



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 29, 2019

The Honorable Jaime Esparza
District Attorney
34th Judicial District
El Paso County Courthouse, 2nd Floor
500 East San Antonio Street
El Paso, Texas 79901-2420

Opinion No. KP-0248

Re: Whether the repeal of 40 U.S.C. § 318 affects the authority the Legislature granted to Federal Protective Service officers under article 2.122(b) of the Texas Code of Criminal Procedure (RQ-0254-KP)

Dear Mr. Esparza:

You ask whether Congress's repeal of 40 U.S.C. § 318 affects the authority the Legislature granted to Federal Protective Service officers under article 2.122(b) of the Texas Code of Criminal Procedure.¹ The Federal Protective Service ("the Service") provides physical security and law enforcement services for all federal property owned or occupied by the federal government and persons on the property. See 40 U.S.C. § 1315(a), (b)(1) (stating that the Secretary of the Department of Homeland Security may appoint employees of the Service to protect federal government property); see also *United States v. House*, 684 F.3d 1173, 1184 (11th Cir. 2012) ("The Federal Protective Service is a law enforcement agency with jurisdiction over properties owned and operated by the General Services Administration . . ."). Article 2.122 of the Texas Code of Criminal Procedure grants specified federal officers and special agents limited enforcement authority under Texas law. TEX. CODE CRIM. PROC. art. 2.122. Subsection (b) grants certain personnel of the Service the powers of arrest and search and seizure:

A person designated as a special policeman by the Federal Protective Services division of the General Services Administration under 40 U.S.C. Section 318 or 318d is not a peace officer but has the powers of arrest and search and seizure as to any offense under the laws of this state.

Id. art. 2.122(b). You inform us that, following changes in federal law that repealed 40 U.S.C. §§ 318 and 318d, some question whether the designated Service personnel still possess arrest and search and seizure authority under article 2.122(b) of the Code of Criminal Procedure. Request Letter at 1.

¹See Letter from Honorable Jaime Esparza, Dist. Att'y, 34th Judicial Dist., to Honorable Ken Paxton, Tex. Att'y Gen. at 2 (Oct. 26, 2018) ("Request Letter"), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs>.

The Texas Supreme Court explains the rules for construing a statute that incorporates another statute by reference when the referenced statute subsequently is repealed, amended, or otherwise changed:

When one statute references another statute, one must look to the referenced statute to understand the referencing statute. This becomes problematic when the Legislature repeals or modifies the referenced statute; different rules of construction apply when the referenced statute is repealed as opposed to when it is amended or revised. When the referenced statute is *repealed*, the meaning and scope of the referencing statute do not change, absent clear legislative intent to the contrary. On the other hand, when the referenced statute is *amended* or *revised*, the referencing statute incorporates the amendments or revisions.

In re R.J.J., 959 S.W.2d 185, 186 (Tex. 1998) (citations omitted). As section 311.027 of the Code Construction Act instructs, “[u]nless expressly provided otherwise, a reference to any portion of a statute or rule applies to all reenactments, revisions, or amendments of the statute or rule.” TEX. GOV’T CODE § 311.027.

Courts generally construe a statute that incorporates another statute by reference as incorporating the language of the referenced statute. *See Kahn v. Harris, Upham & Co.*, 253 S.W.2d 647, 650 (Tex. 1952) (“A statute can incorporate by reference other legislation if the Legislature so intended, but when it does so it is generally considered as a borrowing of ‘outside’ language.”). Moreover, courts avoid a construction that renders a statute meaningless. *See Harris Cty. Dist. Attorney’s Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991). For example, in *J.T.S.*, the court considered the meaning of an expunction statute that referred to court-ordered supervision under article 42.13 of the Code of Criminal Procedure. *Id.* at 573. However, the Legislature had repealed article 42.13 and amended article 42.12 to consolidate provisions concerning court-ordered supervision. *Id.* To give the expunction statute some meaning, the court concluded that the statute’s reference to repealed article 42.13 must be construed as referring to the amended article 42.12. *Id.* at 574. Similarly, in *Garcia v. State*, the court considered a statutory reference to another statute that had been repealed as part of revision and codification. 112 S.W.3d 839, 845 & n.2 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Relying on section 311.027 of the Code Construction Act, the court held that the statute referring to the repealed statute must be construed as referring to the replacement statute. *Id.* at 847. Thus, we must examine Congress’s statutory changes with respect to the Service’s authority granted in 40 U.S.C. § 318 after the enactment of article 2.122(b) of the Texas Code of Criminal Procedure.

In 1993, when the Texas Legislature enacted article 2.122(b), 40 U.S.C. § 318 provided for the administrator of the General Services Administration (the “Administrator”) to appoint persons as “special policemen” to enforce laws for protection of buildings and areas owned or occupied by the United States and under the control of the Administrator and persons on such property. *See* Pub. L. No. 100-678, § 8(a)–(b), 102 Stat. 4049 (1988); *see also* Act of May 29, 1993, 73d Leg., R.S., ch. 927, § 1, 1993 Tex. Gen. Laws 3942, 3942 (codified as TEX. CODE CRIM. PROC. art. 2.122(b)). In 2002, Congress enacted a nonsubstantive recodification of title 40 of the

United States Code, repealing 40 U.S.C. §§ 318–318d and effectively replacing those statutes with 40 U.S.C. § 1315. *See* Pub. L. No. 107-217, 116 Stat. 1140 (2002). Subsequently, Congress enacted the Homeland Security Act (the “Act”), which transferred to the Secretary of the Department of Homeland Security “the functions, personnel, assets, and liabilities of . . . the Federal Protective Service of the General Services Administration, including the functions of the Administrator of General Services relating thereto.” Pub. L. No. 107-296, § 403(3), 116 Stat. 2178 (2002); 6 U.S.C. § 203; 40 U.S.C. § 1315. The Act also revised section 1315 to change the designation of the Service’s law enforcement officers from “special police” to “officers and agents.” *See* 40 U.S.C. § 1315(a), (b).

Thus, while Congress transferred the supervision and appointment of officers of the Service from the General Services Administration to the Department of Homeland Security, and changed the officer’s statutory title, the officers’ function of protecting property of the federal government remains the same. Congress revised the law enforcement authority of the Service set out in 40 U.S.C. §§ 318 and 318d, but did not repeal it outright. If article 2.122(b) does not refer to the replacement codification of the Service’s authority, then the article becomes meaningless. While it is an issue of first impression, a court would likely determine that 40 U.S.C. § 1315 constitutes a revision or amendment of 40 U.S.C. §§ 318 and 318d for purposes of Texas law. Under section 311.027 of the Government Code, the reference in article 2.122(b) to the repealed statutes must be construed as a reference to their replacement. Accordingly, a court would likely conclude that the authority granted by article 2.122(b) of the Texas Code of Criminal Procedure to special policemen of the Service applies to officers and agents of the Service appointed under 40 U.S.C. § 1315.

S U M M A R Y

A court would likely conclude that the law enforcement authority granted by article 2.122(b) of the Texas Code of Criminal Procedure applies to officers and agents of the Federal Protective Service appointed under 40 U.S.C. § 1315.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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