

THE OFFICE OF

THE CRIMINAL DISTRICT ATTORNEY

RECEIVED McLENNAN COUNTY, TEXAS

NOV 21 2006

219 NORTH 6TH STREET, SUITE 200  
WACO, TEXAS 76701  
PHONE - (254) 757-5084  
FAX - (254) 757-5021

FILE # ML-45061-06  
I.D. # 045061

OPINION COMMITTEE

November 17, 2006

JOHN W. SEGRETT  
CRIMINAL DISTRICT ATTORNEY

Hon. Greg Abbott  
Texas Attorney General  
Attention: Opinions Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RQ-0554-GA

Re: Request for Opinion Concerning the Effect of Justice and Constable Precinct Redistricting on Current and Potential Officials

Dear General Abbott:

Attached is a request I received from County Judge Jim Lewis seeking an opinion concerning the redistricting of a justice and constable precinct in McLennan County. This redistricting has created questions the answers to which may be of general interest concerning the operation and interplay of TEXAS CONSTITUTION Art. V, §18, Art. XVI, §65, and Art. XVI, §17.<sup>1</sup>

**BACKGROUND**

Prior to December of 1992 McLennan County was divided into seven Justice and Constable Precincts under Art. V, §18(a). At that time the number was increased to eight, and so it remained until recently.

For the past several years there has been some talk about eliminating one precinct, namely Precinct 6, as a money saving measure. However, no steps were actually taken toward that end until very recently.

As Judge Lewis states in his letter to me, the County Commissioners redistricted so as to abolish Precinct 6 (which includes the town of Moody) by consolidating it with portions of Precinct 5 (centered in the town of McGregor) and Precinct 1 (including much of the City of Waco.) The redistricting order states that the redistricting was effective on August 24, 2006. In short, the redistricting plan approved by the Commissioners took a piece of Old Precinct 6, annexed it to and created a New Precinct 1, and took the remainder of Old Precinct 6 and annexed it to and created a New Precinct 5.

<sup>1</sup> Citations herein are to the CONSTITUTION OF THE STATE OF TEXAS 1876, unless otherwise attributed.

About the same time that the Commissioners Court was seriously contemplating doing away with Precinct 6 it was brought to my attention that the Constable for Precinct 6, Kenneth Lee Brown [hereafter "Brown",] had announced his candidacy for a place on the City Council of the city of Moody, had won election to that office, and was at that time holding the offices of city alderman and constable simultaneously. At the County Judge's request I drafted an opinion, a copy of which is attached, wherein I concluded that Brown had resigned his office of Constable of Precinct 6 when he became a candidate for city council under Art. XVI, §65, but continued to hold the office under Art. XVI. §17 until his successor was duly appointed and qualified. The full term as Constable to which Brown was most recently elected is (or was) scheduled to end in December 31, 2008.

At the time of my opinion the McLennan County Justice and Constable redistricting plan had not been approved by the Civil Rights Division of the Justice Department under the VOTING RIGHTS ACT, 42 U.S.C. 1973c. Approval was given on October 18, 2006. See attached copy.

After debating their options, on October 31, 2006 the Commissioners Court voted to appoint retired McLennan County Sheriff's Sgt. Jack Goodwin [hereinafter "Goodwin"] as Brown's successor. Goodwin qualified and took the oath as Constable of Precinct 6 on November 7, 2006. In my opinion this qualification legally brought Brown's resignation as Constable of Precinct 6 to fruition.

This request explores Goodwin's current status and possible termination of that status.

## TERMINOLOGY

1. **"Elected"**: An individual in office during the term to which he was elected;
2. **"Holdover"**: An individual in office during a vacancy under Article XVI, §17, until his successor is appointed and qualified;
3. **"Appointee"**: An individual qualified and in office after appointment to fill any vacancy;
4. **"Post-Redistricting Official"**: An individual in an office which is abolished, or one who finds himself no longer living in the precinct for the office held due to redistricting, but who nonetheless "shall serve in the precinct in which [he or she] resides for the term to which [he or she] was elected or appointed" under Article V, §18 ( c);
5. **"Resignation"**: An act or condition creating or resulting in a vacancy in office

The following questions were posed to me, and I pose them to you:

### QUESTION ONE

**"After redistricting, was it necessary to appoint a successor to end the Constable's [Brown's] holdover under Article XVI, Section 17, or was there no office in existence in which to hold over?"**

### QUESTION TWO

**"Did the Constable's resignation under Article XVI, Section 65 terminate his right to serve out the remainder of his term under Article V, Section 18 ( c)?"**

### QUESTION THREE

**“If the answer to question one is in the affirmative, what is the length of time of the successor’s term. Is it until the end of the year, or does the successor serve out the remainder of the resigned Constable’s term? Put another way, is the term continuation under Article V, Section 18 ( c) personal to the Constable, and, therefore, terminated by his resignation, or is it connected to the office itself, so that the successor would serve out the remaining term?”**



There has been a difference of opinion as to whether Brown’s Art. XVI, §17 holdover was terminated prior to Goodwin becoming appointee. Some contend that Old Precinct 6 and the offices thereof ceased to exist upon some effective Art. V, §18 redistricting date, either the date stated in the Order or the approval of the redistricting plan by the Justice Department. As contended by Mike Dixon, the attorney for the McLennan County Commissioners Court...

“On one hand, it seems clear that one who “resigns to run” pursuant to Article XVI, Section 65 continues to serve until a successor is appointed and qualified. *See* Art. XVI, Sec. 17, *Texas Constitution*; Texas Attorney General Op. Nos. JC-0318 (2000); DM-377 (1996), and H-161 (1973). On the other hand, it could be argued that, due to the redistricting, there is no office in existence in which to hold over, and, therefore, Article XVI, Section 17 is not applicable.”

An Art. XVI, §65 resignation creates a vacancy in office. *Id.*, §65(b). And according to **OP.ATTY.GEN.** No. JC-0140 (1999) “[a] commissioners Court has no enforceable duty to fill a vacancy in the office of Constable.”<sup>2</sup> Under these authorities it would seem that the vacancy created by Brown’s resignation need never to have been filled by the Commissioners Court at all. But because Art. XVI, §17 provides that “[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified,” Brown was a holdover until Goodwin or someone else became appointee. This way there was no break in service to the people. The Attorney General has determined that a holdover may lawfully receive the salary pending appointment of a successor. **OP.ATTY.GEN.** No. H-161 (1973.) I conclude from this that while Brown was holdover performing constabulary duties and being compensated, the office of Constable Precinct 6 was nonetheless “vacant,” and remained vacant until Goodwin became appointee. Note however that the Office of Constable continues to exist, and the holdover is constable de facto and de jure, contingent upon the condition subsequent of appointment and qualification.

It follows then that the office to which any appointment is or can be made must in fact exist. An appointing authority has no lawful power to make an appointment to a non-existent or non-vacant office. If an office exists the office is subject to becoming vacant and being filled by appointment, even if there is no enforceable duty to do so.

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In the instant redistricting the commissioners took a piece of Old Precinct 6 and annexed it to and

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<sup>2</sup>Despite the seemingly mandatory language of the section that such vacancy “shall” be filled.

created a New Precinct 1, and annexed the remainder of Old Precinct 6 to and created a New Precinct 5. Art. V, §18 provides:

*“(c) When the boundaries of justice of the peace and constable precincts are changed, each Justice and Constable in office on the effective date of the change, or elected to a term of office beginning on or after the effective date of the change, shall serve in the precinct in which the person resides for the term to which each was elected or appointed, even though the change in boundaries places the person's residence outside the precinct for which he was elected or appointed, abolishes the precinct for which he was elected or appointed, or temporarily results in extra Justices or Constables serving in a precinct.”*

The attorney for the Commissioners Court, Mike Dixon, has reasoned:

“This language would appear to indicate that the continuation right is personal to the officeholder in office at the time of the change. In addition, the analysis of the 1983 constitutional amendment which added §18(c) states that (c) “provides for a transition in office for justices of the peace, constables and commissioners each time their respective precinct boundaries are changed.” See Tex. Leg. Council, Analysis of Proposed Constitutional Amendments Appearing on the Nov. 8, 1983 Ballot at p. 8 (Info. Report No. 83-4, August 1983). One can only “transition” if he/she already is in office at the time of the change. This too indicates that continuation is a personal right. However, there does not appear to have been any legal authorities that have specifically addressed this issue.”

Here is how I see it.

Under Art. V, §18(c), it is certain that had Brown not resigned he would have been required<sup>3</sup> to “serve in the [new] precinct in which [he currently] resides for the term to which [he] was elected or appointed,” and Brown would be the constable as a Post-Redistricting Official.<sup>4</sup> If Moody, Brown’s city of residence, is in that part of Old Precinct 6 annexed to New Precinct 1 Brown would have become constable in New Precinct 1, otherwise he would have become constable in New Precinct 5, even though this “temporarily results in extra... Constables serving in [the New] precinct.” Id., §(c).

And it is equally certain that had Brown resigned and Goodwin been appointed before redistricting occurred, Appointee Goodwin would after redistricting become the Post-Redistricting Official, and Goodwin would be an “extra Constable” serving in the New Precinct in which he resides for the remainder of the unexpired term to which he was appointed (Brown’s term.) This is because Art. V, §18(c) not only applies to displaced elected officials but also to displaced appointed officials.<sup>5</sup>

From this it can be concluded that the duty to become a Post-Redistricting Official is not a personal

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<sup>3</sup> Art. V, §18(c) uses the term “shall serve.”

<sup>4</sup> Until December 31, 2008.

<sup>5</sup> This letter does not ask you to address an individual who is “elected to a term of office beginning on or after the effective date of the change.” Art. V, §18(c).

or property right of elected officeholders dislocated by redistricting. It applies equally to any johnny-come-lately who is picked and approved by vote of the Commissioners Court and who qualifies before displacement by a boundary change -- even only days or mere moments before. This is true, I believe, despite the fact that the wording of Art. V, §18(c) such as "each Justice and Constable in office," and "for the term to which each was elected or appointed," and "the precinct for which he was elected or appointed," make it appear that becoming a Post-Redistricting Official is a personal right of the officeholder. In truth it appears to me to be a right of the people.

**"When a person is inducted into an office and thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or any title to it.**

**It may be concluded, therefore, that a fundamental principal associated with our republican form of government is that every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box at the time of the next election, or before that time by any other constitutionally permissible means.**

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**"[A]n office... is a public trust, and not a property right... It is a public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof, and the prospective emoluments of a public office are not property in any sense."**

*Tarrant County v. Ashmore*, 635 S.W.2d 417, 420-21 (Tex. 1982.)

*Ashmore* was decided in 1982. It held that the commissioners court had "received a grant of power from the people of the State and from the legislature to perform the action here complained of," that is, to abolish offices and declare vacancies by redistricting after notice and a hearing. Those forced out by this action had no recourse. It follows that Art. V, §18(c) creating Post-Redistricting Officials was approved by the voters in 1983 to overturn that aspect of *Ashmore*. See OP.ATTY.GEN. No. JC-0462. It was approved not out of fondness or fairness for the individual in a now abolished office, but to foster the interests of the people and the State.

Thus, the public is defended from anyone who "from time to time, for the convenience of the people," redraws lines eliminating a Justice of the Peace here and a Constable there, which would in effect disenfranchising the voters of an abolished or redrawn precinct who did not have the opportunity to vote for their inherited officials. "From time to time, for the convenience of the people," redistricting may appear to override the will of the voters or change the outcome of elections.

Today, Officeholder, Holdover, Appointee and Post-Redistricting Official all have one thing in common: the individual cannot by his or her actions or decisions extinguish the right of the State and its people to have the benefits provided by an official. This was made even more clear when considering Art. V, §18. The voters of Texas could have just as easily rejected the 1983 amendment to that Article and left *Ashmore* the law of this State. But they didn't, and it isn't.

Therefore, I would conclude that the answer to the first question should be that Brown resigned his office, created a vacancy, and continued to perform the duties of office until his successor Goodwin was appointed and qualified. The State and the public are entitled to have someone exercise the powers and perform the duties of Brown's, now Goodwin's, office. This redistricting did not abolish that right on the effective date of the Commissioners Court order.

Given that answer, I would conclude that the answer to the third question should be that Goodwin, or his duly appointed and qualified successor, will be a Post-Redistricting Constable until the end of the current four year constable term on December 31, 2008, in the New Constable Precinct in which he, Goodwin, currently resides.

As to the second question, Brown lost the right to serve out the remainder of his term in any manner when Goodwin was appointed and qualified.

### **LETTER OF THE COUNTY'S LAWYER**

At my request Mike Dixon, the attorney for the Commissioners Court, has delivered to me the attached letter. I am incorporating his letter into this request and ask you to consider his positions and reasoning as you address these issues.

Respectfully Submitted;

**John W. Segrest**  
Criminal District Attorney  
McLennan County, Texas  
219 North Sixth Street, Suite 200  
Waco, Texas 76701  
Phone (254) 757-5084  
Fax (254) 757-3021

**John W. Segrest**  
Criminal District Attorney  
State Bar Number 17995500

### Attachments

cc: Mike Dixon  
Haley & Olson, P.C.  
510 North Valley Mills Drive  
Waco, Texas 76710  
*Without Attachments*

Jim Lewis, County Judge  
McLennan County  
Hand Delivered  
*Without Attachments*

# HALEY ♦ OLSON

A PROFESSIONAL CORPORATION

HERBERT S. BRISTOW  
BLAKE RASNER  
LESLIE A. PALMER, JR.  
CHARLES D. OLSON  
DANIEL A. PALMER  
MICHAEL W. DIXON  
C. ALFRED MACKENZIE  
SHAD M. ROBINSON  
BRANDON R. OATES  
JOSHUA J. WHITE

510 N. VALLEY MILLS DRIVE, SUITE 600  
WACO, TEXAS 76710  
TELEPHONE 254-776-3336  
FACSIMILE 254-776-6823  
WEBSITE: WWW.HALEYOLSON.COM

W.C. HALEY  
(1912-1996)  
LYNDON L. OLSON, SR.  
(1925-2005)

November 16, 2006

Hon. John Segrest  
McLennan County Criminal District Attorney  
219 North 6<sup>th</sup> Street, Suite 200  
Waco, Texas 76701

Re: Interplay Between Article V, Sec. 18 (c), Article XVI, Sec. 65 and Article XVI,  
Sec. 17

Dear John:

As you know, McLennan County recently completed redistricting which resulted in the abolishment of Precinct 6, and the incorporation of that area into another precinct. Pre-clearance has been received from the United States Department of Justice. The Constable of Precinct 6 has two years remaining on his term. In normal circumstances, the Constable would be entitled to serve the remainder of his term in the new precinct. See Art. V, Sec. 18 (c), *Texas Constitution*. However, while having more than one year left on his term the Constable filed for election to the City Council of a Type A municipality. It is my understanding that this resulted in his resignation under Article XVI, Section 65 of the *Texas Constitution*. See Texas Attorney General Opinion Nos. GA-0057 (2003) (city council member holds an office or position of trust); GA-0015 (2003) (resignation under art. 16, sec. 65 automatic). It is also understood that, until the vacancy is filled by the Commissioners Court, and a successor appointed and duly qualified, the Constable would remain as the *de facto* constable under the holdover provision of Article XVI, Section 17 of the *Texas Constitution*. But, there would appear to be no need to appoint a successor where the office itself has been abolished. And, even assuming there was a need to appoint a successor to hold-over in the abolished office; where the officeholder has abandoned his/her personal right to continue his/her term under art. 5, sec. 18 (c) by resignation, the term of this holdover should not include the remaining two years of the resigning official's term. Article V, sec. 18 (c) protects the individual official's term of office, it does not extend the life of the office itself. Otherwise, there would be no need for this provision to state that the official continues to serve in the "new" precinct, as the old precinct would have been given an extended life for the rest of his/her term.

This raises questions relating to the interplay of three Constitutional provisions: Article V, Sec. 18 (c), Article XVI, Sec. 65 and Article XVI, Sec. 17. Because of the uncertainty, the Commissioners Court has appointed a duly-qualified successor as constable.

The questions would appear to be as follows:

1. After redistricting, was it necessary to appoint a successor to end the Constable's holdover under Article XVI, Section 17, or was there no office in existence in which to hold over?<sup>1</sup>
2. Did the Constable's resignation under Article XVI, Section 65 terminate his right to serve out the remainder of his term under Article V, Section 18 (c)?
3. If the answer to question one is in the affirmative, what is the length of the successor's term? Is it until the end of the year, or does the successor serve out the remainder of the resigned Constable's term? Put another way, is the term continuation under Article V, Section 18 (c) personal to the Constable, and, therefore, terminated by his resignation, or is it connected to the office itself, so that the successor would serve out the remaining term?

#### *HOLDOVER*

On one hand, it seems clear that one who "resigns to run" pursuant to Article XVI, Section 65 continues to serve until a successor is appointed and qualified. See Art. XVI, Sec. 17, *Texas Constitution*; Texas Attorney General Op. Nos. JC-0318 (2000); DM-377 (1996), and H-161 (1973). On the other hand, it could be argued that, due to the redistricting, there is no office in existence in which to hold over, and, therefore, Article XVI, Section 17 is not applicable.

#### *TERM CONTINUATION*

Article V, Section 18 (c) provides in part:

When the boundaries of justice of the peace and constable precincts are changed, each Justice and Constable **in office on the effective date of the change, or elected to a term of office beginning on or after the effective date of the change**, shall serve in the precinct in which the person resides for the term to which each was elected or appointed, even though the change in boundaries places the person's residence outside the precinct for which he was elected or appointed, abolishes the precinct for which he was elected or appointed, or temporarily results in extra Justices or Constables serving in a precinct.

See Art. 5, Sec. 18 (c) (*emphasis added*). This language would appear to indicate that the continuation right is personal to the officeholder in office at the time of the change. In

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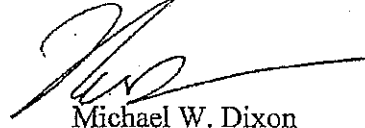
<sup>1</sup> The redistricting order states that it is effective 8-24-06. Pre-clearance was received by letter dated 10-18-06. The successor was appointed on 10-31-06.



addition, the analysis of the 1983 constitutional amendment which added §18(c) states that (c) "provides for a transition in office for justices of the peace, constables and commissioners each time their respective precinct boundaries are changed." See Tex. Leg. Council, Analysis of Proposed Constitutional Amendments Appearing on the Nov. 8, 1983 Ballot at p. 8 (Info. Report No. 83-4, August, 1983). One can only "transition" if he/she already is in office at the time of the change. This too indicates that continuation is a personal right. However, there does not appear to have been any legal authorities that have specifically addressed this issue. My position is that:

Art. 5, sec. 18 (c)	Art. 16, sec. 65
Provides for person already in office to continue to serve out the rest of his/her term when the office is abolished by redistricting.	Provides that an elected official automatically resigns his/her office if he/she announces for another office of trust while more than one year left on the term of first office.
The official remains in office for rest of term even though the office no longer exists. In effect, the official becomes an extra officer of new precinct.	After resignation, the official remains in office until a successor is appointed and qualified under the holdover provision of art. 16, sec. 17.
By operation of art. 16, sec. 65- the official resigns his/her remaining term, including any continuation under art. 5, sec. (c).	Holdover of art. 16, sec. 17 is meant to assure continued service to the public until a successor appointed.
Holdover provision of art. 16, sec. 17 does not apply because there is no office in which to hold-over. Art. 5, sec. 18 (c) continuation is personal to the individual holding office at the time of the change, <i>and does not extend the life of the office itself.</i>	Holdover provision of art. 16, sec. 17 would not be applicable because there is no office in existence in which to hold-over.

Sincerely,



Michael W. Dixon

THE OFFICE OF  
THE CRIMINAL DISTRICT ATTORNEY  
MCLENNAN COUNTY, TEXAS

219 NORTH 6TH STREET, SUITE 200  
WACO, TEXAS 76701  
PHONE - (254) 757-5084  
FAX - (254) 757-5021

August 31, 2006

JOHN W. SEGREST  
CRIMINAL DISTRICT ATTORNEY

County Judge Jim Lewis  
501 Washington Avenue  
Waco, Texas 76701

Hand Delivered

Re: Concerning Kenneth Lee Brown  
Constable of Precinct 6  
McLennan County, Texas

Dear Jim:

Recently you brought to my attention a situation and asked for an opinion as to what responsibilities fall upon the McLennan County Commissioners Court in response thereto. This letter is presented to you under § 41.007, **TEXAS GOVERNMENT CODE**, which states:

"A district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official."

I write this to you and the Court in my capacity as a legal advisor, and not in my capacity as inquisitor and prosecutor. This letter may be subject to mandatory disclosure under the Public Information Act of the **TEXAS GOVERNMENT CODE**, or this writing may be exempted from disclosure under the Act as a "Lawyer-Client Communication" if this is intended to be confidential. See **TEXAS RULES OF EVIDENCE** Rule 503(a)(5). I do not address that question here.

It is my practice to presume that a writing in which I give a legal opinion is intended by you to be confidential. I have no objections to the voluntary release of this document to the public and to Constable Brown, if you wish.

I had previously considered asking for an Attorney General's opinion on some issues that I thought might be presented. However, after a thorough review of the facts and the law I now believe that the issues presented are generally settled and do not lend themselves to Attorney General review.

## STATEMENT OF THE FACTS

Kenneth Lee Brown is currently the constable for Precinct 6 in McLennan County<sup>1</sup>. He is also currently an alderman or city council member for the city of Moody in McLennan County, a Type A general law municipality<sup>2</sup>. This is a history of his office holding:

- In 2001 Brown was elected to the city council. On November 12, 2001 he was sworn into office. The term on the city council is two (2) years.
- A few days later, on November 29, 2001, Brown filed an Appointment of Campaign Treasurer stating that he was seeking to fill an unexpired term as constable. At the November 5, 2002 general election Brown was elected as constable, and was sworn in on November 19, 2002. This term expired December 31, 2004.
- On August 8, 2003, Brown filed an Appointment of Campaign Treasurer for a full term as constable at the November 2004 general election. He later was placed on the November 2004 ballot.
- At approximately the same time Brown also appointed a campaign treasurer for his re-election to the city council, and on September 10, 2003, he became a candidate for re-election to the city council when he applied for a place on the City's general election ballot. He was unopposed for another two year term on the city council.
- At the November 2, 2004 general election Brown was elected to a full four year term as constable. He was sworn in and qualified for that term in office on January 1, 2005.
- Thereafter, Brown announced that he was again a candidate for re-election to the city council, and he became a candidate for re-election on or about September 8, 2005 when he applied for a place on the city of Moody's November 8, 2005 general election ballot. He again ran unopposed and is currently serving on the city council.

Brown is currently holding two offices at the same time. Our concern is that under certain circumstances this may not be allowed by law, or may have other legal consequences.

## NATURE OF THE INQUIRY

Brown has done nothing criminal, illegal or wrong by running for and holding two offices at the same time. I am aware of no demonstrable misconduct or incompetence on the part of Constable Brown.

The law defines wrongdoing which will affect one's status as an officeholder. The law provides for the removal of an officeholder from office for "incompetency, official misconduct, habitual drunkenness, or other causes defined by law." **TEXAS CONSTITUTION** Art. V, §2. Other laws provide that an official can

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<sup>1</sup> Hereinafter Kenneth Lee Brown will be called "Brown," and the office of Constable of Precinct 6, McLennan County will be called "constable."

<sup>2</sup> Hereinafter the Moody, Texas city council will be called "city council."

be removed for "incompetence," defined as gross ignorance of the duties of office, gross carelessness in the carrying out of those duties, unfitness or inability to discharge the duties of office because of mental or physical restrictions, "official misconduct," intoxication, conviction of certain crimes, and failure to give the bond of office, to name a few. See **TEXAS LOCAL GOVERNMENT CODE** §87.001, et seq. Other laws provide for the ousting of an official from office for usurping or "unlawfully holding" an office, or doing an act causing a "forfeiture" of office. **TEXAS CIVIL PRACTICES AND REMEDIES CODE** §66.001. As none of these have been raised as to Brown, this opinion does not consider them.

Our laws generally restrict the holding of multiple public offices at the same time, and provide consequences for those in office running for another office. Instead of looking at such situations as malfeasance by the officeholder, one should see it as an officeholder creating a status for himself or herself which may have legal, and sometimes unintended consequences. These consequences may include forfeiture of or resignation from office.

### **PRINCIPALS OF CONSTRUCTION**

Constitutional and statutory provisions relating to the eligibility for office must be strictly construed against ineligibility. See Wentworth v. Meyer, 839 S.W.2d 766 (Tex. 1992) and Brown v. Meyer, 787 S.W.2d 42 (Tex. 1990.)

### **INCOMPATIBILITY OF OFFICES**

Op. Atty. Gen. No. WW-1316 (1962) addressed whether the offices of city council member and constable are incompatible. After considering "the respective duties incumbent upon a constable and an alderman of an incorporated city" the Attorney General could "conceive of no basis upon which it may be said that the offices are incompatible..." and held the two offices are not incompatible.

I am unable to locate any Texas case decision or any other Texas Attorney General's Opinion which holds that the office of constable and the office of city council member are incompatible as a matter of law. At the same time I can find no decision or opinion which cites WW-1316 as authority.

I must assume that WW-1316 still states the position of the Attorney General. I can find no sound basis to believe otherwise. I attach a copy of this opinion for your review.<sup>3</sup>

### **RESIGN-TO-RUN PROVISION OF THE TEXAS CONSTITUTION**

The **TEXAS CONSTITUTION** Article XVI, § 65 provides (emphasis added):

(a) **This section applies to** the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys;

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<sup>3</sup> Because no salary is paid, the office of city council member is not an office of "profit" under **TEXAS CONSTITUTION** Art. XVI, §65, or an office of emolument under **TEXAS CONSTITUTION** Art. XVI, §40, which prohibits holding "more than one civil office of emolument...." I believe these provisions are not involved here.

County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and **Constables**.

**(b) If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.<sup>4</sup>**

### RESIGNATION

An elected city council member holds an office or position of trust. *Boyett v. Calvert*, 467 D.E.2d 205 (Tex.Civ.App.-Austin 1971; *Op. Atty. Gen.* No. GA-0057 (2003.)) Therefore, under this constitutional provision it is my opinion that Constable Brown automatically resigned the office of constable by announcing and becoming a candidate for the city council.

### THE EFFECT OF RESIGNATION

When an officeholder resigns his or her office under TEXAS CONSTITUTION Art. XVI, §65, the resignation creates a "vacancy" which is then "filled... in the same manner as other vacancies...." The vacancy exists "automatically." No one needs to accept the resignation. No judicial action is required before a vacancy exists. The person or body with the lawful authority to fill the vacancy may simply fill the vacancy in the manner prescribed by law. *Op. Atty. Gen.* No. GA-0015 (2003.)

### FILLING THE VACANCY

A vacancy in the office of constable may be filled by the Commissioners court of the county. TEXAS LOCAL GOVERNMENT CODE §87.041. However, according to a previous opinion of the Attorney General, there is no mandatory duty to fill a vacancy created by TEXAS CONSTITUTION Art. XVI, §65. See *Op. Atty. Gen.* No. JC-0140 (1999) ("A Commissioners court has no enforceable duty to fill a vacancy in the office of Constable.") An officer who automatically resigns under the resign-to-run provision of TEXAS CONSTITUTION Art. XVI, §65 is ineligible for appointment to fill the vacancy created in that office. *Op. Atty. Gen.* No. WW-788 (1960); *Op. Atty. Gen.* No. DM-377 (1996.)

It is my opinion that the McLennan County Commissioners Court may lawfully proceed to fill the vacancy in the office of McLennan County Constable, Precinct 6. Constable Brown, however, is not eligible for appointment to succeed himself.

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<sup>4</sup>TEXAS CONSTITUTION Art. 11, §11 provides for a similar resignation for municipal officers who announce for another office of trust. Because an automatic resignation as a city council member does not involve filling a vacancy by the County Commissioners, I do not address that issue herein.

## HOLDING OVER

However, TEXAS CONSTITUTION Art. XVI, §17, provides that “[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.” This section is self-executing and is mandatory in order to prevent vacancies in office and the consequent cessation of the functions of government. Plains Common Consol. School Dist. No. 1 of Yoakum County v. Hayhurst, 122 S.W.2d 322 (Tex. Civ. App. 1938.) Even when the officer resigns he or she is “held over” in the performance of their duties until a successor is elected or appointed and has been qualified. Willmann v. City of San Antonio, 123 S.W.3d 469 (Tex. App. [4 Dist] 2003.) Such an officer may lawfully receive the salary during the period he is holding over and awaiting appointment of his successor. Op. Atty. Gen. No. H-161 (1973).<sup>5</sup>

Constable Brown resigned as constable when he made a certain and public announcement for city council. He resigned again when he became a candidate for city council by filing for a place on the ballot. Op. Atty. Gen. No. GA-0210 (2004.) It is my opinion that until the McLennan County Commissioners Court fills the vacancy caused by these resignations, Constable Brown has the mandatory obligation to continue to perform the duties of constable, and he is entitled to be paid.

I also believe that an officeholder who refuses or neglects to perform the duties of office during the holdover period may be removed from office for that reason.<sup>6</sup>

## QUALIFICATION OF SUCCESSOR

An appointee filling a vacancy “qualifies” when, before entering upon the duties of office, he or she files a Statement of Officer, known as the Bribery Statement, and takes the official oath. TEXAS CONSTITUTION Art. XVI, §1; see also TEXAS GOVERNMENT CODE Chapter 602. In addition, the person must give a bond if bond is required by law for the office. TEXAS GOVERNMENT CODE §604.001.

For the office of constable, the appointee must take and sign the Constitutional oath of office and execute a bond under TEXAS LOCAL GOVERNMENT CODE §86.002(b), and file a Bribery Statement before entering into the duties of office.

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<sup>5</sup> There is an exception to this hold-over provision. An officeholder who has vacated his or her office by “accepting and qualifying” for a second office that is incompatible with the first office “does not hold over under XVI, section 17 of the TEXAS CONSTITUTION.” Op. Atty. Gen. No. GA-0015 (2003.) In such a situation the officeholder actually “divests” himself or herself of the office, and is deprived of the authority of the office even before a successor has qualified. Op. Atty. Gen. No. M-627 (1970). Because the offices here are not incompatible, this exception does not apply.

<sup>6</sup> My opinion here does not address the effect of the recent vote by the Commissioner’s Court of McLennan County to eliminate Precinct 6, its Justice of the Peace and Constable. However, I assume that an officeholder in an abolished precinct remains the officeholder until the end of his or her elected term, must continue to perform the duties of office until the end of that term, and is entitled to collect the salary of office until the end of that term. No office holder may, in my opinion, “retire-on-duty” and receive compensation while failing to attend to the duties of office.

## OBLIGATION OF THE COMMISSIONERS COURT

In Op. Atty. Gen. No. JC-0140 (1999) the Attorney General held that a commissioners court has no enforceable duty to fill a vacancy in the office of Constable.

Under this AG's opinion there appears two options for the McLennan County Commissioners Court:

- Do nothing and allow Constable Brown to hold over under **TEXAS CONSTITUTION** Art. XVI, §17 until the end of his term; or
- Appoint a successor under **TEXAS LOCAL GOVERNMENT CODE** §87.041, who may qualify and assume the duties of the office of Constable for McLennan County Precinct 6.

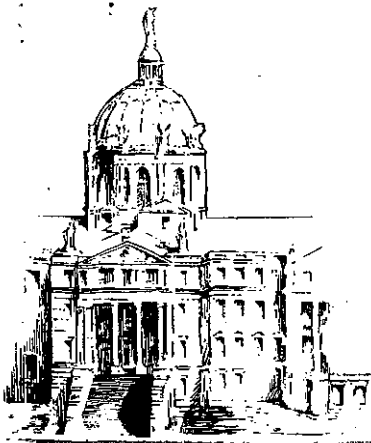
### SUMMARY

When Constable Kenneth Lee Brown announced that he was a candidate for, and when he became a candidate for a place on the City Council of the City of Moody, he automatically resigned his office as Constable of Precinct 6 of McLennan County, Texas. These two offices are not incompatible. Constable Kenneth Lee Brown must continue to serve as Constable until his successor is appointed by the McLennan County Commissioners Court and the successor qualifies for Constable by filing the require statements and bond, and by taking the oath of office.

Very Truly Yours;

---

John W. Segrest  
Criminal District Attorney



McLennan County Courthouse

**Jim Lewis**  
McLENNAN COUNTY JUDGE

P.O. Box 1728  
Waco, Texas  
76703-1728

254-757-5049  
Fax No. 254-757-5196

November 1, 2006

Hon. John Segrest  
McLennan County Criminal District Attorney  
219 North 6<sup>th</sup> Street, Suite 200  
Waco, Texas 76701

**RECEIVED**

NOV - 2 2006

JOHN W. SEGREST  
CRIMINAL DISTRICT ATTORNEY

Dear John:

As you know, McLennan County recently completed redistricting which resulted in the abolishment of Precinct 6, and the incorporation of that area into another precinct. Pre-clearance has been received from the United States Department of Justice. The Constable of Precinct 6 has two years remaining on his term. In normal circumstances, it is my understanding that the Constable would be entitled to serve the remainder of his term in the new precinct. *See* Art. V, Sec. 18 (c), *Texas Constitution*. However, while having more than one year left on his term the Constable filed for election to the City Council of the City of Moody. It is my understanding from your previous opinion issued at my request that this resulted in his resignation under Article XVI, Section 65 of the *Texas Constitution*. However, it was also understood from your memo that, until the vacancy is filled by the Commissioners Court, and a successor appointed and duly qualified, the Constable would remain as the constable under the holdover provision of Article XVI, Section 17 of the *Texas Constitution*. Thus, my questions pertain to the interplay of three Constitutional provisions: Article V, Sec. 18 (c), Article XVI, Sec. 65 and Article XVI, Sec. 17.

My questions are as follows:

1. After redistricting, was it necessary to appoint a successor to end the Constable's holdover under Article XVI, Section 17, or was there no office in existence in which to hold over?<sup>[1]</sup>
2. Did the Constable's resignation under Article XVI, Section 65 terminate his right to serve out the remainder of his term under Article V, Section 18 (c)?

<sup>[1]</sup> The redistricting order states that it is effective 8-24-06. Pre-clearance was received by letter dated 10-18-06. The successor was appointed on 10-31-06.



3. If the answer to question one is in the affirmative, what is the length of the successor's term? Is it until the end of the year, or does the successor serve out the remainder of the resigned Constable's term? Put another way, is the term continuation under Article V, Section 18 (c) personal to the Constable, and, therefore, terminated by his resignation, or is it connected to the office itself, so that the successor would serve out the remaining term?

As this appears to be uncharted territory under the present legal authorities, I respectfully request that you seek an opinion from the Texas Attorney General's Office on these issues.

Thank you for your kind attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "JL", is written over the typed name.

Jim Lewis  
County Judge

OCT-18-2006 17:30

DOJ/CRD/VOTING

P.02/02



## Civil Rights Division

JKT:JR:DJJ:jdh  
DJ 166-012-3  
2006-5688

Voting Section - NWB  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

RECEIVED

October 18, 2006

OCT 19 2006

McLENNAN CO.  
JUDGE

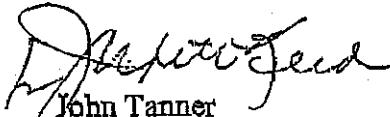
David M. Guinn, Esq.  
Michael D. Morrison, Esq.  
Guinn & Morrison  
One Bear Place #97288  
Waco, Texas 76798-7288

Dear Messrs. Guinn and Morrison:

This refers to the reduction in number of Justices of the Peace from nine to eight and Constables from eight to seven and the resulting 2006 redistricting plan for McLennan County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 25, 2006; supplemental information was received through September 22, 2006.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Sincerely,

  
John Tanner  
Chief, Voting Section