing and only upon the affirmative vote of at least three members of the Commissioners' Court."

As stated by you, the maximum compensation allowed officers is governed by Articles 3883, as amended, and 3891, as amended. The pertinent provisions of Article 3883 are as follows:

"Except as otherwise provided in this Act, the annual fees that may be retained by precinct, county and district officers mentioned in this Article shall be as follows:

"1. In counties containing twenty five (25,000) thousand or less inhabitants: County Judge, District or Criminal District Attorney, Sheriff, County Clerk, County Attorney, District Clerk, Tax Collector, Tax Assessor, or the Assessor and Collector of Texas, Twenty-four Hundred (\$2400.00) Dollars each; Justice of the Peace and Constable, Twelve Hundred (\$1200.00) Dollars each."

We now reach the pertinent parts of Article 3891:

"each officer named in this Chapter shall first out of the current fees of his office pay or be paid the amount allowed him under the provisions of Article 3883, together with the salaries of his assistants and deputies, and authorized expenses under Article 3899, and the amount necessary to cover costs of premium on whatever surety bond may be required by law. If the current fees of such office collected in any year be more than the amount needed to pay the amounts above specified, same shall be deemed excess fees, and shall be disposed of in the manner hereinafter

provided.

"In counties containing twenty-five thousand (25,000) or less inhabitants, District or County officers named herein shall retain one-third of such excess fees until such one-third, together with the amounts specified in Article 3883, amounts to Three thousand Dollars (\$3,000). Precinct officers shall retain one-third until such one-third, together with the amount specified in Article 3883, amounts to Fourteen Hundred Dollars (\$1400)."

Therefore, a county judge in counties containing twenty-five thousand population or less, may retain the maximum of Twenty-four Hundred (\$2400.00) Dollars and one-third of the excess fees, the maximum compensation and excess fees not to exceed Three Thousand (\$3,000.00) Dollars, making it possible for a county judge to earn a total of Three Thousand (\$3000.00) Dollars per year, as his maximum compensation.

Your county judge is ex-officio school superintendent. Your letter states he was voted an ex-officio compensation of Nine Hundred (\$900.00) Dollars for this work. This is proper under the provisions of Article 3888, as amended, now reading as follows:

"In a county where the County Judge acts as superintendent of public instruction, he shall receive for such services such salary not to exceed Nine Hundred Dollars (\$900) a year as the County Board of School Trustees of the respective counties may provide. The amount shall be paid in the manner specified in Chapter 49, Acts of the Forty-first Legislature, Fourth Called Session (Art. 2700d-1), and in Chapter 175, Acts of the Forty-second Legislature, Regular Session (Art. 2827a)."

We direct your attention to the fact this article has been long construed by this Department as being accountable as part of the maximum the officer could retain under the provisions of Article 3891, supra, and the county judge is not entitled to the compensation provided by Article 3888 over and above his maximum compen-

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sation arrived at by reason of said Article 3891.

It has been consistently held by former administrations of this office that the Commissioners' Court may allow a county judge ex-officio compensation under Article 3895, supra, in any amount within the discretion of that body so long as the total of fees earned plus ex-officio may equal, but not exceed the maximum allowed by law, in this instance, Three Thousand (\$3000.00) Dollars.

You are, therefore, advised that the Commissioners' Court of Shackelford County in voting the county judge the amount of Two Thousand Seven Hundred (\$2,700.00) Dollars, acted within their legal right in so doing, insofar as your first question applies.

We next consider whether the county judge had the legal right to break the tie vote of the Commissioners' Court in favor of a salary increase for himself.

We note your holding that the language of the statute (Art. 3895, supra) should be "only upon the affirmative vote of at least three members of the Commissioners' Court." You state this would require the vote of three commissioners. We must disagree with you on this part of your holding, for the county judge is a member of the court. Sec. 11, Tex. Jur. 558; Art. 2342, R. C. S., 1925. On any other question except where he is himself interested, the county judge could properly participate as a member of said court. To illustrate, if the question of ex-officio compensation for the county attorney was under consideration, there is no doubt but that the county judge and two commissioners could fix the amount, even over opposition of the other commissioners.

We do not believe the county judge should participate as a voting member of the court when his own compensation is before that body.

Article 2340, R. C. S., 1925, reads as follows:

"Before entering upon the duties of their office, the county judge and each com-

missioner shall take the official oath, and shall also take a written oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office. Each commissioner shall execute a bond to be approved by the county judge in the sum of three thousand dollars, payable to the county treasurer, conditioned for the faithful performance of the duties of his office, that he will pay over to his county all moneys illegally paid to him out of county funds, as voluntary payments or otherwise, and that he will not vote or give his consent to pay out county funds except for lawful purposes."

It will be noted the county judge and each commissioner is bound by oath "that he will not be directly or indirectly interested in any contract with, or claim against, the county.....except such warrants as may issue to him as fees of office."

The order fixing the compensation would be essential before the warrants could issue and we therefore conclude the county judge would be prohibited by his oath from participating in the vote establishing the order.

The Supreme Court of Texas in the case of Dalton v. Allen, 215 S. W. 439, held a similar order valid where the county judge was present and presided over the court when his ex-officio compensation was increased, but he did not vote upon the question, and we think the inference very strong the holding of the case would have been different had the judge voted for the increase. See also 218 S. W. 73 (same case, Court of Civil Appeals conforming to answers to certified question.)

The following from 46 C. J. 1037 seems here applicable:

"A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into

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conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it."

We, therefore, respectfully advise you it is our opinion the order increasing your county judge's ex-officio salary to Twenty-Seven Hundred (\$2,700.00) Dollars per year, where same was done by his vote, is illegal.

Very truly yours

ATTORNEY GENERAL OF TEXAS

(signed)

By

Benjamin Woodall
Assistant

BW:AW:iw

APPROVED:

ATTORNEY GENERAL OF TEXAS