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May 9, 2005

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MAY 10 2005

OPINION COMMITTEE

RQ-0345-GA

The Honorable Greg Abbott
Attorney General Office
Opinion Committee
209 W. 14th Street
Austin, Texas 78701

FILE # ML-44212-05
I.D. # 044212

Re: Request for Attorney General Opinion regarding whether an elected trustee on the McAllen Public Utility Board is an "elected public officer" and therefore limited to a term of office not to exceed two years as specified under Article XVI, Section 30 (a) of the Texas Constitution.

Dear General Abbott:

In my capacity as a State Representative, I am requesting your formal opinion on the following question:

Is an elected trustee on the McAllen Public Utility Board an "elected officer" and holder of a public office, and therefore limited to a term of office not to exceed two years as specified under Article XVI, Section 30, (a) of the Texas Constitution?

The Ordinance creating the City of McAllen Public Utility Board of Trustees (the pertinent section of which is attached) was adopted on February 5, 1945, and provided that the trustees serve for eight year terms. The Ordinance was adopted under the authority of Article 1115 V.T.C.S. (see now Section 1502.070 Texas Government Code). The same provision relating to the Utility Board trustee terms of office has been carried over in the various water and sewer bond ordinances. The question arises as to whether or not a place on the Board of Trustees of the McAllen Public Utility constitutes an "office" under Article XVI, Section 30 of the Texas Constitution and such offices are therefore subject to a two year term limitation.

Unfortunately, the Constitution itself does not attempt to define the generic term "office". If the generic opinion set out in Tex. A. G. Op. O-384 (1939) is to be followed, then the answer to the question is that the Utility Board trustees are constitutional officers because they are elected. Relying on cases that did not deal with any elected positions, the opinion concludes: "Based upon the foregoing decisions of the courts, and attempting to apply the

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various criteria suggested by them, we can safely conclude that all persons who are elected to their positions are 'officers' within the meaning of Article 16, Section 30, of the Constitution ...". There were no prior cases or subsequent cases supporting this conclusion by the Attorney General. Furthermore, if the manner of assuming the position of Utility Board trustee is demonstrative of the question, then the Board of Commissioners of the City could amend the bond ordinance to provide for the appointment of the Trustees and the question of whether they were constitutional officers would still need to be answered.

The most often used definition of "officer" is an individual who is vested with some portion of the sovereign functions of government to be exercised by him for the benefit of the public for a certain period of time and largely independent of the control of others (*Aldine Independent School District v. Standley*, 280 W. W.2nd 758 (Tex. 1955)). The distinction between an officer and an employee or one that does not hold an office is that the office involves a delegation to the individual of some sovereign function of the government, legislative, executive or judicial (often conferred by state statute - see Tex. A.G. Op. DM-381 (1996)) while an employee does not perform such functions or is not largely independent of the control of others (usually a fact question - see Tex. A.G. Op. GA-0214 (2004)). Many of the cases in this area are older cases that had been decided based on statutory functions of the officers and those statutes have now been repealed or amended.

The primary reason why the Utility Board members may not have been considered officers in 1945, at the time of adoption of the bond ordinance, is based on a series of cases that deal with the San Antonio Public Water Board. Historically, the courts of the State of Texas had determined different functions of city government as being either "proprietary" or "governmental" as it related to the question of governmental immunity. Governmental functions were defined as those functions placed on a municipality by law and given to it by the State as part of the State sovereignty to be exercised by the municipality in the interest of the general public. Proprietary functions are carried out primarily for the city and its inhabitants only and do not confer any general benefits relating to the general public outside of the city limits. The courts, throughout the years, had drawn a somewhat arbitrary line between the distinctions of governmental and proprietary functions. For instance, collection of storm sewer waters or the provision of potable drinking water was considered a proprietary function, while the collection and treatment of sanitary sewer waters was a governmental function. The regulation of traffic was a governmental function, while the maintenance of the road was a proprietary function.

The specific question of whether or not the board of trustees of a water work were officers under Article 16, Section 30 of the Constitution was addressed in the case of *San Antonio Independent School District vs. Waterworks Board of Trustees*, 120 SW2d 861 (Tex. Civ. App. - Beaumont, 1938 writ ref'd n.r.e.) The Court held that members of the Water Works Board of Trustees for the City of San Antonio were not Constitutional officers and hence were not subject to the Constitutional limitation on terms of office under the provisions of Article XVI, Section 30 of the State Constitution. This holding was based specifically on the fact that the provision of potable water service was not a governmental function but a proprietary function of the City and therefore, the Trustees were not vested with the authority

required for a constitutional office. The court pointed out that the proprietary function pertained to business affairs administered for the special benefit of the urban community embraced within the corporate boundaries. This finding was also applicable to a gas and electric utility operated by the city (*Byrd vs. City of San Antonio, Texas*, 587 Fed. 2d 184 (Fifth Cir. 1979)). The McAllen Utility Board has always operated a sanitary sewer system in addition to the treated water system.

At the time of the creation of the McAllen Public Utility Board in 1945, the Attorney General's opinion 0-384 had been issued, the case of *City of San Antonio ISD vs. Waterworks Board of Trustees*, was decided, and the Constitution limited terms of office to two years. It is assumed that bond counsel, in setting up the Board of Trustees for eight years took all of the foregoing into consideration. The fact that the first bond issue related to the water utilities may have had something to do with the eight-year terms however.

The case and statutory law on governmental and proprietary functions (as it related to municipal liability) remained constant until the 1987 amendment to the Texas Tort Claims Act as codified under Section 101.0215 Texas Civil Practice and Remedies Code. The State Constitution had been amended to grant the legislature authority to designate governmental and proprietary functions by statute. Based on such authority, the legislature established a list of specific governmental functions for the purpose of waiver of immunity under the tort laws of the State of Texas. While the amendments to the Texas Tort Claims Act obviously did not directly deal with the question of whether or not the persons operating or in charge of such functions in the City are "officers" under the limitations in the Constitution, the language used in the statute does raise the question. In defining what is a governmental function, the legislature in subsection (a) of Section 101.0215 did use the historical standard of exercise of State sovereignty. It also changed the case law categorization for some functions.

Included for the first time under the category of a governmental function was the provision of water service. Sewer service already had been defined as a governmental function and did not change under the new law. This change may affect the previous case law that held that the Water Works Trustees of the City of San Antonio were not officers under the Constitution because they carried out a proprietary function. The legislature in subsection (a) of Section 101.0215 also provided that "sanitary (and storm) sewer", "water and sewer service", "dams and reservoirs" and "waterworks" are governmental functions.

The matter is further complicated by the fact that Section 101.0215(b)(1) of Texas Civil Practice and Remedies Code provides that the operation and maintenance of a public utility is a proprietary function. The question is "does a Utility Board that controls and operates a "sanitary sewer, water and sewer service and waterworks" also operates and maintains a "public utility?" There is no definition of the term public utility in the Remedies Code. The term "public utility" specifically does not include a municipal water or sewer work under the provisions of Chapter 13 and specifically Section 13.002 *Definitions*, of the Texas Water Code dealing with the statutory oversight of water and sewer service.

The Honorable Greg Abbe

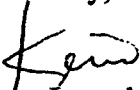
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The heading "public utilities" was the chapter heading for Chapter 10, Title 28 V.T.C.S. and such chapter included the operations of a water works and sewer works (see Article 1108 *Public Utilities* V.T.C.S. now repealed). Article 1115 V.T.C.S. (see now Section 1502.070 Texas Government Code) provided that the proceedings of the municipality in establishing the utility system's five member board may specify the terms of office of the Board of Trustees. This statute was the basis for longer than two (and four) year terms for utility board members in many revenue bond indentures and was applicable to both water and sewer works.

In summary, does an elected trustee of an utility board that has the full operation and control authority (but cannot fix rate or issue debt independently) over the water and sewer works of municipality occupy an office as that term is used under Article XVI Section 30 of the constitution?

Sincerely,



Rep. Ismael "Kino" Flores

Chairman

House Committee on Licensing & Administrative Procedures