



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 27, 1990

Honorable Travis S. Ware
Criminal District Attorney
Lubbock County
Lubbock County Courthouse
P. O. Box 10536
Lubbock, Texas 79408

LO-90-95

Dear Mr. Ware:

You inform us that the sheriff of Lubbock County is in the process of negotiating a contract to provide housing and facilities for 120 inmates from Washington, D.C. You state that, in order to comply with any such contract, the county would need to retain 21 employees in order to supervise the convicted felons. The commissioners court has expressed to you concern regarding the authority of the sheriff to negotiate and enter into any such contract. Accordingly, you ask three questions regarding whether the county sheriff possesses the authority to enter into a contract to provide housing and facilities for 120 inmates from Washington, D.C. You do not ask and therefore we do not address whether the county has any such authority.

You first ask whether section 18 of article V of the Texas Constitution provides the commissioners court with sole authority to enter into a contract providing housing and facilities for prisoners from another jurisdiction. Subsection (b) of section 18 of article V of the Texas Constitution provides the following in pertinent part:

The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

In Anderson v. Wood, 152 S.W.2d 1084 (Tex. 1941), the sheriff of Bexar County sought to enjoin the county commissioners of Bexar County from interfering with the alleged right of the county sheriff to employ and discharge the courthouse engineer, janitors, and elevator operators, jail

guards and jail matrons, and county traffic officers.¹ The court affirmed a district court holding that, based upon the authority then conferred by statute: (1) the right to employ and discharge the courthouse employees rested exclusively in the commissioners court; (2) the right to employ and discharge the jail employees rested exclusively in the sheriff; and (3) the sheriff had the right to direct the traffic officers in the performance of their duties, but that the commissioners court had the right to discharge them, either on the request of the sheriff or on its own initiative, when their services were unsatisfactory or no longer needed.

In so holding, the Texas Supreme Court declared:

While under the above constitutional provision [section 18 of article V] the jurisdiction of the Commissioners' Court over county business is not general and all-inclusive, but is limited to such as is specifically conferred by the Constitution and statutes. . . , yet the Commissioners' Court is the acting governing body of the county. . . . It is the general business and contracting agency of the county, and it alone has authority to make contracts binding on the county, unless otherwise specifically provided by statute. . . . On the other hand, a sheriff has no authority to make contracts that are binding on the county, except where he is specially so authorized to do by statute. . . .

Id. at 1085 (citations omitted).² See also Childress County v. State, 92 S.W.2d 1011 (Tex. 1936); Wilson v. Calhoun

1. Section 23 of article V of the Texas Constitution creates the office of county sheriff and provides:

There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties and perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose offices shall be filled by the Commissioners Court until the next general election.

2. In Hardin County v. Trunkline Gas Co., 311 F.2d 882 (Footnote Continued)

County, 489 S.W.2d 393 (Tex. Civ. App. - Corpus Christi 1972, writ ref'd n.r.e.).

Therefore, we answer your first question in the negative. Section 18, of article V, of the Texas Constitution does not repose sole authority in the commissioners court to contract on behalf of the county. Rather, section 18 has been construed to confer sole authority on the commissioners court to enter into contracts binding on the county, unless a statute specifically provides otherwise.

You next ask whether section 351.043 of the Local Government Code authorizes the county sheriff to enter into a contract providing housing and facilities in the Lubbock County Jail for 120 prisoners from Washington, D.C. Chapter 351 of the Local Government Code governs county jails and law enforcement. Section 351.043 of the code provides the following:

(a) The sheriff or jailer may receive into the county jail a federal prisoner delivered by a federal law enforcement officer unless the sheriff or jailer determines that receipt of the prisoner may violate a state or federal court order, a statute, or a rule of the Commission on Jail Standards.

(b) The sheriff or jailer shall safely keep the prisoner until the prisoner is transferred or discharged by due course of law.

(c) The federal law enforcement officer on whose authority the prisoner is received and kept is directly and personally liable to the sheriff or jailer for the jail fees and

(Footnote Continued)

(5th Cir. 1963), vacated 374 U.S. 8 (1963), on remand 330 F.2d 789 (5th Cir. 1964), cert. denied 379 U.S. 848 (1964), federal courts construed Texas case law to provide:

In the absence of a statute authorizing some other agency to contract, authority to contract on behalf of a county is vested by Texas law in the commissioners' court and if neither the constitution nor the statutes empower commissioners' court to make a particular contract, the contract is null and void.

other costs incurred in keeping the prisoner. The fees and costs shall be estimated according to laws regulating similar fees and costs in other cases.

(d) In this section, "federal law enforcement officer" has the meaning assigned by 5 U.S.C. Section 8331(20). (Emphasis added.)

For two reasons, we do not construe the phrase "may receive into the county jail a federal prisoner" to authorize the county sheriff to enter into a contract to provide housing and facilities for 120 federal prisoners from Washington, D.C.

First, the predecessor statutes to section 351.043 of the Local Government Code originally required a county sheriff to accept federal prisoners. See V.T.C.S. art. 5117 (1925 Revision of Civil Statutes); Revised Civil Statutes arts. 5112, 5113 (1911 Revision of Civil Statutes); Revised Civil Statutes arts. 3136, 3137 (1895 Revision of Civil Statutes). See also Binford v. Harris County, 261 S.W. 535 (Tex. Civ. App. - Galveston 1924, err. ref'd). Article 5117, V.T.C.S., was unamended after its enactment in 1925 until 1981.

In 1981, article 5117, V.T.C.S., was amended to provide that a county sheriff was no longer required to receive federal prisoners into the county jail, but rather that he "may receive" federal prisoners, unless he determines that to do so would violate a state or federal court order or statute or a rule promulgated by the Commission of Jail Standards. Acts 1981, 67th Leg., ch. 241, § 1, at 603.³ The substitution of the phrase "shall receive" for the phrase "may receive" was not intended by the legislature to

3. A commentator has described the 1981 amendment in the following way:

Section 351.043, in a prior version, required the county sheriff to accept federal prisoners. The statute was amended in 1981 so that the county sheriff is no longer under a mandatory duty to accept federal prisoners.

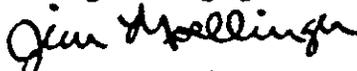
1 D. Brooks, County and Special District Law, ch. 20, § 20.60 at 741 (Texas Practice 1989).

effect anything other than to no longer impose on the county sheriff a mandatory duty to admit federal prisoners into the county jail. The legislative history of the 1981 amendment supports our construction. Bill Analysis, S.B. 1065, 67th Leg. (1981).

Second, we think that if the legislature had intended that the county sheriff be empowered to enter into the sort of contract about which you inquire it would have done so in an unequivocal manner. In instances in which the legislature has intended to confer on counties the authority to enter into certain contracts, it has done so explicitly, using the word "contract," see, e.g., Local Gov't Code §§ 351.031, 351.101, 351.102; or a phrase such as "by resolution or order of its governing body, enter into an agreement." See, e.g., Local Gov't Code § 362.002. Similarly, when the legislature has intended to confer on sheriffs the authority to enter into certain contracts, it has done so explicitly, using the word "contract." See, e.g., Local Gov't Code § 351.0415. Accordingly, we conclude that, with the codification of section 351.043 of the Local Government Code, the legislature did not intend to confer on a county sheriff the authority to enter into a contract providing housing and facilities to federal prisoners from Washington, D.C.

Finally you ask whether there any other provisions which authorize the county sheriff to enter a contract providing housing and facilities in the Lubbock County Jail for 120 prisoners from Washington, D.C. We do not provide this type of general advice in the opinion process. Therefore, we decline to answer your third question.

Very truly yours,



Jim Moellinger
Assistant Attorney General
Opinion Committee

APPROVED: Rick Gilpin, Chairman
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RG/SW/JM/mc

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