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**RQ-105**

January 27, 1998

Honorable Dan Morales  
Attorney General of Texas  
Legal Opinion Division  
P.O. Box 12548-2548  
Attention: John Fuller, Assistant Attorney General  
Austin, Texas 78711

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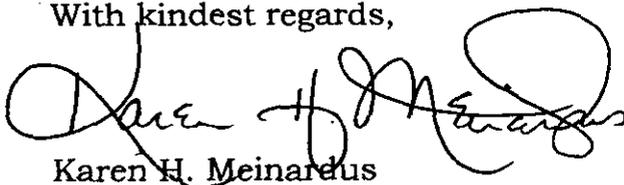
Dear Mr. Fuller:

On behalf of Wharton County, I have been requested to seek an Attorney General's Opinion regarding an appointed Constable Position. Because of the somewhat complicated fact scenario, I have attached the fact section prior to and within the legal brief.

Due to time being of the essence, I request that your immediate attention be given to the rendering of an expedited legal opinion on this matter.

Should you have any immediate questions or concerns, I trust that you will call me.

With kindest regards,



Karen H. Meinardus

enclosure

### Facts

On December 19, 1997, following their acceptance of resignation from the current Constable, the Commissioners Court voted unanimously to appoint an El Campo Police Officer as the Constable of Precinct 4. He was scheduled to be sworn into office on January 1, 1998 (to complete his employment with the City of El Campo through December 31, 1997). On December 20, 1997, while carrying out his official duties as a Police Officer of El Campo, he was accused of sexual assault of a woman to whom he was giving courtesy transportation from the local hospital. That next week the officer resigned from the El Campo Police Department.

This office determined that the Commissioners Court did not have proper authority to rescind their appointment or to remove the officer from his appointed position. (See attached Brief).

He was sworn in as Constable of Precinct 4 of Wharton County on January 1, 1998.

He is the **only** candidate for either political party for the office of Constable, Precinct 4 in the upcoming primary election.

On January 22, 1998, the Wharton County Grand Jury returned an indictment charging him with Sexual Assault. No date has been set for the criminal trial on this matter.

My request for legal opinion relate only to the applicability of the civil removal statutes.

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### Questions

1. § 87.001 of the **Texas Local Government Code** provides that "an officer may not be removed under this chapter for an act the officer committed before **election** to office."

The officer is accused of committing sexual assault **after** being appointed to office but **prior** to being sworn in. Would § 87.001 be controlling in this instance? If so, would the controlling date be related to acts which occurred prior to being appointed or prior to being sworn in?

2. The Constable, even though an indictment has been returned against him, is the **only** candidate for Constable of Precinct 4 of Wharton County. If he is elected to office (and since there are no other candidates, he most likely will be), will this office be precluded from bringing a removal action for those acts which occurred prior to the primary election?
3. I realize that if a final conviction occurs, that removal will be automatic, but there remains this issue of whether this office can even go forward with any type of Petition for Removal. Since the acts are alleged to have occurred while an El Campo Police Officer, not while in the official capacity of County Constable, does the County have standing to bring an action for removal of the Constable from the County office?

### **Legal Brief**

Prior to the Constable being sworn in, I found no authority, either statutory, constitutional or at common law, for Commissioner's Court to rescind the appointment of the Constable. It is well established that County Commissioners Court have limited authority to act and "the legal basis for any action taken must be grounded ultimately in the Constitution or statutes." **Guynes v. Galveston County**, 861 S.W.2d 861, 863 (1963).

**Article 5, §24** of the **Texas Constitution** provides that constables, among other county officer, may be removed from office by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon cause being set forth in writing and a finding of its truth by a jury. This specific constitutional provision has been previously interpreted by Attorney General Morales to mean that county officers may be removed from office only by a district judge **after** a jury trial. Tex. Atty. Gen. Opin. DM-114 (1992). Further, "when an officer (such as constable has a set term, as opposed to served at the pleasure of the appointing authority, the officer is not subject to removal at the will of the appointing authority (here, the Commissioners Court) (Citations omitted) Where a valid statute

prescribes the removal method for a county officer, that method is deemed exclusive. *Id.* citing State ex re. Kelly v. Baker, 580 S.W.2d 611, 614 (Tex. Civ. App.-Amarillo 1979, no writ); State ex rel Downs v. Harney, 164 S.W.2d 55 (Tex. Civ. App.- San Antonio 1942, writ ref'd w.o.m.); see also Garcia v. Laughlin 283 S.W.2d 191 (Tex. 1955).

**§ D of Chapter 87 of the Texas Local Government Code** prescribes the vacancies which may be filled by the Commissioners Court of a county, the manner in which a vacancy is to be filled and the term of office for the person appointed. No provision is included for rescinding appointments made under its provisions. Under these provisions it should be noted that allegations of misconduct, even criminal misconduct, are insufficient to form the basis for filing of a petition for removal of a county officer if the alleged misconduct does not relate to the officer's performance of his or her official duties. (In this case, the alleged misconduct relates to the officer's performance of duties as an El Campo Police Officer prior to his being sworn in as a County Constable).

Sections 87.015-87.019 provide the procedure for removal by jury trial. These provisions clearly prescribe the manner in which a county officer may be removed or suspended from office, and under the above referenced authorities these methods would likely be deemed to be exclusive by the court.

Section 87.001 of the **Texas Local Government Code** specifically provides that an officer may not be removed from office for an act the officer committed prior to election to office. Although the express language of this provision addresses acts taken prior to election to office, the question remains as to whether the language of this provision addresses acts taken prior to appointment to office.

The statutory exception to the foregoing prohibition against removal for prior acts, of course, are addressed within the provisions of Section 87.031 of the **Texas Local Government Code**, which provides for the **immediate** removal of a county officer convicted of a felony or a misdemeanor involving official misconduct.

The District Judge may also stay any civil proceedings for removal during the pendency of criminal action.