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JAN 31 2014

OPINION COMMITTEE

GEANIE W. MORRISON
DISTRICT 30
January 27, 2014

FILE # MC-47511-14
I.D. # 47511

The Honorable Greg Abbott
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

RQ-1181-GA

Dear General Abbott:

The Aransas County Commissioners Court has asked me to request the following Attorney General Opinion:

Is the Aransas County Commissioner's Court required to appoint a County Attorney to fill the constructive vacancy created by the current County Attorney's running for the office of Aransas County Court at Law? Stated differently, do Section 87.041 of the Local Government Code and Article V, Section 28(b) of the Texas Constitution mandate the Aransas County Commissioners Court to fill the constructive vacancy created by Article XVI, Section 65 of the Texas Constitution or is the decision left up to the discretion of the Aransas County Commissioner's Court?

The facts are thus:

In November 2012, Richard Bianchi was re-elected as Aransas County Attorney for the term of January 1, 2013 to December 31, 2016. In the summer of 2013, Richard Bianchi declared himself as a candidate for Aransas County Court at Law Judge for the four year term beginning January 1, 2015. The primary is in March, 2014 and general election is in November, 2014.

The Aransas County Commissioners Court, with the advice of outside counsel, is of the opinion that pursuant to the "resign to run" provision Article XVI, Section 65 of the Texas Constitution, Richard Bianchi constructively resigned his position as County Attorney when he declared his intent to run for Aransas County Court at Law Judge. However, until his successor is appointed or elected, Richard Bianchi remains as the "holdover" County Attorney with all powers and responsibilities of the office pursuant to Article XVI, Section 17 of the Texas Constitution.



COMMITTEES:
Elections – Chair
Insurance

EMAIL: Geanie.Morrison@house.state.tx.us

TEXAS LEGISLATIVE CAUCUSES:
Energy, Manufacturing, Rural,
Sportsman, Tourism

Two candidates are currently running to fill the unexpired term of the office of Aransas County Attorney. Again that primary is in March, 2014 and the general election is in November, 2014. The Aransas County Commissioner's Court has not appointed an interim County Attorney, but rather has permitted Richard Bianchi to remain as "holdover" County Attorney until his successor is elected and qualifies to fill the unexpired term of Aransas County Attorney.

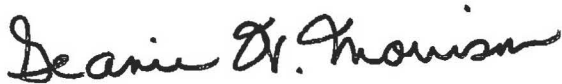
Because Section 87.041 of the Local Government Code provides that Commissioner's Court "may" appoint the successor County Attorney, the Commissioners believe that that decision rests in the sound discretion of the Aransas County Commissioners Court.

Your office addressed a nearly identical question in JC-0140 (1999) which involved a vacancy in the office of Constable. In that opinion you stated:

"In our opinion, the proper way to harmonize these constitutional and statutory provisions is to conclude that, whether 'may' or 'shall' is used, the Commissioner's Court is not under any duty to fill any of the positions in Section 87.041".

Since the office of County Attorney is one of the positions enumerated in Section 87.041, the Aransas County Commissioners are of the opinion that they are not required to appoint an interim successor County Attorney. Rather, they can, in the exercise of their discretion, permit Richard Bianchi to remain as "holdover" County Attorney until the voters elect his successor.

Sincerely,

A handwritten signature in cursive script that reads "Geanie W. Morrison".

Geanie W. Morrison