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DALLAS, TEXAS

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The Honorable John Cornyn  
Attorney General of Texas  
Office of the Attorney General  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, TX 78711-2548

*Certified Mail # Z 579 879 138*  
Return Receipt Requested

Re: Request for an opinion on the interpretation of certain statutory provisions governing civil service employees and governing a constable's authority to select his own staff.

Dear Attorney General Cornyn:

The Dallas County Commissioner's Court has asked this office to forward to you for opinion certain questions it has regarding the legal significance of the difference between the failure of a constable to re-swear deputies and termination or dismissal of an employee. Specifically, this office asks whether under Texas law, expiration of term of office of a deputy constable and a subsequent failure to re-swear is distinguishable from an act of termination, and therefore lies outside the coverage of civil service grievance procedures?

**BACKGROUND**

A newly elected Constable in Dallas County, decided not to re-swear several deputies of the former Constable on January 1, 2001. The former deputy constables filed civil service grievances with Dallas County protesting the new constable's decision. The Dallas County Civil Service Commission determined that the failure to rehire did not constitute a grievable action. Dallas County's position is that expiration of term of office and a subsequent failure to re-swear is distinguishable from an act of termination, and therefore lies outside the coverage of civil service grievance procedures created by the County pursuant to Chapter 158 of the Texas Local Government Code.

**BRIEF**

**Texas Case Law**

Section 86.011 of the Texas Local Government Code (Appointment of Deputy Constable) states in subsection (b) that each deputy constable must qualify in the manner provided for deputy

sheriffs. Under Section 85.003 of the Texas Local Government Code (Deputies), the appointment of a deputy sheriff must be in writing. Also, a person appointed as a deputy sheriff, before beginning to perform the duties of office, must take and subscribe the official oath. Since deputy constables must qualify in the same manner as deputy sheriffs, we view the Texas case law on deputy sheriffs as instructive for our legal analysis of deputy constables.

In *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex.App.–Austin 1997, writ denied), the court held that under Texas law, deputy sheriffs' terms as deputies expire automatically when their sheriff's tenure of office **expires** on December 31 of the given year. The employment term expires at the end of the sheriff's tenure for all employees of the sheriff's office, not just deputies. *Abbott* 946 S.W.2d at 517. Therefore, failure to rehire by a new sheriff does not constitute a "**dismissal**" under a personnel policy. *Id.* at 518.

In *El Paso County Sheriff's Deputies' Ass'n v. Samaniego*, 802 S.W.2d 727, 728 (Tex.App.–El Paso 1990, writ denied), the court held that under Texas law, deputy sheriffs' terms as deputies expire automatically when their sheriff's tenure of office expires. Expire and terminate have different meanings. *Samaniego*, 802 S.W.2d at 728. **Expire** means something has run its course, while **terminate** contemplates some positive interference. *Id.* Failure to re-deputize deputy sheriffs does not constitute "termination" under a collective bargaining agreement providing for grievance procedures in the event of termination. *Id.* at 728-729. Terms expire without any wrongdoing by a deputy, they occur due to passage of time, without any action by the sheriff. *Id.* Also, in *Arrington v. County of Dallas*, 792 S.W.2d 468, 471 (Tex.App.–Dallas 1990, writ denied), the Dallas Court of Appeals held that the term of deputy constables, as that of deputy sheriffs, expires when the principal's term expires. (citing *El Paso County v. Hill*, 754 S.W.2d 267, 268 (Tex.App.–El Paso 1988, writ denied)).

### **Federal Case Law**

In *Brady v. Fort Bend County*, 145 F.3d 691, 697 (5<sup>th</sup> Cir. 1998), the Fifth Circuit held that under Texas law, deputy sheriffs' terms as deputies expire automatically when their sheriff's tenure of office expires on December 31 of the given year. (citing *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex.App.–Austin 1997, writ denied); *El Paso County Sheriff's Deputies' Ass'n v. Samaniego*, 802 S.W.2d 727, 728 (Tex.App.–El Paso 1990, writ denied)).

Although no First Amendment rights violations have been alleged against the Dallas County constable at issue, in *Warnock v. Pecos County*, 116 F.3d 776, 779 n. 1 (5<sup>th</sup> Cir. 1997), the Court explained that there is no difference in failure to hire versus discharge when the court does an analysis of whether a deputy has been impermissibly terminated for exercising First Amendment rights. *See also*, *Pierce v. Texas Dept. of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5<sup>th</sup> Cir. 1994) (Under First Amendment analysis, adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands). In our opinion, the First Amendment cases are inapplicable because the deputy constables in the instant case have not suffered reprisals for exercising rights of free speech or freedom of association which would trigger

the First Amendment analysis. Therefore, the traditional view that expiration of term does not constitute termination would still apply.

### **Chapter 158 of Texas Local Government Code**

Subchapter A of Chapter 158 of the Local Government Code has been viewed as providing a basis for deputy constables to be covered under the civil service system in Dallas County. Section 158.010 (Employment by Departments), states in subsection (d) that "This Section does not affect the status of any person who is an employee of a department under a county civil service system on the date the head of the department assumes responsibility for selecting persons who are to be employees of that department." This particular subsection is somewhat unclear. Does Section 158.010 (d) mean that all employees that are deputy constables under a former constable must also be sworn in as deputies under the newly elected constable? Or does Section 158.010 (d) mean that all employees selected by a newly elected constable under Section 158.010 (a) retain their civil service rights and do not have to "start over" in the accumulation of time under the other subsections of 158.010?

Our position is that, there is a sequential orderliness to the subsections of Section 158.010. In the first paragraph, the constable can select his staff. In the second paragraph, the newcomers have a probationary period. In the third paragraph, the long term employees enjoy permanent status. In the fourth paragraph, the employees are told that they do not have to start the process all over. It does not guarantee a job or bind an elected official to all the staff previously in place. In fact, the paragraph (d) points back and is subject to the authority in the first paragraph (a) for "selecting all persons to be employees."

The opposing interpretation negates the meaning of paragraph (a) and takes away the power of the constable to select his staff. There is no selection done by him; it was all done for him and before he got elected. The opposing interpretation negates all the language in cases that speak about the term of office of the deputy as being "coincident with the term of office of the sheriff or constable". Such language becomes superfluous if the "term of office" means nothing and there is no lapse or expiration.

The opposing interpretation also renders the requirement under the Local Government Code a nullity that the constable must select the person in writing and then swear them into office. If they have to be sworn in anyway, then this does not apply to existing staff in a civil service county. In short, the constable is relegated to performing a ministerial duty of swearing them in rather than enjoying the privilege of selecting his staff. Such an interpretation is not supported by the policy in numerous Texas cases of the right of the constable to select his staff. Arguably, that right is abridged if not abrogated if the constable is bound to "select" all of the previous staff and his "appointment" and "oath" are little more than a rubber stamp of the entire work of his predecessor. We contend that the civil service right accrues the moment that the constable selects his staff and that no one has to "start over" in their accrual of time and seniority under section 158.010 if they were previously employed.

### Attorney General Opinions

The deputy constables that were not re-sworn by the Dallas County constable, vigorously cite to Texas Attorney General Opinion LO-97-016 (1997), and the legislative history quoted therein, for the proposition that deputy constables may be defined as employees under a county civil service system created pursuant to Subchapter A of Chapter 158 of the Texas Local Government Code. We agree that Dallas County has in fact defined employees to include deputy constables in its civil service system, pursuant to Dallas County Court Order 90-1567, dated September 18, 1990.

However, in Attorney General Opinion JC-0334, dated January 22, 2001, the Attorney General emphasizes, that Subchapter A of Chapter 158 of the Local Government Code “does not set out procedures applicable to dismissal of civil service county employees or to disciplinary action against them.” This AG Opinion clarifies that pursuant to Section 158.008 of the Local Government Code, if a civil service system is created under this subchapter, the Commissioners court must appoint a civil service commission to administer the system. Pursuant to Section 158.009, this civil service commission must adopt, publish and enforce rules regarding: definitions of county employees; selection and classification of employees; competitive examinations; promotions, seniority and tenure; layoffs and dismissals; disciplinary actions; grievance procedures; and other matters relating to employees' selection, rights, advancement, benefits and working conditions.

### Dallas County Personnel/ Employment Policy

The scope of grievance appeal procedures is provided for in Section 12.02 of the Dallas County Policy, June 1999 Revision. Section 12.02 indicates that a personal grievance may be filed by an employee on one or more of the following grounds:

- A) improper application of rules regulations and procedures;
- B) unfair treatment, including coercion, restraint or reprisal;
- C) discrimination because of race, religion, color, creed, gender, age, national origin, disability or political affiliation;
- D) disciplinary actions taken against him/her without proper cause;
- E) improper application of fringe benefits or improper working conditions;
- F) demotion, suspension, or dismissal.

The *Abbott v. Pollock*, case cited above states that failure to rehire by a new sheriff does not constitute a “dismissal” under a personnel policy. The *El Paso County Sheriff's Deputies' Ass'n v. Samaniego* case cited above explains that failure to re-deputize deputy sheriffs does not constitute “termination” under a collective bargaining agreement providing for grievance procedures in the event of termination. Similarly, in our situation, failure to rehire or re-deputize by a new Constable would not constitute demotion, suspension or dismissal under Section 12.02 of the Dallas County policy on grievance procedures. In the absence of express language in the Dallas County employment and personnel policy regarding expiration of terms of office, the failure to re-swear deputies is not subject to a grievance. Therefore it is our opinion that there should not be a grievance

hearing for the former deputy constables based on grounds that they were demoted, suspended or dismissed.

### CONCLUSION

Section 86.011 of the Local Government Code provides that deputy constables must qualify in the manner provided for deputy sheriffs. Unlike most other county employees, deputy constables and deputy sheriffs are armed peace officers. Texas case law has clearly held that after the expiration of a term of office, these peace officers must be re-sworn by a new constable or sheriff to become appointees of that elected official. We have not found a Texas case or a federal case from the Fifth Circuit Court of Appeals that directly addresses the employment of deputy constables under Chapter 158 of the Texas Local Government Code. We have not found a case that supports the contention that Section 158.010 of the Code means that under a Chapter 158 civil service system, a newly elected constable may be compelled by a Commissioner's Court to re-swear all of the deputy constables appointed by the former constable. If constables are required to re-hire persons that they may not trust or have confidence in, to the most sensitive positions on their staff, it would be a very large departure from the traditional interpretation of Texas law regarding both sheriffs and constables and the expiration of their terms of office. It is our position that failure to re-deputize a deputy constable at the expiration of a term of office does not constitute "termination" nor does it constitute "dismissal" under a personnel policy.

Respectfully submitted,



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