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August 5, 2004

RQ-0257-GA

The Hon. Greg Abbott,
Attorney General of Texas
c/o Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # NL-43872-04
I.D. # 43872

Re: Request for Letter Opinion

Dear General Abbott:

We are requesting an Attorney General's Letter Opinion with regard to the following question:

Does a person elected to the office of County Sheriff in succession to a person who was appointed to fill a vacancy in office take office immediately after the General Election returns are canvassed in November, or when the next regular term begins on January 1?

The elected Williamson County Sheriff resigned in January of this year and was replaced by appointment of Commissioners Court. The current Sheriff is not a candidate in the November General Election for the 2005-2008 regular term; another candidate is running unopposed. Some supporters of the candidate insist that he should take office as soon as the election results are official, while some supporters of the current Sheriff insist with equal vehemence that he should retain office until January 1. We believe that a Letter Opinion from your office as an outside neutral party will settle this controversy and resolve the anxieties of Sheriff's Office employees who are uncertain about their future.

Although the parties will be looking to your decision, Texas law requires me to submit a proposed opinion for your consideration. I believe that the relevant provisions of the Texas Constitution and statutes are as follows:

- Constitution Art. 5, § 23: "There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, ... and vacancies in whose office shall be filled by the Commissioners Court until the next general election."

- Constitution Art. 16, § 17: “All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.”
- Local Government Code § 87.041: “The person appointed by the commissioners court to fill the vacancy shall hold office until the next general election.”
- Government Code § 601.003(a): “The regular term of an elective ... county ... office begins on January 1 of the year following the general election for state and county officers.”
- Government Code § 601.003(b): “A person elected to a regular term of office shall qualify and assume the duties of the office on, or as soon as possible after, January 1 of the year following the person’s election.”

I believe that there is controlling case law on this question.

- *Ex Parte Sanders*, 147 Tex. 248, 215 S.W.2d 325 (1949). In this case, an incumbent judge had died shortly before the primary election and someone was appointed to fill out his term. After the general election, the successful candidate Sanders went into the courtroom and asserted his right to eject the appointed judge. The Texas Supreme Court upheld Sanders’ resulting contempt conviction, saying that he was not entitled to take office until he had duly qualified. The Constitution sets the term of an elected judge as (at that time) two years, and the predecessor to Govt. Code § 601.003 set the beginning of that term as no sooner than January 1. Therefore, Sanders had been elected only to a term beginning on January 1, 1949, and ending on December 31, 1950; he could not extend his term in office by almost two months through taking office on November 9, 1948. Even though the incumbent judge was appointed to “hold office until the next general election,” under Const. Art. 16, § 17, he held over until his successor had duly qualified, and Sanders could not “qualify and assume the duties of the office” until his term began in January.
- *Stockwell v. Parr*, 319 S.W.2d 779, 783 (Tex.Civ.App.—San Antonio 1958; writ dismissed as moot, 159 Tex. 440, 322 S.W.2d 615 [1959]). This case arose from a dispute over who should be Sheriff of Duval County after George F. Parr had been disqualified and a former sheriff appointed to fill the vacancy. Parr obtained a District Court order invalidating the appointment and allowing him to take office; the incumbent appealed. The Court of Appeals held for the incumbent Sheriff (and the County Clerk who had been appointed under the same circumstances). “Moreover, inasmuch as the Commissioners’ Court on January 1, 1957, appointed J. P. Stockwell to fill the vacancy in the office of Sheriff of Duval County, Texas, and Rafael Garcia to fill the vacancy in the office of County Clerk of said county, and these appointees have duly qualified as such officers, and have been and are now in possession of and performing the duties of said offices, they

are, at least, de facto officers and entitled to an injunction to restrain any interference with their possession of the offices during the tenure of their appointment. *Callaghan v. McGown*, Tex.Civ.App., 90 S.W. 319, writ refused; *Callaghan v. Tobin*, 40 Tex.Civ.App. 441, 90 S.W. 328, writ refused; *Callaghan v. Irvin*, 40 Tex.Civ.App. 453, 90 S.W. 335, writ refused. Inasmuch as the appointment of appellants J. P. Stockwell and Rafael Garcia could only extend to the next General Election (Constitution, Art. 5, Secs. 20 and 23), their right to hold the respective offices will expire on January 1, 1959. *Ex parte Sanders*, 147 Tex. 248, 215 S.W.2d 325.”

- *Rice v. English*, 742 S.W.2d 439 (Tex. App.—Tyler 1987, writ denied). This case, while not exactly on point, is illustrative. It involved a Houston County commissioner who died just before he won the 1986 general election. The court held that the person appointed to fill the vacancy on November 13, 1986, was entitled to serve until a successor qualified, in this case after the next general election in 1988. The fact that the current unexpired term ended on January 1, 1987, did not matter because the constitution and laws provide that an appointed officer serves until his successor can lawfully qualify.

There also seem to be at least seven relevant prior Attorney General's Opinions on this point, and one by the Secretary of State's Election Division:

- OP. ATTY. GEN. 1942, No. O-4994. The Wilbarger County Judge died and was replaced by the Commissioners Court, but another man won the Executive Committee nomination and was elected unopposed. The question was asked when the judge-elect should take office, and the Attorney General concluded that the appointed judge was entitled to serve past the November general election until the judge-elect took office when the regular term began on January 1.
- OP. ATTY. GEN. 1970, No. M-742. This Opinion addressed precisely the same question and fact situation as the current request. An appointed Justice of the Peace in Bexar County had been defeated in the primary election and the nominee won the general election as an unopposed candidate. The question was asked whether the incumbent or the justice-elect should serve between November and January. The Attorney General followed the precedent of *Ex Parte Sanders* and concluded that the appointed justice should remain in office until January 1; until that date there was no vacancy for the justice-elect to fill. Although the justice-elect held a certificate of election, he could not qualify and enter into office until his regular term began on January 1 (the discussion here is instructive).
- OP. SEC. STATE ELECTIONS DIVISION 1982, No. DAD-36. This involved a complex situation in which a district judge was appointed to replace a deceased Supreme Court justice, but remained on the ballot for the district court. The Elections Division, following

the cases and Attorney General's Opinions cited above, held that the terms of both the appointed justice and the appointed judge who had succeeded him would end on January 1 following the general election, so there was no question either of a vacancy in office or of someone holding two positions at the same time.

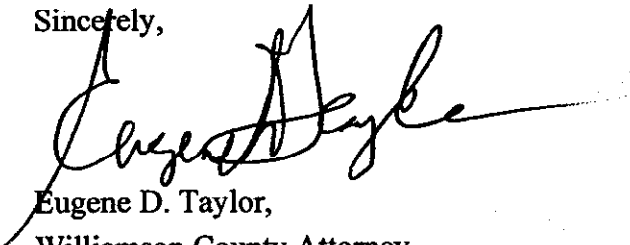
- OP. ATTY. GEN. 1982, No. MW-521. The governor filled the newly-created 267th District Court, the appointee lost the primary, and the nominee was elected unopposed. Again, someone asked the question who was to serve between November and January. Again, the answer was that the appointee served until the beginning of the regular term on January 1.
- OP. ATTY. GEN. 1986, No. JM-558. In this case, an incumbent Webb County justice of the peace had lost the primary and wished to retire before the general election. The question was whether the person who won the election could immediately take office. The answer: "If the commissioners court appoints someone to the vacancy created in the office of justice of the peace by the incumbent's resignation, the appointee is entitled to serve out the remainder of the term, and to continue in office pursuant to article XVI, section 17, of the Texas Constitution until his successor qualifies. The individual elected to the office of justice of the peace in the November 1986 general election is not entitled to qualify and enter into his office prior to January 1, 1987."
- OP. ATTY. GEN. 1986, No. JM-579. This was much the same situation, again involving a justice of the peace in Webb County. It affirms that if the justice-elect was beginning a regular term on January 1, he was not qualified to take office until that date.
- OP. ATTY. GEN. 1986, No. JM-589. This is a somewhat different twist on what was apparently a common problem that year. An incumbent Place 2 justice of the peace in Harris County died during the first half of a four-year term, so the succeeding election was for an unexpired term, not a regular term as in the present case. The Opinion cites most of the precedents above and agrees with them, but points out that none of them apply to election to an unexpired term. This is controlled by the predecessor statute to Govt. Code § 601.004, which provides that a person is entitled to qualify for an unexpired term immediately after receipt of the certificate of election. This situation does not present the problem of extending the length of an elected officer's term past its constitutional limits.

Based on the cited authorities, I believe that a court confronted with the Williamson County situation would hold that the appointed Sheriff will continue to hold office after the general election until the newly-elected Sheriff's regular term begins on the following January 1.

I hope you can respond as soon as possible to resolve the uncertainty of the Sheriff's Office employees. By copy of this request, we are informing both the incumbent Sheriff and the

unopposed candidate, in case they wish to comment. If you need any clarification, please call immediately.

Sincerely,



Eugene D. Taylor,
Williamson County Attorney,

cc: Sheriff Jim Wilson
Colonel James Wilson