



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

May 15, 1989

Honorable Alberto M. Ramon
County Attorney
Maverick County
P. O. Box 4050
Eagle Pass, Texas 78853-4050

LO-89-42

Dear Mr. Ramon:

This is in regard to your February 28, 1989, request for an attorney general opinion (RQ-1668) in which you ask:

Whether a Sheriff, with the approval of Commissioners' Court, can lawfully transfer funds budgeted for Sheriff's personnel to a Constable's budget for payment of Constable's time spent assisting Sheriff's department as a Constable while regular deputy sheriff is absent on account of workman's compensation injury?

You relate that because of the temporary absence of a deputy sheriff in your county, the commissioners court approved "the hiring of Constables to assist the Sheriff's Office as needed to be paid hourly rate as starting deputies." Pursuant to the commissioners' action, a constable serving in the county has been "assisting" the sheriff's department by performing "field work."

You say that you have recommended to the commissioners that the "Sheriff will not consider said Constable as an employee subject to his direct orders," that the "Sheriff will not be permitted to interfere with the Constable's own exercise of discretion," and that the "Constable will remain a Constable and will not perform any function for the Sheriff's department that he could not lawfully perform as a Constable." The "Constable will not wear a deputy sheriff's uniform or badge, but, rather, his own work clothes and Constable's badge." You say that you have also recommended that the compensation of the constable for his assistance to the sheriff be accomplished by transferring funds, with commissioners court approval, from the sheriff's to the

constable's budget. You say that it has been agreed to follow your recommendations pending our response to this request. You indicate that your request was occasioned by queries as to the legality of these arrangements from the county treasurer and county auditor.

We note first that you have not submitted a brief on your question as required by Government Code section 402.043. You do state in your letter that the county attorney's question is "whether the procedure recommended is or is not legal for purposes of complying with § 40, article 14 of the Constitution of the state of Texas." We understand that you meant to refer to section 40 of article XVI of the constitution, and that you believe that article XVI, section 40, of the constitution would prevent a constable from serving as a part-time deputy sheriff, where each position is compensated. The procedure you describe, including the transfer of funds, is apparently designed to allow the constable to assist the sheriff without becoming a deputy sheriff or being compensated from the sheriff's budget.

We agree that the constable's 'assistance' to the sheriff raises a question under article XVI, section 40. Article XVI, section 40, provides, "No person shall hold or exercise at the same time, more than one civil office of emolument." (Emphasis added). A constable holds a civil office of emolument covered by article XVI, section 40. Attorney General Opinion M-45 (1967). A deputy sheriff also holds a civil office of emolument under the constitutional provision. Irwin v. State, 177 S.W.2d 970 (Tex. Crim. App. 1944) (overruled on search and seizure issue by Angel v. State, 740 S.W.2d 727, 735-36 (Tex. Crim. App. 1987)).

While the facts you present might tend to indicate that the constable in question does not actually "hold" the office of deputy sheriff within the meaning of article XVI, section 40, we are unable to conclude from those facts that he is not "exercising" that office within the meaning of the provision. If he is in some way subject to the sheriff's direction in the performance of the extra duties, he might well be "exercising" the duties of office of a deputy sheriff. On the other hand, if the constable is in fact not subject to the direct orders of the sheriff, does not perform any duties which he could not perform as constable, and the sheriff does not interfere with his discretion in performing those duties, we question whether he should be

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remunerated for "assistance" to the sheriff, since the services in question would appear to be more aptly characterized as additional ones rendered in his capacity as constable. See Attorney General Opinion JM-57 (1983). Similarly, if he is subject to the sheriff's direction in "assisting" the sheriff, that assistance could well be incompatible with his constable's duties under the common law doctrine of incompatibility. See Attorney General Opinions H-727 (1975); O-1263 (1939).

Also, the actions taken with respect to arranging for the compensation of the constable for the services in question may raise questions under state laws governing the commissioners court's budgetary actions including their making provision for elected officers' remuneration. See Local Gov't Code §§ 152.013 (action on officers' compensation to be taken during the regular budget hearing and adoption proceedings), 111.003, 111.007 (budget to be prepared and adopted after public hearings in seventh and eighth months respectively of preceding fiscal year).

In any case, the question you present turns on questions of fact. We are not able to make findings of fact in the opinion process. Accordingly, we decline to rule on the propriety of the arrangements you ask about. We enclose copies of prior opinions of this office which we hope will be of assistance to you in resolving your question.

Very truly yours,



William Walker
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk, Chief
Letter Opinion Section

WW/SW/mc

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Enclosures: