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JD #15233
MBS

RQ-331

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February 26, 1992

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Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

Re: Request for Attorney General
Opinion Concerning Article
8885

Dear General Morales:

I am requesting your opinion regarding the application given article 8885 of Texas Revised Civil Statutes. In Tarrant County the tax assessor-collector has 165 employees of which three are certified pursuant to article 8885 and 2 are registered in the hopes of becoming certified. The problem which has arisen is that the tax assessor-collector has registered but has not completed the certification process within five years. See Board of Tax Professional Examiners Rule 623.14 (e) (3) (All references to Rule hereafter are to the Rules of the Board).. According to the same rule the tax assessor-collector may not sit for the test for two years. Id. As a result the elected Tarrant County Tax Assessor-Collector is not registered within the meaning of section 24 of article 8885.

The questions for your decision are:

1. Must the tax assessor-collector register and become certified pursuant to article 8885?

2. If the answer is yes, may the tax assessor-collector in conjunction with the commissioners court designate a deputy tax assessor-collector as the one primarily responsible for performing the assessment functions (Texas Property Tax Code, Title I, Chapter 26 and the collections functions (Texas Property Tax Code, Title I, Chapters 31 and 33) thereby relieving the tax assessor-collector from the duty of becoming registered and certified pursuant to article 8885?

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3. If the answer to number 2 is no, are the rules of the Board of Tax Professional Examiners constitutional?

4. In the event that your answer to number 3 is yes, then, is article 8885 of Texas Revised Civil Statutes constitutional as it applies to this situation?

TAX ASSESSOR-COLLECTOR DUTY TO REGISTER

A previous attorney general has decided that the predecessor of article 8885 imposed qualifications upon the office of county tax assessor-collector and therefore, imposed a duty on the tax assessor-collector to register. Op. Tex. Att'y Gen. No. H-1120 (1978). However, in 1983 the 68th Legislature deleted in section 11 the words, "all persons elected or appointed to act as assessors, chief deputies, assistants, or employees engaged in the practice of assessing for a county" Act of May 26, 1983, ch. 980, § 11, 1983 Tex Sess. Law Serv. 5335 (Vernon). The 68th Legislature defined tax assessor-collector to mean, "the chief administrator of a taxing unit's tax office who is responsible for the assessing functions described in Chapter 26, Tax Code, and for collection functions described in Chapter 31, Tax Code." Tex. Rev. Civ. Stat. Ann. art. 8885, § 2 (11) (Vernon Supp. 1992). None of the new definitions refer to the elected tax assessor-collector raising the inference that legislative intent was to change the requirement that the elected official must register.

DESIGNATION OF DEPUTY

In the event you have answered question 1 yes, may the tax assessor-collector avoid the registration requirement by designation of a deputy to perform the duties of assessment and collection in her office. Section 11 of article 8885, Texas Revised Civil Statutes provides:

The following persons shall register with the board:

(2) the tax assessor-collector, tax collector, or other person designated by the governing body of a taxing unit as the chief administrator of the unit's assessment functions, collections functions, or both; and other persons

The rules of the Board of Tax Professional Examiners expressly provide that the county may designate someone other than the tax assessor-collector as the person primarily responsible for performing the assessment functions. Rule 623.3 (3) (A). The statute just quoted provides for designation of

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both functions. Additionally, the use of the words "or" indicate that the tax assessor-collector and commissioners court may designate an alternative such as a deputy tax assessor-collector.

While the statute and rule seem clear, a previous attorney general clouded the issue when he decided that a legislative attempt to permit the electorate to place the assessment and collection duties of the county tax assessor-collector elsewhere was contrary to article VIII, section 14, of the Texas Constitution. Op. Tex. Att'y Gen No. JM-833 (1987). However, the same opinion did find a differing statutory provision constitutional by construing that provision to allow assistance for the assessor-collector, as long as it was not an attempt to supplant her. *Id.* at 3997. A similar construction of article 8885 would avoid the constitutional problems discussed in the balance of this request.

CONSTITUTIONALITY OF ADMINISTRATIVE RULES

In the event you find that the tax assessor-collector must register herself, we question the legality of rule 623.14 (e) (3). The rule allows the registrant two attempts at passing within one year but provides, "A registrant who fails a Class IV examination the third time shall have the registration cancelled and may apply for registration two years from the date of the last failure." Rule 623.14 (e) (3). We contend that such a rule either exceeds the power given the board by the legislature or represents an unconstitutional attempt by the legislature to delegate its law making power to the board.

Our first contention is that the rule exceeds the power given the board by the legislature. Sections 7, 16, and 17 of article 8885 grant rule making power to the Board of Tax Professional Examiners. The legislation requires the board to make rules establishing standards of education in keeping with the purposes of the Act. Tex. Rev. Civ. Stat. Ann. art. 8885, § 7 (Vernon Supp. 1992). Section 16 of the Act requires a classification system. *Id.* at § 16. Finally, the legislature required that a person attain certification within five years after his initial registration. *Id.* at § 17.

Nothing in the legislative grants of power authorize the Board to prevent a registrant from registering for a two year period because of failure to pass a test. No purpose of the statute is fulfilled by this requirement since other members of the office are certified and the statute prohibits the employer from requiring the certified person to violate the statute. *Id.* at § 22.

Secondly, in order for the legislature to delegate its power to a regulatory agency, the legislature must first adopt minimum standards which carry out the express purpose of the statute. Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. -- Austin 1977, writ ref'd). Despite what must surely be protestations to the contrary, this act is essentially standardless. The legislative attempts are:

Sec. 16 The board by rule shall adopt a classification system for registrants and establish minimum requirements for each classification. Requirements must be based on experience in property taxation administration, education and training, professional performance and achievements, and compliance with the code of ethics.

Sec. 17 The board by rule shall adopt minimum requirements for the certification of registrants. . .

(b) The rules shall require that:

. . .
(2) a person registered as an assessor or assessor-collector attain certification as a registered Texas assessor within five years after his initial registration; and . . .

Tex. Rev. Civ. Stat. Ann. art. 8885 (Vernon Supp. 1992).

The effect of this language is to delegate what those minimum requirements must be. Such a lack of standards give rise to the arbitrary and capricious result reached here preventing the registrant from re-registering for two years. Vague standards like these have long been condemned by Texas courts. Texas Antiquities Committee v. Dallas Co. Community College District, 554 S.W.2d 924 (Tex. 1977).

While the elected official holds no vested property right, it does not follow that the officer "has no financial or 'property' interest that may be protected against interference by others not acting under statutory or constitutional authority." Tarrant County v. Ashmore, 635 S.W.2d 417 (Tex. 1982). The application of Rule 623.14 (e) (3) violates sections 3 and 19 of article 1 of the Texas Constitution. Tax assessors who have served less than five years and not attained certification perform their constitutional duties without fear of criminal sanction while those who serve beyond five years perform their duties at the risk of criminal penalty. Regulation based merely on length of time one is engaged in the business has been held in

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contravention of the Texas Constitution. Ex parte Dreibelbis, 109 S.W.2d 476, 477 (Tex. Crim. App. 1937).

Additionally, it is hard to see how the people of Texas are served by entrusting the responsibility of assessing property for taxation to those who are uncertified for less than five years, but not entrusting that responsibility in those who hire certified people to assist them in performing those duties but themselves fail to certify within five years.

Texas courts begin equal protection analysis with the presumption of the statute's constitutionality. Texas Public Building Authority v Mattox, 686 S.W.2d 924 (Tex. 1985). The test for federal and state equal protection is generally the same. Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985). Similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so. Id. at 197. This administrative rule in hand with the statute create a classification of those with five years experience who do not pass the test. The statute provides no rational relationship between the ability to pass the test and the legitimate state interest because so many other classes of people of less than five years experience may perform their duties without fear of criminal prosecution.

CONSTITUTIONALITY OF ARTICLE 8885

Texas has long followed the general rule that where the Constitution declares the qualifications for office it is not within the power of the Legislature to change or add to these unless the Constitution adds that power. Dickson v. Strickland, 265 S.W. 1012 (Tex. 1924). Additionally, where the Constitution prescribes no qualifications, the Legislature is free to impose qualifications. Op. Tex. Att'y Gen. No. H-1120 (1978). However, an exception to that rule is available in several jurisdictions. Where the Constitution prescribes qualifications for eligibility generally, and some specific qualifications for certain constitutional offices while omitting qualifications for others, courts have interpreted the omission to be deliberate and done with the intention that the legislature lacked power to prescribe additional qualifications. Annotation, Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office, 34 A.L.R.2d 155, 176 (1954).

The Texas Constitution imposes residence qualifications for all district and county officers, a general qualification. Tex. Const. art. XVI, § 14. For district judges the constitution imposes additional qualifications. See Tex. Const. art. V, § 7. Since the Constitution imposes no qualifications for the Assessor

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and Collector of Taxes, the exception to the general rule could apply in Texas. Without cases in point the application of this exception would avoid a confrontation with the removal procedure set out in the Constitution.

If section 24 applies to a tax assessor-collector who registered but was unable to attain certification within five years, then the force of article 8885 imposes a criminal penalty on said tax assessor-collector and effects her removal from office. Section 24 of article 5 of the Texas Constitution provides the exclusive means for removal from county offices, including the tax assessor-collector. Childress County v. Sachse, 310 S.W.2d 414 (Tex. Civ. App. -- Amarillo 1958, writ ref. n. r.e.). Certainly, the Constitution gives the Legislature the power to define incompetency and official misconduct. Article 8885 does not define incompetency to include the tax assessor-collector's failure to attain certification. Therefore, the definition of incompetency in the Texas Local Government Code does not apply. See Tex. Loc. Gov't Code Ann. § 87.011 (Vernon 1988); cf. Tex. Loc. Gov't Code Ann. § 83.003 (Vernon 1988) (which establishes continuing education requirements for the county treasurer and legislatively defines incompetency in Chapter 87 to include the treasurer's failure to complete the 20 classroom hours of instruction in an accredited public institution of higher education); Tex. Loc. Gov't Code Ann. § 81.0025 (Vernon Supp. 1992) (education requirements for county commissioners defining incompetency); Tex. Loc. Gov't Code Ann. § 84.0085 (Vernon 1988) (education requirements for county auditor defining incompetency). Finally, if the statute requires certification within five years, she becomes subject to criminal prosecution unless she resigns effecting her removal without trial by jury.

If the legislature had intended article 8885 to include elected tax assessor-collectors it could have directly said so. Furthermore, it could have defined failure to attain certification as incompetency within the removal statute. I believe you will agree that in order to find the statute constitutional either the tax assessor-collector need not register, or if she must, she may designate a deputy tax assessor-collector who is registered to perform assessment and collection functions in assistance of her constitutional and statutory duties.

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Sincerely,

A handwritten signature in black ink, appearing to read "Tim Curry". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

TC/kb