

# County of Nueces



WALTER D. BRYAN  
Chief, Civil Division

LAURA GARZA JIMENEZ,  
Chief, Criminal Division

TYNER W. LITTLE, III  
Chief of Administrative Services

FILED  
APR 23 1996  
Opinion Committee

CARL E. LEWIS  
COUNTY ATTORNEY  
NUECES COUNTY COURTHOUSE  
901 LEOPARD  
ROOM 206 (512)888-0286  
CORPUS CHRISTI, TEXAS 78401-3680

FILE # ML-38764-96  
I.D. # -38764

April 9, 1996

RQ. 891

HON. DAN MORALES  
ATTORNEY GENERAL, STATE OF TEXAS  
ATTN: Opinion Committee  
300 W. 15th St., 11th Floor  
Austin, Texas 78701

RE: Whether the employees of a County Attorney are subject to removal "at will" pursuant to § 41.105 of the Texas Government Code in a county subject to a civil service system adopted in accordance with Chapter 158 of the Texas Local Government Code.

Dear General Morales:

The above referenced question comes from the conflict that arises between Civil Service due process and the "at will" employment provision in the Texas Government Code with respect to personnel of the County Attorney's Office. At the request of the Nueces County Civil Service Commission, we ask your office to render an opinion based on the following facts and attached exhibits.

On October 23, 1991, the Nueces County Commissioners Court adopted an "Order Instituting a Civil Service System for Nueces County" pursuant to Sections 158.0065 and 158.003 of the Texas Local Government Code (**Exhibit A**). Subsequently, Civil Service Commissioners were selected and a Human Resources Office with a director was established to administer the system.

On February 13, 1992, the past presiding County Attorney issued a legal opinion at the request of the Human Resources Director pertaining to the application of the civil service system to the various county departments and employees. Specifically, the Human Resources Director inquired as to which employees of the county were to be included in the system and deemed to possess the due process rights of employment adopted and enforced by the commission. The relevant portions of the opinion provide:

"The Local Government Code (LCG) Section 158.001 defines 'employee' under the County Civil Service System.

An 'employee' is a person who obtains a position by appointment and who is not authorized to perform governmental functions involving an exercise of discretion in the person's own right.

An 'employee' is also a person included by a local civil service rule adopted by the new Civil Service Commission. The Commission may decide to include some county workers who do not generally meet the criteria of 'employee' (because the employee exercises discretion in his/her own right). For example, the Commission may include under the definition of 'employee' sheriff deputies who would normally be excluded as they exercise discretion in their own right." (Opinion attached, **Exhibit B**)."

More specifically, with reference to the County Attorney's Office, the opinion stated that "assistant county attorneys and paralegals are not mandatorily included but may be included by the commission. A county employee who exercises discretion may be included as an employee by the Civil Service Commission under Section 158.001 of the Act."

By order of the Nueces County Civil Service Commission issued May 21, 1992, all employees of the County Attorney were included in the civil service system (**Exhibit C**). Almost two months later, an order adopted on July 14, 1992, included all staff of the County Attorney except the top three staff positions immediately under the County Attorney (**Exhibit D**). As a consequence, the current orders of the commission assert that all regular staff attorneys, paralegals, and secretaries are included in the civil service system.

Provisions in the Government Code dealing with "at will" status of County Attorney employees now cast doubt on the viability of the County Attorney opinion of February 13, 1992 and more importantly the Civil Service Commission order of July 14, 1992.

Section 41.101 of the Texas Government Code provides:

"In this subchapter, 'prosecuting attorney' means a county attorney, district attorney, or criminal district attorney."

The Nueces County Attorney is responsible for all misdemeanor prosecutions in Nueces County. The following references to the Texas Government Code are therefore applicable to the County Attorney.

Section 41.102 provides:

"A prosecuting attorney may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel that in his judgment are required for the proper and efficient operation and administration of the office."

Section 41.105 provides:

"All personnel of a prosecuting attorney's office are subject to removal at the will of the prosecuting attorney."

These provisions show that the county attorney is authorized to use his own judgment in employment decisions relating to the proper and efficient operation of the county attorney's office. Furthermore, the "at will" removal provision bestows upon the county attorney the ability to make those decisions without regard to any employment due process rights recognized by a civil service system or commission order.

Given that the Nueces County Civil Service Commission orders include all regular staff attorneys in the civil service system based on the apparent authority of Section 158.009(a)1 of the Texas Local Government Code, which requires the commission to define employees, it is important to note that conflict is generated by an additional provision found in the Government Code. The Local Government Code defines an "employee" as one who obtains a position by appointment and who is **not** authorized to perform governmental functions involving an exercise of discretion in the person's own right. In contrast, Section 41.103(b) of the Government Code provides that "an assistant prosecuting attorney may perform all duties imposed by law on the prosecuting attorney." This suggests that an assistant county attorney may perform governmental functions involving an exercise of discretion in his or her own right, and as such is not within the definition of employee contemplated by the Local Government Code and the Civil Service Commission.

The question then becomes whether the Civil Service Commission has adopted an order pursuant to the authority of the Local Government Code, which abrogates the express authority of the County Attorney to determine the composition of his staff as provided by the Government Code. The Code Construction Act, Chapter 311 of the Texas Government Code, provides guidance to the resolution of this issue. There is immediate conflict between the statutes when an order adopted by a civil service commission gives due process rights of employment to the employees of a prosecuting

Attorney General  
Page 4

attorney. Specifically, Section 158.009(a)1 of the Local Government Code comes into conflict with Section 41.105 of the Government Code.

The Code Construction Act provides that if a general provision of a statute conflicts with a local or special provision, both provisions, if possible, shall be construed so that effect is given to both. Section 311.026(a) Texas Government Code. If the conflicts are irreconcilable, as they are in the facts presented in this question, the special or local provision prevails as an exception to the general provision. Section 311.026(b) Texas Government Code.

Section 158.009 of the Local Government Code cannot be viewed as a local or special provision. Section 41.105 of the Government Code is specific in its application to the county attorney as "prosecuting attorney." Section 158.009 has general application to various county departments and elected officials while the Government Code provision has application solely to prosecuting attorneys.

It is our position that the personnel of the Nueces County Attorney's Office are subject to removal at the will of the County Attorney as provided in Section 41.105, Texas Government Code. The Nueces County Civil Service Commission should amend its rules to give effect to the authority granted the County Attorney by Section 41.105.

With the above considerations we respectfully request that your office issue an opinion, a letter opinion if possible, because time is of great importance. If you require additional information, please do not hesitate to contact us.

Sincerely,



Carl E. Lewis  
County Attorney  
Nueces County, Texas

cc: Civil Service Commission  
Nueces County

EXHIBIT "A"

ORDER  
INSTITUTING A CIVIL SERVICE SYSTEM  
FOR NUECES COUNTY

WHEREAS, in accordance with the authority of Section 158.0065, Local Government Code, Vernon's Texas Codes (H.B. 2804, 72nd Texas Legislature, Regular Session, 1991) a petition was received by the Commissioners Court on September 24, 1991, asking for a Civil Service System, and;

WHEREAS, the petitions were received and checked by the County Auditor's Office as to employees names, and;

WHEREAS, the Commissioners Court finds and determines that the petitions include well over 50% of the employees of the county as required by said Section 158.0065;

NOW, THEREFORE, BE IT ORDERED by the Commissioners Court of Nueces County:

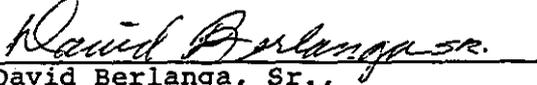
1. In accordance with Section 158.0065, Section 158.003, Local Government Code, and other authority, the Commissioners Court hereby creates a Civil Service System for Nueces County employees, as defined by statute and other authority, and;
2. A Civil Service Commission will be appointed on or about December 4, 1991, and will be provided with adequate office space and sufficient funds to employ an adequate staff and to purchase necessary supplies and equipment.

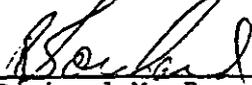
Adopted this the 23rd day of October, 1991.

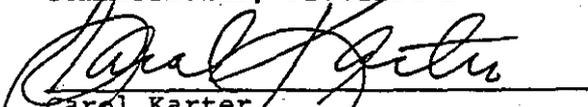
THE COUNTY OF NUECES BY:

  
Robert N. Barnes, County Judge

  
George D. Shaffer,  
Commissioner, Precinct 1

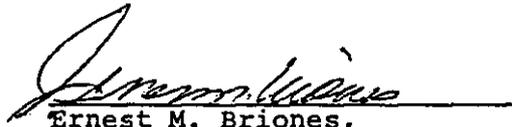
  
David Berlanga, Sr.,  
Commissioner, Precinct 2

  
Richard M. Borchard, Jr.,  
Commissioner, Precinct 3

  
Carol Karter,  
Commissioner, Precinct 4



ATTEST:

  
Ernest M. Briones,  
County Clerk  
Nueces County, Texas

**FILED**

OCT 23 1991

(3) "Department" means a county, district, or precinct office or officer, agency, or board that has jurisdiction and control of the performance of employees' official duties.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 881, § 1, eff. Sept. 1, 1989.

#### § 158.002. Eligible Counties

A county with a population of 200,000 or more may, in accordance with this subchapter, 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 this subchapter or by the operation of Subchapter B.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### § 158.003. Creation by Order

(a) A county civil service system may be created by an order adopted by a majority of the members of the commissioners court of the county.

(b) A copy of an order adopted under this section shall be placed in the minutes of the court's proceedings. The copy of the order is public information.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### § 158.004. Creation by Election

(a) A county civil service system may be created by approval of the system by a majority of the qualified voters of the county voting at an election called for that purpose.

(b) The commissioners court by order may call an election on the question of the creation of a county civil service system.

(c) The commissioners court shall hold the election called under this section on the first authorized uniform election date prescribed by Chapter 41, Election Code, that allows sufficient time for publication of the notice required by Subsection (e) and for compliance with any other requirements established by law.

(d) The order calling the election must specify the date, time, and place of the election, the form of the ballots, and the name of the presiding judge for each voting place.

(e) In addition to the notice required by Chapter 4, Election Code, the commissioners court must publish in a newspaper of general circulation in the county a substantial copy of the order calling the election. The first publication must be made on or before the 15th day before the date of the election and continue once a week for two consecutive weeks.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### § 158.005. Ballots and Voting at Election to Create System

(a) Each qualified voter of the county is entitled to vote at the election.

(b) The commissioners court shall order the ballot at the election to be printed to provide for voting for or against the proposition: "Creation of a county civil service system."

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### § 158.006. Result of Election to Create System

(a) The presiding judge of each voting place shall supervise the counting of votes cast at the election.

(b) Within 24 hours after the election, each judge shall certify to the commissioners court the results of the election at the voting place.

(c) A copy of the results of the election shall be filed with the county clerk. The copy on file with the county clerk is a public record.

(d) If the proposition is approved, the commissioners court shall declare the result and by order create the county civil service system. A copy of the order creating the system shall be placed in the minutes of the court's proceedings.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### § 158.0065. Petition to create by Order or Election

(a) This section applies only in a county with a population of 290,000 or more that would not be eligible to expand or dissolve the system under Section 158.007.

(b) The commissioners court of a county that receives a petition signed by at least 50 percent of the county's employees requesting the creation of a county civil service system shall vote not later than the 30th day after the date that the court receives the petition whether to create a system by adopting an order under Section 158.003. If the court does not create a system as provided by Section 158.003, the court shall call an election to decide the question as provided by Sections 158.004-158.006.

Added by Acts 1991, 72nd Leg., ch. 548, § 1, eff. June 15, 1991.

#### § 158.007. Expanded Coverage or Dissolution of System in Populous Counties

(a) In a county that has a population of more than 800,000 and a civil service system created under this subchapter, the qualified voters of the county, voting at an election called for that purpose, may determine whether the system will be dissolved or expanded to

EXHIBIT "B"

# County of Nueces



**CARLOS VALDEZ**  
COUNTY ATTORNEY  
NUECES COUNTY COURTHOUSE  
901 LEOPARD  
ROOM 206 (512) 888-0286  
CORPUS CHRISTI, TEXAS 78401-3680

FIRST ASSISTANT  
RICHARD M. BERRY

February 13, 1992

John Falcon  
Nueces County Human Resources Director  
901 Leopard, Room 306  
Corpus Christi, TX 78401

RE: Summary of Civil Service Statute as Applicable to  
Nueces County

Dear John:

You have asked seven questions regarding the application of the new civil service system to the various county departments. I have set out a summary of the relevant legal authority for you and have stated the results of the effects of that authority with regard to each department. In the future, you should submit requests concerning specific positions or other departments about which you have questions to me for a case by case determination.

## SUMMARY OF EFFECT OF CIVIL SERVICE ON COUNTY DEPARTMENTS

### I.

#### Definition of "employee"

The Local Government Code (LGC) Section 158.001 defines "employee" under the County Civil Service System.

An "employee" is a person who obtains a position by appointment and who is not authorized to perform governmental functions involving an exercise of discretion in the person's own right.

An "employee" is also a person included by a local civil service rule adopted by the new County Civil Service Commission. The Commission may decide to include some county workers who do not generally meet the criteria of "employee" (because the

employee exercises discretion in his/her own right). For example, the Commission may include under the definition of "employee" sheriff deputies who would normally be excluded as they exercise discretion in their own right.

An "employee" does not include a person who holds an office, the term of which is limited by the constitution of this state.

## II.

### Statutory Exemptions from Civil Service

The Local Government Code Section 158.013 specifically excludes the following persons from civil service:

1. assistant district attorneys, investigators, or other employees of a district or criminal district attorney,
2. the official shorthand reporter of a court,
3. an elected or appointed officer under the Constitution.

## III.

### Relevant Case Law Authority to Civil Service

1. Arrington v. County of Dallas, 792 S.W.2d 468 (Tex.App. - Dallas, 1990, writ denied).

The Court holds that deputy constables are excluded from the class of defined employees subject to county civil service rules. The court emphasizes that deputy constables exercise their own discretion in performing their duties. The same analysis applies to deputy sheriffs.

2. Green v. Stewart, 516 S.W.2d 133 (Tex. 1974).

The Court holds that deputy tax assessor-collectors are employees within Civil Service Act because they do not act in their own right but in the right of the assessor-collector.

3. Clark v. Young, 787 S.W.2d 166 (Tex.App. - Forth Worth, 1990, writ denied).

The Court holds that court coordinators are excluded from any county civil service system as the coordinators serve at the pleasure of the judge.

4. Shore v. Howard, 414 F.Supp. 379 (1976).

The Court holds that probation officers are not county employees within civil service definition and would be excluded.

*Local Code  
§ 45.001  
§ 41.*

IV.

Relevant Attorney General Opinions

1. H-619 (1975)  
Assistant county purchasing agents are subject to the County Civil Service Act, while adult probation officers and assistant county auditors are not.
2. H-942 (1977)  
Secretaries and clerks employed by juvenile probation office are not subject to civil service.
3. H-985 (1977)  
County Civil Service Act does not apply to deputy sheriffs.
4. M-1088 (1972)  
Deputies of county officials are "employees" within civil service.
5. H-672 (1975)  
Juvenile probation officers are not subject to Civil Service.
6. H-1144 (1978)  
Deputy county clerks are eligible for civil service.

V.

Department by Department Analysis of  
Applicability of Civil Service Act

1. Law Library
  - a. Staff is included; Director may be included as a discretionary employee of the County.
  - b. Staff fits definition of "employee" under LGC Section 158.001.
2. Parks and Recreation
  - a. Staff is included; Director may be included.
  - b. Fits definition of "employee" under LGC Section 158.001.
3. Community Supervision and Corrections Department
  - a. The entire department is excluded.
  - b. See: Shore v. Howard, 414 F.Supp 379 (1976).

- c. AG opinions H-942 (1977), H-672 (1975), H-619 (1975)
  - d. Probation officers are under the the supervision of the district judges.
4. Juvenile Probation Department
- a. The entire department is excluded.
  - b. See reasoning under Adult Probation.
5. Tax Assessor-Collector
- a. Staff is included because they fit definition of "employee" under LGC Section 158.001.
  - b. The tax-assessor collector is an elected official under the Constitution and is excluded from civil service. Article 8, Section 14, LGC Section 158.001; LGC Section 158.013(3).
6. County Commissioners
- a. Staff is included because they fit definition of "employee" under LGC Section 158.001.
  - b. County Commissioners are excluded as they are elected officials under the Constitution. Article V, Section 18. LGC Section 158.001; LGC Section 158.013(3).
7. County Judge
- a. Staff is included because they fit the definition of "employee" under LGC Section 158.001.
  - b. County Judge is elected under Constitution. Article V, Section 15. He is not an "employee" for civil service under LGC Section 158.001. See Also: LGC Section 158.013(3)
8. County Attorney
- a. Staff is included as they fit definition of "employee" under LGC Section 158.001.
  - b. Assistant county attorneys and paralegals are not mandatorily included but may be included by the commission. A county employee who exercises discretion may be included as an employee by the Civil Service Commission under Section 158.001 of the Act.
  - c. County Attorney is not eligible as he is an elected official under the Constitution. Article V, Section 21. LGC Section 158.001, LGC Section 158.013(3)

9. Court of Appeals

This department is not a County department.

10. County Courts at Law

a. Court coordinators and staff are excluded.

(1) They serve at the pleasure of the judge.

(2) See: Clark v. Young, 787 S.W.2d 166  
(Tex.App. - Fort Worth 1990, writ denied)  
This court case applied to district court coordinators but the same reasoning would appear to apply to county courts at law.

b. Court reporters are excluded.

(1) See: 158.013(2) Local Government Code

c. Court bailiffs are excluded.

(1) According to the Government Code Section 53.001(6), a district or county judge in Nueces County shall appoint a bailiff. Therefore, bailiffs are not eligible.

d. The County Court at Law Judges are elected officials and cannot be included in civil service.

10. District Courts.

a. Court coordinators are excluded.

(1) See: Clark v. Young, 787 S.W.2d 166  
(Tex.App. - Fort Worth 1990, writ denied).

(2) They serve at the pleasure of the judge.

b. Court reporters are excluded.

(1) See: 158.013(2) Local Government Code.

c. Court bailiffs are excluded.

(1) Bailiffs serve at the pleasure of the judge. See: Government Code 53.001(6). By analogy, they are like probation officers and they cannot be county employees under civil service.

d. District Judges are elected under the Constitution and are thus exempt from civil service. Article V, Section 7. LGC Section 158.013(3).

12. District Attorney
  - a. Entire office is excluded.
  - b. See: Local Government Code Section 158.013(1)
  - c. District Attorney exempt under Local Government Code Section 158.013(3) as they are elected under the Constitution, Article V, Section 21.
  
13. District Clerk.
  - a. The staff is included.
  - b. They fit the definition of "employee".
  - c. AG Opinion H-1144 (1978) states that deputy county clerks are eligible for civil service.
  - d. Deputy district clerks should be eligible by analogy.
  - e. District Clerk is excluded from civil service as he is an elected officer under the Constitution. Article V, Section 9. LGC Section 158.013(3).
  
14. Justice of the Peace.
  - a. Justice of the Peace is excluded as he is an elected official under the Constitution. Article V, Section 19, LGC Section 158.013(3); LGC Section 158.001.
  - b. Staff is excluded because they serve at the pleasure of the Justice of the Peace. This is consistent with 11-942 (1977) A.G.Op. and Shore vs. Howard, cited herein.
  
15. County Sheriff.
  - a. Clerical staff is eligible.
  - b. Deputy sheriffs are not mandatorily included because they exercise discretion in their own right.
  - c. However, the civil service commission can decide to include deputy sheriffs as employees.
  - d. County sheriff is excluded from Civil Service because he is an elected officer under the Constitution. Article V, Section 13. LGC Section 158.013(3).
  
16. Constables.
  - a. The staff is included.
  - b. Deputies act with discretion, but may be included by the Civil Service Commission.
  - c. Constable is elected official under the Constitution and is excluded. Article V, Section 18, Texas Const.

17. Auditor.
  - a. Assistant county auditors are excluded from Civil Service as they serve under the district judge. AG Opinion H-619 (1975).
  - b. By extension, clerical staff in the office is also excluded.
  - c. The Auditor is an appointed official, appointed by District Court Judges, and is excluded from Civil Service because he/she serves at the pleasure of the Judges. See Clark v. Young and Shore v. Howard, cited herein, and AG Op. H-619(1975).
  
18. County Clerk.
  - a. The staff is included.
  - b. They meet the definition of "employee".
  - c. See: AG Opinion H-1144 (1978).
  - d. County Clerk is an elected official under the Constitution and is thus excluded from Civil Service. Article V, Section 20. LGC Section 158.013(3); LGC Section 158.001.
  
20. Purchasing.
  - a. The entire department is excluded.
  - b. Since the Purchasing Agent is appointed by a board of District Court Judges (three judges and two commissioners), the office is ultimately under the control of District Court Judges. Article 262.011, Local Govt. Code. Therefore, the Purchasing Agent and his/her employees are excluded from civil service control. See Clark v. Young, Shore v. Howard, cited herein, and AG Op. H-619(1975).
  
21. Telecommunications Services (Data Processing)
  - a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.
  
22. Personnel Director.
  - a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.
  
23. Veterans Services.
  - a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.

24. Building Superintendent.
- a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.
25. Animal Control.
- a. Officer exercises discretion similar to deputy sheriffs and constables, therefore, although not mandatorily included, Civil Service Commission may include him/her.
26. Beach Cleaning.
- a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.
27. Administrative Office of the Court.
- The entire staff and administrator are excluded from civil service because they are under the control of District Court Judges. See Clark v. Young, Shore v. Howard, cited herein, and AG Op. H-619 (1975).
28. Medical Examiner.
- a. The staff is included in civil service.
  - b. The Examiner exercises discretion, but the Civil Service Commission may include him/her.
29. Human Services.
- a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.
- ~~30.~~ 30. City/County Health Unit.
- a. Only those staff members who work solely for the County, and do not exercise discretion in their position, are included in civil service.
  - b. Staff members who exercise discretion are not mandatorily included, but may be included by the Civil Service Commission.
  - c. The director is not under complete control of the County and is excluded from civil service.
31. Solid Waste.
- a. The staff is included in civil service.
  - b. The director exercises discretion, but the Civil Service Commission may include him/her.

32. Agricultural Extension Service.

This is a state controlled agency.

33. County Attorney Collection Account.

- a. This office is under the control of the County Attorney who may relinquish control of the director and staff to the County. If the department comes under the control of the County, then the staff is included in civil service and the director, who exercises discretion, may be included in civil service.
- b. If the department remains under the control of the County Attorney, then the entire staff is excluded from civil service.

34. Dispute Resolution.

This department is not under the exclusive control of the County and is excluded from civil service.

35. Engineering.

- a. The staff is included in civil service.
- b. The staff's engineers exercise discretion, but may be included by the Civil Service Commission.
- c. The director exercises discretion, but may be included by the Civil Service Commission.

Many of the items on the list submitted by the Personnel Director are actually "funds" under which monies are held and disbursed and therefore we are not considering those items on the list.

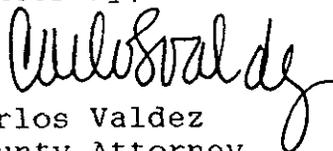
The above summary answers questions one through three, and five. Question four asks "Could the head of an excluded department choose to adopt rules and regulations parallel with the rest of the county and implement same on his/her own voluntary discretion?" The answer to this question is yes, the department head may adopt rules and regulations which parallel the civil service commission rules and regulations. However, the department rules cannot allow for the county civil service commission to make a determination on a disputed employment issue. The department head may establish its own review committee or similar entity.

Question six asks "How would any of the above effect a newly elected official, who upon assuming office, might wish to replace non-exempt employees in his/her department?" The answer to this

question is that any newly elected official would have to comply with the rules and regulations of the Civil Service Commission regarding circumstances of employment of the covered employees. However, the implementation of civil service does not affect the substantive law as it exists today and an elected official still has the authority to choose who is hired and who is terminated at will.

If you have any further questions, please feel free to submit them to this office.

Sincerely,



Carlos Valdez  
County Attorney

CV/arm

xc: Dick Berry  
Jay M. Wright

EXHIBIT "C"

*Order issued 5/21/92*

**NUECES COUNTY CIVIL SERVICE COMMISSION ORDER:**

Whereas, Article 158.001 of the Local Government Code, Vernon's Texas Codes, allows the Civil Service Board, by order, to include by local rule the deputies of the Sheriff and Constables who are authorized by statute to perform an exercise of discretion in the deputies own right, and,

Whereas, this Board believes said Deputy Sheriffs and Deputy Constables should be included under Civil Service,

Now Therefore Be It Ordered by the Civil Service Board of Nueces County, that in accordance with Articles 158.001 and 158.009 of the Local Government Code, Vernon's Texas Codes, all Sheriff Deputies and Constable Deputies who are authorized by statute to perform an exercise of discretion of the person's own right are covered under the county's civil service system.

Additionally, be it ordered by the Civil Service Board of Nueces County, that the following employees and employee groups be and are included under civil service:

**LAW LIBRARY**

The Director and staff are all included.

**PARK & RECREATION**

The Director and all staff are included.

**SHERIFF DEPARTMENT**

All deputies, including the Chief Deputy, all jail employees, all ID employees, all clerical employees are included. Each and every employee under the jurisdiction of the Sheriff except the elected position of Sheriff, are included.

**ROAD DEPARTMENT, ENGINEERING, TULE LAKE LIFT BRIDGE**

All road department employees, including supervisors; all engineering employees, including supervisors, the County Engineer and County Road Engineer are included, as well as all employees of the Tule Lake Lift Bridge, are included.

**TAX ASSESSOR COLLECTOR**

All staff including the Chief Deputy are included. The elected position of Tax Assessor-Collector is not included.

#### COUNTY JUDGE AND COUNTY COMMISSIONERS

All employees working for or under the jurisdiction of the Commissioners Court, the County Judge, or the County Commissioners are included. The elected positions of County Judge and County Commissioners are not included.

#### COUNTY ATTORNEY

All staff including the First Assistant, all attorneys, all clerical and paralegal personnel, except for the elected position of County Attorney, are included.

#### DISTRICT CLERK AND CHILD SUPPORT

All staff including the Chief Deputy, deputy district clerks, child support staff, including all supervisors, are included. The elected position of District Clerk is not included.

#### CONSTABLES

All Deputy Constables, including Chief Deputies, and all clerical and other staff are included. The elected positions of Constable are not included.

#### COUNTY CLERK

All staff of the County Clerk including the Chief Deputy are included. The elected position of County Clerk is not included.

#### DATA PROCESSING AND COMMUNICATIONS

All staff including the director are included.

#### PERSONNEL (HUMAN RESOURCES)

All staff including the director are included.

#### BUILDING AND MAINTENANCE EMPLOYEES

All Building and Maintenance employees in the courthouse and other county buildings, including the director are included.

#### ROBSTOWN PARK, COUNTY LIBRARY, HILLTOP CENTER, SENIOR COMMUNITY SERVICES, ANIMAL CONTROL, SOLID WASTE, BEACH SERVICES AND BEACH CLEANING

All staff including the directors of each of these departments are included.

MEDICAL EXAMINER

All staff including the Medical Examiner (provided the medical examiner is a county employee and not a contracted employee) are included.

HUMAN SERVICES (WELFARE)

All employees including the director are included.

COUNTY AGRICULTURE EXTENSION

All clerical employees who draw their full compensation from Nueces County are included. The County Extension Agent is not included.

And further, I move that this motion does provide for the inclusion of employees or employee groups who might in the future be found eligible under the provisions of Local Government Code, or any other law, and who might not have been mentioned herein by this Department by Department presentation that I have just made. On the basis of what I have Just stated, I now propose my motion to this body for approval that it so be ordered:

*John Jordan*  
-----  
*May 29, 1992*

EXHIBIT "D"

*Order issued 7/14/92*

NUECES COUNTY CIVIL SERVICE COMMISSION ORDER:

Amendment to Civil Service Commission order of May 21, 1992, wherein the identification of county employees for inclusion in Civil Service was adopted and is herein amended in certain departments to read as follows: Specifically, this amendment applies to the following departments only:

LAW LIBRARY

All employees and staff are included. The Director is excluded.

PARK & RECREATION

All employees and staff are included. The Director is excluded.

ROAD DEPARTMENT, ENGINEERING, TULE LAKE LIFT BRIDGE

Except for the County Engineer and County Road Engineer, all road department employees, including supervisors; all engineering employees, including supervisors, as well as all employees of the Tule Lake Lift Bridge, are included. The County Engineer and County Road Engineer are excluded.

TAX ASSESSOR COLLECTOR

With the exception of the Chief Deputy and the Chief Accountant, all other staff members and deputies are included. The Chief Deputy and the Chief Accountant are excluded. The elected position of Tax Assessor-Collector is excluded.

DISTRICT CLERK AND CHILD SUPPORT

With the exception of the Chief Deputy and the Child Support Supervisor, all deputy district clerks, child support staff, including all supervisors, are included. The Chief Deputy and the Child Support Supervisor are excluded. The elected position of District Clerk is also excluded.

COUNTY CLERK

With the exception of the Chief Deputy and the Chief Accountant, all staff of the County Clerk are included. The elected position of County Clerk is excluded.

DATA PROCESSING AND COMMUNICATIONS

Except for the Director, all staff are included. The Director is excluded.

PERSONNEL (HUMAN RESOURCES)

Except for the Director, all staff are included. The Director is excluded.

BUILDING AND MAINTENANCE EMPLOYEES

Except for the Director, all Building and Maintenance employees in the courthouse and other county buildings are included. The Director is excluded.

ROBSTOWN PARK, COUNTY LIBRARY, HILLTOP CENTER, SENIOR COMMUNITY SERVICES, ANIMAL CONTROL, SOLID WASTE, BEACH SERVICES AND BEACH CLEANING

Excluding Directors, all other staff and employees of each of these departments are included. Where Directors exist for any of these departments, those Directors are excluded.

MEDICAL EXAMINER

Except for the Medical Examiner, all staff and employees are included. The Medical Examiner is excluded.

HUMAN SERVICES (WELFARE)

Except for the Director, all employees are included. The Director is excluded.

COMMISSIONER PRECINCT #3

Except for the Operations Manager, all employees including all supervisors are included. The Operations Manager is excluded. The Elected position of Commissioner Precinct #3 is excluded.

VETERANS SERVICE OFFICE

Except for the Director, all employees are included. The Director is excluded.

NUECES COUNTY CIVIL SERVICE COMMISSION ORDER

This amendment introduced by Mr. Rene Rodriguez, and seconded by Yolanda Olivarez, was passed and provides for amending the amendment introduced by Mr. John Jordan, both of which were acted upon during the session of June 17, 1992, and both of which were amendments to the original order of May 21, 1992, wherein the commission identified "employees eligible for participation in county civil service". Specifically, this amendment added to Mr. Jordan's proposal for exclusions, the additional exclusions as follows:

SHERIFF'S DEPARTMENT

The two top staff positions immediately under the Sheriff, which include the Chief Deputy Sheriff, and the Head Jail Administrator are excluded from Civil Service.

COUNTY ATTORNEY

The three top positions immediately under the elected County Attorney, which include the First Assistant, the Chief of the Civil Section, and the Chief of the Criminal Section.

CONSTABLES

The two top staff positions immediately under the elected Constable, which include the Chief Deputy Constable and the next lower position in the chain of responsibility within each respective constable office.

COUNTY COMMISSIONERS

In each County Commissioner precinct where the position of Operations Manager exists and is filled, that individual will be exempt from civil service.

In conclusion, this amendment was adopted with the following vote:

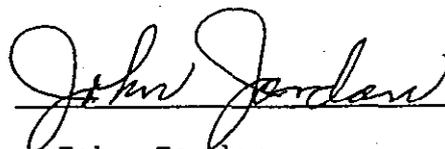
Rene Rodriguez voted ..... Yes.

Yolanda Olivarez voted ..... Yes.

John Jordan voted..... No.

Motion passed herewith.

Date 7-14-92

  
\_\_\_\_\_  
John Jordan  
Commission Chairman

**EXHIBIT "E"**

## CHAPTER VIII

### GRIEVANCE AND APPEALS

#### ELIGIBILITY TO FILE A GRIEVANCE OR APPEAL:

8.00 Under the "Powers of the Commission," as cited in Section 158.009 of the Texas Local Government Code, any civil service employee of the county who has completed his/her probationary period may file a grievance or appeal in matters of:

1. termination, demotion, or suspension, or
2. any violations or infractions of the Nueces County Civil Service Rules and Regulations.

By failure to initiate (according to Step 1 in Section 8.01) such a grievance within seven (7) calendar days, civil service employees waive all rights to exercise the grievance process for that action. All such appeals or grievances must be filed with the Civil Service Commission on an "Employee's Grievance Form" (NCF-4). These forms are available at the county Civil Service Office.

#### GRIEVANCE PROCEDURE:

8.01 a. Grievances, other than charges of discrimination due to race, sex, national origin, citizenship, age, religious preference, veterans status, physical handicap or sexual harassment, shall be processed in accordance with the following steps:

Step 1: The grievance shall be discussed verbally by the grieving employee with the employee's immediate supervisor within seven (7) calendar days of the event. It shall be the responsibility of the grievant to verbally notify the supervisor that this is the first step of a formal grievance. The immediate supervisor shall within five (5) calendar days orally submit an answer to the grieving employee or his/her representative.

Step 2: If the grievance is not settled after the preceding step has been followed, the grieving employee shall state the grievance in writing and submit same to his/her department head, or the department head's designee. This must be done within seven (7) calendar days after the receipt of the supervisor's oral answer to the stated grievance.

Within five (5) calendar days after receipt of the written grievance, the grieving employee's department head, or his/her designee, shall answer the grievance in writing to the grieving employee.

Step 3: If the grievance remains unresolved, the employee shall forward the grievance as originally written and the attached answer from the department head, or his/her designee, to the personnel office (in the case of non-civil service workers) or to the Civil

Service Commission (in the case of civil service workers), within seven (7) calendar days after receipt of the department head's, or his/her designee's, answer to the grievance.

The above steps must be taken in addition to any other response that may have been rendered under sub-paragraph 7.05c, or any other department level appeal procedure.

b. All complaints of discrimination by employees on the basis of race, sex, national origin, age, religious preference, physical handicap or sexual harassment shall be filed in writing with the Director of Personnel. Complaints that remain unresolved at the personnel department level shall be forwarded to the Civil Service Commission.

#### APPEAL TO THE CIVIL SERVICE COMMISSION:

8.02 a. Any employee under civil service who has completed the probationary period may, after following the grievance procedure set forth in Section 8.01, appeal to the Civil Service Commission for relief. This appeal (as defined in Step 3 of Section 8.01a) must occur within seven (7) calendar days after receiving the written order of the affected department head, or his/her designee, concerning that cause.

b. At the next meeting after the date of filing a written appeal with the Civil Service Commission, provided the written appeal has been on file for at least two weeks, the Commission shall commence the hearing thereof and shall provide due process as expeditiously as possible.

#### CONDUCT OF HEARING:

8.03 a. The appointing authority shall be entitled to appear personally, produce evidence, and have representation. The appointing authority's portion of the hearing shall be presented first.

b. The applicant shall be entitled to appear personally, produce evidence, have representation and a public hearing.

c. Administrative rules of evidence may be used in all orders, decisions, rules, and regulations of the Civil Service Commission and shall be valid.

#### INVESTIGATION:

8.04 The Commission shall have and exercise as necessary, the power to compel the attendance of witnesses and the production of records, books, and papers, and to administer oaths in matters relating employment as prescribed in Local Government Code section 158.009. In such cases, wherein compliance is not met by any agency, the Civil Service Commission shall subpoena any material, witness(es), or records relevant to the case.

With Amendments Through February 10, 1994

#### INSPECTION:

8.05 An employee who has appealed to the county personnel department, or to the Civil Service Commission, shall have the right to inspect any document in the possession of or under the control of the appointing authority which is relevant to such appeal and which would be admissible in evidence at a hearing on such appeal. The employee shall also have the right to interview other employees having knowledge of the acts or omissions upon which the removal, suspension, or reduction in rank or compensation was based. Interviews of other employees and inspection of documents shall be at times and places reasonable for the employee and the appointing authority.

#### AMENDMENT OF CHARGES:

8.06 At any time before the employee's appeal is submitted to the Civil Service Commission (Commissioners Court through the Personnel Director for non-civil service employees) for decision, the appointing authority may, with the consent of the Civil Service Commission or Commissioners Court as applicable, serve on the employee and file with said Commission or Court, an amended or supplemental statement of charges. If the amended or supplemental charges present new causes or allegations, the employee shall be afforded a reasonable opportunity to prepare his/her defense thereto, but he/she shall not be entitled to file a further answer unless the Commission or the hearing board or officer so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental charges may be made orally at the hearing.

#### FAILURE TO ANSWER:

8.07 a. Failure on the part of an accused employee to file an answer within the time allowed in Section 8.01 shall be construed as an admission of the truth of the charges made against him/her.

b. Failure on the part of management to answer within the time allowed in Section 8.01 will give the employee the right to progress to the next step of the grievance procedure.

#### MAXIMUM PERIOD OF SUSPENSION:

8.08 Any suspension invoked under this rule against any one employee of the county, whether with or without pay, or for one or more periods, shall not aggregate more than 90 calendar days in any one calendar year; provided, however, where the charge upon which a suspension is the subject of criminal complaint or indictment filed against such employee, the period of suspension may exceed 90 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgement of conviction or acquittal of the offense charged in the complaint or indictment has become final.

FINDING AND DECISION:

8.09 a. The finding and decision of the Commission shall be final, subject to the right of appeal under Chapter 158 of the Local Government Code and shall be certified to the appropriate appointing authority and shall forthwith be enforced and followed by same.

b. A County employee who, on a final decision by the Commission, is demoted, suspended, or removed from the employee's position may appeal the decision by filing a petition in a District Court in the County within 30 calendar days after the date of the decision.

RECORD FILED:

8.10 A copy of the order in writing, a copy of the answer, together with a copy of the finding and decision of the Civil Service Commission shall be filed as a public record in the office of the Commission.

TIME LIMITS OF THE GRIEVANCE AND/OR APPEAL PROCEDURES:

8.11 a. No matter shall be entertained as grievance hereunder unless it is raised as such within seven (7) calendar days after the occurrence of the event or after the employee becomes aware of the event giving rise to the grievance.

b. All time limits set forth in this procedure may be extended for good cause by mutual written consent of the aggrieved, the appointing authority, and the Director of Personnel. Without such written agreement, the time limits shall be strictly enforced. If the grieving party or parties fail to pursue the grievance within the time limits set forth, the grievance shall be considered resolved based upon the last answer given by supervisory representatives of the County. In cases where management failed to meet the time frame requirements, the employee will be entitled to remedy directly with the civil service commission whose decision will be final.

## MEMORANDUM BRIEF

### QUESTION PRESENTED:

Is a juvenile board authorized to enter into a memorandum of understanding with school districts which permits placement in a juvenile justice alternative education program of juveniles expelled from school but not adjudicated as delinquent pursuant to TEX. EDUC. CODE ANN. § 37.011(b) (Vernon Supp. 1996)?

### INTRODUCTION:

Chapter 37 of the Texas Education Code<sup>1</sup> was adopted by the Legislature in 1995 as a part of Senate Bill 1. The issues addressed in this brief are related to Subchapter A of Chapter 37, entitled "Alternative Settings For Behavior Management," consisting of §§ 37.001 - .019. The focus of this portion of the statute is the establishment of a cooperative effort between school districts, juvenile boards, juvenile probation departments, juvenile courts, and other governmental agencies and community organizations to provide appropriate educational opportunities to students whose behavior mandates their removal from the regular classroom environment. At the core of this effort is the school district's code of conduct, which must be jointly adopted by the school district and the juvenile board. In addition to establishing standards for student conduct, § 37.001(a) requires that the code of conduct:

- (1) specify the circumstances, in accordance with this subchapter, under which a student may be removed from a classroom, campus, or alternative education program;
- (2) outline the responsibilities of each juvenile board concerning the establishment and operation of a juvenile justice alternative education program under Section 37.011;
- (3) define the conditions on payments from the district to each juvenile board;
- (4) specify conditions that authorize or require a principal or other appropriate administrator to transfer a student to an alternative education program; and
- (5) outline conditions under which a student may be suspended as provided by Section 37.005 or expelled as provided by Section 37.007.

Two types of formal alternative programs are required: each school district must provide an Alternative Education Program ("AEP") and the juvenile board of a county with a population greater than 125,000 must develop a Juvenile Justice Alternative Education Program ("JJAEP"). Both programs must focus on English language arts, mathematics, science, history, and self-

---

<sup>1</sup> TEX. EDUC. CODE ANN. §§ 37.001 - .157 (Vernon Supp. 1996).

discipline. The JJAEP must operate at least seven hours per day, 180 days per year, but is not required to have certified teachers.<sup>2</sup>

Students in a regular classroom whose conduct repeatedly or seriously interferes with a teacher's ability to communicate with other students or the ability of their classmates to learn may be removed from class and placed in the AEP.<sup>3</sup> A student who engages in off-campus conduct punishable as a felony must be placed in an AEP. Additionally, any student who commits certain non-felony offenses on school property or while attending school-sponsored or school-related activities must be removed to an AEP.<sup>4</sup> More serious breaches of the law committed on school property or while attending school-sponsored or school-related activities result in mandatory expulsion under § 37.007(a).<sup>5</sup> Pursuant to § 37.007(b), a student may also be expelled for serious or persistent misbehavior while attending a district's AEP. Such misbehavior need not constitute a crime.

If a student has been expelled as prescribed by § 37.007 and a juvenile court subsequently determines that the offending act meets the definition of delinquent conduct under Title 3 of the Family Code, § 37.011(b) requires the court to order the student into the JJAEP.<sup>6</sup> TEX. FAM. CODE ANN. § 51.03(a) defines delinquent conduct as conduct, other than a traffic offense, punishable by imprisonment or confinement in jail; violation of a juvenile court order or of an order of a municipal court or justice court constituting contempt; or driving while intoxicated or under the influence of drugs.

We have requested that your office render an opinion concerning the ability of the Harris County Juvenile Board ("HCJB") to make agreements with school districts which would permit students to be placed in the JJAEP who do not meet the § 37.011 criteria. The following four

---

<sup>2</sup> TEX. EDUC. CODE ANN. §§ 37.011(f) and (g) (Vernon Supp. 1996).

<sup>3</sup> TEX. EDUC. CODE ANN. §§ 37.002(b) and (c) (Vernon Supp. 1996).

<sup>4</sup> TEX. EDUC. CODE ANN. § 37.006 (Vernon Supp. 1996). These offenses include assault or terroristic threat; non-felony drug offenses; certain offenses involving alcoholic beverages, abusable glue or aerosol paint, and volatile chemicals; and, public lewdness or indecent exposure. Additionally, whether at school or not, a student who engages in the offense of retaliation against any school employee must be placed in an AEP.

<sup>5</sup> These offenses are: possession or use of a firearm, illegal knife, club, or prohibited weapon; aggravated assault, sexual assault, or aggravated sexual assault; arson; murder; indecency with a child; aggravated kidnapping; and felonies involving drugs or alcohol. Mandatory expulsion also results from commission of any of the foregoing offenses off-campus when the act involves retaliation against a school employee.

<sup>6</sup> Section 37.011 of the Texas Education Code provides:

(b) If a student is found to have engaged in conduct described by Section 37.007 and the student is found by a juvenile court to have engaged in delinquent conduct under Title 3, Family Code, the juvenile court shall:

- (1) require the juvenile justice alternative education program in the county in which the conduct occurred to provide educational services to the student; and
- (2) order the student to attend the program from the date of adjudication.

categories of students not covered by the mandatory placement provisions of § 37.011(b) are at issue:

- (1) Students whose serious or persistent misbehavior warrants expulsion pursuant to § 37.007(b), although the student has not or could not be adjudicated as delinquent;
- (2) Those who are the subject of mandatory expulsion for committing offenses listed in § 37.007(a), (c), (d), or (f), but have yet to be found guilty of engaging in delinquent conduct by a juvenile court;
- (3) Students expelled for committing offenses listed in § 37.007(a), (c), (d), or (f), but who were found by the juvenile court to have committed a lesser offense; and
- (4) Those who have been expelled for committing offenses listed in § 37.007(a), (c), (d), or (f), but for whom no petition alleging delinquency is filed by the district attorney or for whom the petition has been withdrawn.

Under each of these scenarios, it is assumed that the juvenile court does not have the authority to order the involuntary attendance of a student in a JJAEP. This conclusion is based on a literal reading of § 37.011(b), which states that a student must be both expelled pursuant to § 37.007 and then be found delinquent before the court may order JJAEP attendance.<sup>7</sup> Chapter 37 contains no other discussion of the juvenile court's ability to order JJAEP attendance, nor does it provide any other specific mechanism by which a student is authorized to enter a JJAEP.

#### ARGUMENT FOR NOT ALLOWING JJAEP ATTENDANCE:

Most would agree that it is good public policy for these students to be placed in a school and given an education, rather than be left free to roam the streets. However, the issue is whether Chapter 37 grants the HCJB any legal authority to provide a school and to place students in its JJAEP who do not meet the criteria specified in §§ 37.007 and .011. If the statute said that the Board *shall* or *may* do so, it is clear that adequate authority would exist. It is apparent that Chapter 37 says neither. The division of powers between the three branches of government contained in Article 2 of the Texas Constitution, together with the vesting of legislative power in the House of Representatives and Senate contained in Article 3, prohibit agencies such as the HCJB from taking actions not authorized by the legislature. Of course, it is possible for the legislature to delegate quasi-legislative powers when accompanied by sufficiently definite standards or limitations. However, Chapter 37 contains no such guidance.

---

<sup>7</sup> There is disagreement on this issue. For example, the *Guide to Chapter 37 Discipline, Law and Order*, dated November 10, 1995, jointly published by the Texas Education Agency, Texas Juvenile Probation Commission, and Texas Youth Commission, at pages 23 and 24, concludes that a delinquency adjudication is not necessary if the court finds the student has engaged in conduct indicating a need for supervision. These agencies have concluded that the court would have the discretion to order attendance. On the other hand, Steve Bickerstaff's analysis on behalf of The Conference of Urban Counties, entitled *Recommendations for Implementation of Juvenile Justice Alternative Education Programs*, revised as of December 19, 1995, recommends that absent a court order meeting the § 37.011(b) criteria, that students be placed in a JJAEP only by consent.

The case of *Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 231 (Tex. App. - Houston 1992, writ denied), contains the following excellent summary of the rules to be applied in analyzing statutes such as this:

Several general principles guide our statutory construction effort. First, we diligently attempt to ascertain and advance the legislative intent. TEX. GOV'T CODE ANN. § 312.005 (Vernon 1988). Second, we liberally construe the Revised Statutes to achieve their purposes and promote justice. *Id.* § 312.006. Third, where the language of a statute is unambiguous, we give effect to the statute according to its terms. *Mathews Constr. Co. v. Jasper Housing Constr. Co.*, 528 S.W.2d 323, 326 (Tex.Civ.App. - Beaumont 1975, writ ref'd n.r.e.). Fourth, we will not adopt a construction that would render a law or provision absurd or meaningless. *City of Deer Park v. State ex rel. Shell Oil Co.*, 259 S.W.2d 284, 287 (Tex.Civ.App. - Waco 1953), *aff'd*, 154 Tex. 174, 275 S.W.2d 77 (1954). Fifth, an express listing of certain persons, things, consequences, or classes is equivalent to an express exclusion of all others. *Lenhard v. Butler*, 745 S.W.2d 101, 105 (Tex.App. - Fort Worth 1988, writ denied); see *McCalla v. State Farm Mut. Auto Ins. Co.*, 704 S.W.2d 518, 519 (Tex.App. - Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Those portions of Chapter 37 dealing with the JJAEP are not ambiguous. Section 37.011(b) clearly requires the juvenile court to order JJAEP attendance for students found to have engaged in § 37.007 conduct and to be delinquent. The statute mentions no other class of students who should be placed in the JJAEP. This express listing of those who must attend the JJAEP is the equivalent of the express exclusion of all others.

Administrative agencies have no inherent authority and their implied powers are limited to "those necessary to implement or perform powers and duties which are explicitly granted by statute." *Denton County Electric Cooperative v. Public Utility Comm'n*, 818 S.W.2d 490, 492 (Tex.App. - Texarkana 1991, writ denied). The juvenile board's construction of its authority cannot control over the clear terms of the statute, nor can such construction "arrogate to the agency express powers which the statute clearly does not grant, and in fact impliedly withholds." *Id.* at 493.

Based on the foregoing analysis, it appears that Chapter 37 does not expressly authorize the HCJB to offer JJAEP attendance to any class of student other than those specifically identified in the statute.

#### ARGUMENT FOR ALLOWING JJAEP ATTENDANCE:

Another way to state the issue is whether or not the § 37.011(b) procedure was intended by the legislature to be the exclusive means of JJAEP placement. An affirmative answer to this question seems inconsistent with the legislature's overall approach. Under the first scenario, a student assigned to an AEP could be expelled for persistent misbehavior based on repeated

incidents of insubordination or disruptive conduct, none of which constitute a crime. This student would not meet the delinquency requirement of § 37.011(b), thus precluding attendance at a JJAEP or any school-sponsored program. This student would be left without educational opportunities, while others who were expelled for serious criminal conduct would benefit from JJAEP attendance. It is difficult to believe that the drafters of Chapter 37 intended such a result.

The situation regarding the other three classes of students is equally compelling. Scenarios 2, 3, and 4 cover students who have been lawfully expelled following an administrative hearing conducted by the school district, which resulted in the determination that the students engaged in serious criminal conduct. Pursuant to § 37.009(f), this hearing must be conducted in a manner which affords the due process protections guaranteed by the federal constitution.

Scenario 2 involves the often lengthy time between expulsion by the school and adjudication by the court. A student could easily be out of school for several weeks, if not several months, in this preadjudication period. The ultimate irony is achieved in scenarios 3 and 4, when a student has been expelled, but is convicted of a lesser offense or not convicted at all. If the JJAEP is not available to these students, they will be denied an educational opportunity because they were not convicted of the charged offense. Had they been convicted, the juvenile court would be obligated to order JJAEP attendance. The legislature could not have intended this absurd result.

The statute clearly grants considerable latitude to school districts and the juvenile board in crafting a code of conduct, including the ability to establish standards of conduct, set rules for removal from the classroom or from the AEP, assign responsibilities relative to the operation of the JJAEP, and outline the conditions for suspension or expulsion.<sup>8</sup> Moreover, Chapter 37 places severe limitations on the ability of juvenile courts to order certain actions as a condition of probation unless the school district and the juvenile board have entered into a memorandum of understanding concerning the juvenile probation department's responsibilities regarding students in the AEP.<sup>9</sup> Undoubtedly the provisions related to the juvenile probation department would be a part of the overall agreement between the juvenile board and the school district. It seems apparent that the legislature's intent was not only to authorize, but also to encourage school districts and juvenile boards to craft their own rules within the overall framework provided by Chapter 37. This authority would include the ability to provide for placement of students in the JJAEP other than by court order.

The express listing of the class of students which must be ordered into the JJAEP by a juvenile court is equivalent to an express exclusion of all others. That is to say, the juvenile court cannot order JJAEP attendance for a student who does not meet the statutory criteria. This in no way limits the ability of the HCJB to contract with school districts to offer JJAEP

---

<sup>8</sup> TEX. EDUC. CODE ANN. § 37.001(a) (Vernon Supp. 1996).

<sup>9</sup> TEX. EDUC. CODE ANN. § 37.010 (Vernon Supp. 1996) requires such an agreement as a prerequisite to the court's ability to order a student expelled under § 37.007 to attend regular school classes or an AEP as a condition of probation.

attendance as an option to expulsion. Additional protection is provided by requiring parental consent for JJAEP placement other than by court order.

It was the clear intention of the legislature in creating the JJAEP that expelled students continue to have access to some form of education. Chapter 37 contains adequate authority for the HCJB and the school districts to agree to provide JJAEP referral as an option under the described circumstances.