



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 6, 1997

The Honorable **Ciro D. Rodriguez**
Chair, Committee on Local
and Consent Calendars
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 97-016

Re: Whether a deputy constable may be classified as an "employee" pursuant to chapter 158 of the Local Government Code; reconsideration of DM-385 (ID# 39131)

Dear Representative Rodriguez:

You ask us to reconsider Attorney General Opinion DM-385 (1996). We concluded in DM-385 that a county civil service commission in a county with a basic civil service system created pursuant to chapter 158 of the Local Government Code may adopt a rule defining deputy constables as "employees" covered by the system. Your letter relates objections to our conclusion as being in conflict with prior Attorney General opinions, contrary to rules of statutory construction, and laden with unworkable and potentially dangerous consequences. We carefully reexamined the opinion in light of these objections, but our conclusion remains the same: sections 158.001 and 158.009 of chapter 158, subchapter A, as amended by the legislature in 1989, allow county civil service commissioners to include deputy constables within the definition of an "employee" covered by chapter 158, subchapter A of the code. The pre-amendment Attorney General opinions to which you cite do not control the amended statute. The consequences of the law described in your letter, which were contemplated by the legislature when the statute was amended, may be avoided by legislative action or by civil service commission rules themselves.

As you know, Local Government Code chapter 158, subchapter A, permits a county with a population of 200,000 or more to create a county civil service system to include "all the employees of the county who are not exempted from the system by the express terms or judicial interpretations of [Subchapter A]¹ or by the operation of Subchapter B."² Local Gov't Code § 158.002. As amended in 1989, section 158.001(2) defines an "employee" in a county that has adopted a basic subchapter A civil service system as

a person who obtains a position by appointment and who is not authorized by statute to perform governmental functions involving an exercise of discretion

¹Nothing in subchapter A expressly excludes deputy constables from civil service system coverage, and no court has so interpreted subchapter A since the statute was amended.

²Subchapter B allows counties to create a civil service system for sheriff's departments. See Local Gov't Code ch. 158, subch. B.

in the person's own right, *unless the person is included by a local civil service rule adopted under the procedures outlined in Section 158.009*; or a person included in the coverage of a county civil service system as the result of an election held under Section 158.007.³ The term does not include a person who holds an office the term of which is limited by the constitution of this state.

See id. § 158.001(2) (emphasis added) (footnote added). Because deputy constables are "authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right," they normally would be excluded from section 158.002(2)'s definition of employee. *See Arrington v. County of Dallas*, 792 S.W.2d 468, 470-71 (Tex. App.--Dallas 1990, writ denied). However, the phrase "unless the person is included by a local civil service rule adopted under the procedures outlined in Section 158.009" was added to the statute by the legislature for the express purpose of allowing counties to include deputy constables within their civil service systems.⁴ Representative Steven Wolens explained the bill to the House County Affairs Committee:

So simply what this bill does is it makes the deputy constables subject to the civil service act, and in doing so it takes care of two things. Number one, it protects deputy constables from being fired for political reasons, and secondly it will benefit the county as it delineates when a deputy constable can be fired and what those proper procedures are for firing a deputy constable.

Hearings on S.B. 1006 Before the House County Affairs Comm., 71st Leg., R.S. (May 9, 1989) (statement of Rep. Wolens) (tape available from House Audio/Video Services); *see also* Hearings on S.B. 1006 Before the Senate Intergovernmental Relations Comm., 71st Leg., R.S. (Apr. 4, 1989) (statement of Sen. Eddie Bernice Johnson) ("This legislation simply provides for deputy constables to come into the civil service of the county civil service program.") (transcript available from Senate Staff Services). We believe, therefore, as we did in DM-385, that inclusion of deputy constables in a county civil service system is permitted by both the letter and the intent of Local Government Code chapter 158, subchapter A.

In your request for reconsideration you suggest that placement of deputy constables in the civil service system usurps the constitutional and statutory role of a constable as the sole authority responsible for the activities of his or her deputies, including the right of a constable to terminate at

³Section 158.007 of the Local Government Code allows the voters of populous counties to expand a civil service system to include additional county employees in the coverage of the system.

⁴In fact, the amendment was made in direct response to the decision in *Arrington v. County of Dallas*, 792 S.W.2d 468, 470-71 (Tex. App.--Dallas 1990, writ denied), which held that deputy constables were not covered by Dallas County's civil service system. *See* Hearings on S.B. 1006 Before the House County Affairs Comm., 71st Leg., R.S. (May 9, 1989) (statement of Rep. Steven Wolens) ("The bill before you deals with the story of Floyd Arrington . . .") (tape available from House Audio/Video Services).

will the employment of a deputy constable, an argument that we did not specifically address in DM-385. Although the office of constable is constitutionally created, *see* Tex. Const. art. V, § 18, constables' powers and duties, including the procedure for appointing deputy constables, are prescribed by statute. *See* Local Gov't Code ch. 86; *see also id.* § 86.011 ("An elected constable who desires to appoint a deputy must apply in writing to the commissioners court The commissioners court shall approve and confirm the appointment of the deputy only if the commissioners court determines that the constable needs a deputy"); § 151.001 (requiring district, county, and precinct officers to apply to county commissioners court for authority to appoint deputies, assistants, or clerks).

Neither the constitution nor any statute vests in constables sole authority to terminate deputy constables. By enacting Local Government Code chapter 158, the legislature has given the power to prescribe rules for the selection, classification, layoff, and dismissal of deputy constables to county civil service commissions. *Id.* § 158.009. We do not find this grant of power to be a usurpation of any power granted solely to constables either by the constitution or by statute.

In support of the argument that constables have exclusive control over the firing of their deputies, you cite *Renken v. Harris County*, 808 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1991, no writ). We do not find that case to control on the issue considered in DM-385. In *Renken*, a dismissed deputy constable argued that he had a right to appeal his dismissal to the county commissioners court through a county grievance procedure established pursuant to statute.³ By virtue of the existence of the grievance procedure, the deputy argued, he was an employee who could be terminated only "for cause." The *Renken* court agreed with the county's position that the deputy was an "at-will" employee who could be discharged at any time for any reason or for no reason at all because: (1) the county grievance procedure merely provided a means for employees to voice their complaints, and thus did not establish any right with respect to termination or discharge; and (2) the commissioners court had no legal duty or authority to appoint or terminate deputy constables, and none was assumed merely by establishment of a grievance procedure. *Renken*, 808 S.W.2d at 224-26. Whereas the grievance procedure statute at issue in *Renken* did not give the county power to review terminations, chapter 158 gives county civil service commissions rule-making authority with respect to "layoffs and dismissals" of county employees covered by the chapter. Local Gov't Code § 158.009.

Members of the House County Affairs Committee considered the consequences of including deputy constables in civil service systems, but nevertheless proceeded to approve amendment of the statute. Committee member Representative Jeff Wentworth said:

I wonder if maybe deputy constables and deputy sheriffs weren't intentionally left out of that definition originally, because I've heard the argument made at least in my county by our sheriff who has had a number of

³Local Government Code section 160.005 requires counties with a population of more than 2.4 million to establish a grievance procedure for county employees.

problems about firing deputy sheriffs that to deputize them, he has to have confidence in that deputy and . . . he ought to be able to fire any deputy on the spot because of the nature of their employment.

Hearings on S.B. 1006 Before the House County Affairs Comm., 71st Leg., R.S. (May 9, 1989) (statement of Rep. Wentworth) (tape available from House Audio/Video Services).

In response to Representative Wentworth's concerns, Representative Wolens stressed that inclusion in the civil service commission does not prevent deputy constables from being fired. See Hearings on S.B. 1006 Before the House County Affairs Comm., 71st Leg., R.S. (May 9, 1989) (tape available from House Audio/Video Services). County civil service commissions are required to adopt rules regarding the terms of employment and grounds for dismissal of employees. See Local Gov't Code § 158.009. If a deputy constable deviates from the employment standards, he or she is subject to dismissal in accordance with the procedures established by the civil service commission. A constable's requirements for the appropriate job performance of a deputy can be incorporated into civil service commission rules, so that deputies performing unsatisfactorily and in violation of the rules can be dismissed. Furthermore, it is within the legislature's power to remove deputy constables from civil service protection by amending the statute.

Accordingly, we affirm our decision in Attorney General Opinion DM-385 (1996).

S U M M A R Y

A county civil service commission in a county with a basic civil service system created pursuant to chapter 158 of the Local Government Code may adopt a rule defining deputy constables as "employees" covered by the system. Attorney General Opinion DM-385 (1996) is affirmed.

Yours very truly,



Barbara Griffin
Assistant Attorney General
Opinion Committee