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OPINION COMMITTEE

June 6, 2003

Via CMRRR # 7002 3150 0000 2643 6564

Honorable Greg Abbott
Attorney General of Texas
Support Services Division
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Austin, Texas 78711-2548

FILE # ML-43135-03
I.D. # 43135

Re: Request for Attorney General Opinion:

Dear Attorney General Abbott:

On behalf of the Honorable Robert J. Kern, 387th District Court, Fort Bend County, Texas, I am seeking an opinion from your office. I request your opinion on the following questions:

1. Is a "master" under Vernon's Ann. Civ. St. art 1918(b), §1 to 16 (repealed) the same as an "associate judge" under section 201.001 of the Texas Family code, specifically with respect to powers, appointment, authority and termination?
2. Does the authorization to appoint a master under Vernon's Ann. Civ. St. art 1918(b) by commissioners court in 1984 automatically encompass the appointment of an associate judge under Section 201.001 Family Code in 2003, without further request to commissioners court and without further authorization by commissioners court?
3. Does the commissioners court authorization to employ a master "at a salary not to exceed \$50,000 a year" limit a court from paying a greater salary at a future date without further commissioners court approval?

4. What authorization does a judge have to appoint as an associate judge someone who did not apply for the posted position, did not interview and did not meet the posted qualifications?
5. What responsibility does a judge have to those persons who timely applied for a posted associate judge position, participated in the interview process and met the posted requirements, but were overlooked, but not rejected, in favor of another applicant?
6. If the commissioners' court approved the appointment of a family court master at a maximum salary, is it interpreted to authorize the appointment of a family code associate judge at a greater salary without further action?
7. Does such authorization to the only then sitting family court to appoint a master extend, upon the legislative creation of a second family court, to authorize either the appointment of an associate judge for the second court or the appointment of one associate judge for both courts?

Statement of Facts

On August 13, 1984, the Fort Bend County Commissioners Court "authorized Judge Stansbury to employ a Master for the 328th District Court at a salary not to exceed \$50,000.00 a year effective October 1, 1984." *See Exhibit A.* At that time, the 387th District Court did not exist. Since this action by Commissioners Court in 1984, no other action has been taken with regard to this matter. Currently, this position is allocated in the county budget under the 328th District Court and uses the term "court master" and "associate judge" interchangeably. *See Exhibit B.*

In 1999, the 387th District Court was created by the 76th Legislature, with a directive to give preference to family law matters. The jurisdiction of the 328th and 387th District Courts are identical as to family law matters.

In November 2002, the associate judge for the 328th District Court resigned. The then-sitting judge of the 328th District Court did not hire a replacement for the associate judge, due in part because of his upcoming retirement at the end of that year. It can be inferred that the retiring judge wanted the newly elected judge to be able to choose an associate judge for the court and/or be able to participate in the selection process. A job description was posted encompassing both courts and applications/resumes were submitted to the judges of both courts. Interviews were conducted; however, the judges could not agree upon one candidate. The position was posted for a second time, at a slightly higher salary; applications/resumes were submitted through the county human resources department in response to the second posting as well. A dispute has arisen regarding the authority to appoint an associate judge. The judge of the 328th District Court has appointed an associate judge, who currently serves only the 328th District Court.

Question No. 1: Is a “master” under Vernon’s Ann. Civ. St. art 1918(b), §1 to 16 (repealed) the same as an “associate judge” under section 201.001 of the Texas Family code, specifically with respect to powers, appointment, authority and termination?

In 1984, when the Fort Bend County Commissioners Court authorized the judge of the 328th District Court to employ a master, the source regarding the appointment was Vernon’s Ann. Civ. St. art 1918b, §1 to 16. This section was repealed and codified in the Government Code under Chapter 54; however, the repealed sections relating to family law masters was codified in Section 201.001 et seq. of the Family Code. *See Exhibits C, D & E.* Through my research, I have located a copy of the 66th Legislature – Regular Sessions laws regarding the appointment of a master, which took effect on August 27, 1979, and codified as Vernon’s Ann. Civ. St. art 1918b, §1. *See Exhibit C.* The Government Code was amended again in 1985, after the 1984 authorization of the Commissioners’ Court to the judge of the 328th District Court to employ a master. Commissioners’ Court has never been asked to authorize an associate judge, nor have they done so. Their last action regarding this matter was in 1984.

Since 1984, the statutes regarding the employment of a master have been amended significantly. Chapter 54 of the Texas Government Code is currently broken-down by county and sections 54.1001 through 54.1022 pertain specifically to Fort Bend County. However, the relevant provisions contained in the Government Code as it pertains to family law associate judges and family law masters are now codified in Section 201 et seq. of the Texas Family Code; and, therefore, in my opinion, apply to the appointment of an associate for the family courts in Fort Bend County and Chapter 54 of the Government Code does not apply.

Section 201 et seq. of the Family Code is broken down into two subchapters: Subchapter A: Associate Judge; Subchapter B: Child Support Master and Court Monitor. The powers of a master appointed under Vernon’s Ann. Civ. St. art 1918b, §5 in 1984 are almost identical to the powers of an associate judge under Section 201.007 of the Family Code. The powers and duties of a master under Section 201.104 under the Family Code are drastically different than the powers of a master appointed under Vernon’s Ann. Civ. St. art 1918b, §5 in 1984.

Question No. 2: Does the authorization to appoint a master under Vernon’s Ann. Civ. St. art 1918(b) by commissioners court in 1984 automatically encompass the appointment of an associate judge under Section 201.001 Family Code in 2003, without further request to commissioners court and without further authorization by commissioners court?

The term “master” was used in the applicable statute in 1984, hence the authorization of the Fort Bend County Commissioners Court in 1984 to employ a

“master” for the 328th District Court. The relevant section of the Government Code as it was in 1984 authorizes the appointment of a master if authorized by the commissioners’ court. It appears that the proper procedures for the employment of the master were followed in 1984. The fact that the term has since changed from “master” to “associate judge” does not, in my opinion, alter the authority derived from as Vernon’s Ann. Civ. St. art 1918b, §1 in 1984, under which the Fort Bend County Commissioners Court authorized the employment of a master. In fact, the term court “master” is currently used in subchapter B of Chapter 201 of the Texas Family Code and applies to courts having jurisdiction of Title IV-D cases. In this instance, the district courts do not exercise Title IV-D jurisdiction. Therefore, in my opinion, the appointment, powers and duties of a master in 1984 under Vernon’s Ann. Civ. St. art 1918b, §1 are the same as an “associate judge” under Chapter 201 of the Family Code today. Judge Kern does not question the authority of the judge of the 328th District Court to appoint a master at a maximum salary of \$50,000.00.

Pursuant to Section 201.001 of the Texas Family Code, a judge of a court having jurisdiction of a suit may appoint a full-time or part-time associate judge to perform the duties authorized by this chapter if the commissioners court authorizes the employment of an associate judge. If more than one court in a county has jurisdiction of a suit, the commissioners court may authorize the appointment of an associate judge for each court or may authorize one or more associate judges to share service with two or more courts. Although section 201.001(c) authorizes two courts with jurisdiction to share the services of an associate judge, it is the opinion of this office that the sharing must be authorized by the commissioners’ court. Absent the authority of the commissioners’ court, a judge does not have the authority to make an appointment of an associate judge to his/her court. Therefore, in my opinion, since to date the Fort Bend County Commissioners’ Court has authorized the employment of a master for the 328th District Court, only the 328th District Court has the authority to employ a master. Commissioners’ Court has not authorized the appointment of an associate judge.

Question No. 3: Does the commissioners court authorization to employ a master “at a salary not to exceed \$50,000 a year” limit a court from paying a greater salary at a future date without further commissioners court approval?

Judge Kern contends that the Fort Bend County Commissioners’ Court has not authorized the employment of an associate judge, only a master. The original salary approved by the Commissioners’ Court in 1984 was \$50,000. Fort Bend County prepares its budget in accordance with Chapter 111, subchapter C of the Local Government Code. Proposed budgets are submitted and a budget for each county department and elected official is ultimately approved by the Commissioners Court. It is through this process that the salary for this position, originally called a master and now referred to as associate judge, has increased significantly. The current annual salary of the associate judge is in excess of \$90,000. If a master appointed in 1984 is the same as an associate judge appointed in 2003, is the increase in salary appropriate and justified without further commissioners’ court action?

Question No. 4: What authorization does a judge have to appoint as an associate judge someone who did not apply for the posted position, did not interview and did not meet the posted qualifications?

In the event you find that the appointment of an associate judge by the judge of the 328th District Court was lawful and proper, it is the opinion of this office that an elected official has the authority to hire anyone he/she so desires, so long as the basis for the employment is not made on the basis of race, color, age, sex, religion, disability or national origin. "It is the law in Texas that an elected officer occupies a sphere of authority, which is delegated to him by the Constitution and laws, within which another officer may not interfere or usurp." *Pritchard & Abbott v. McKenna*, 162 Tex. 617, 350 S.W.2d 333, 335 (Tex. 1961). Additionally, an elected county officer may "decide how to use the employees who work in his or her office to accomplish the officer's constitutional and statutory duties. Tex. Att'y Gen. Op. No. JC-0239 (2000) at 4. Therefore, it is the opinion of this office that the judge of the 328th District Court, or any elected official, has the authority to appoint and/or hire someone who did not go through the customary hiring practices. However, Judge Kern questions that since customary hiring practices were invoked, including the human resources department, can a Judge then abandon the practice and make a unilateral decision without interviewing other candidates?

Judge Kern is concerned that the associate judge candidate selected by the Judge of the 328th District Court did not submit an application/resume in response to the first posting and was not interviewed at part of that process. The selected candidate was interviewed by the Judge of the 328th District Court; however, Judge Kern was not included in the interview, based on an opinion from this office that the authority to hire an associate judge lies solely with the Judge of the 328th District Court. Judge Kern disagrees with that opinion, hence this request.

Judge Kern is concerned that the applicants not considered for this position by the Judge of the 328th District Court could possibly have claim against the Judge of the 328th District Court and Fort Bend County based on race and sex discrimination. Several of the applicants were women and several were of Hispanic descent; however, none were interviewed and a white-male was selected as the associate judge. Furthermore, Judge Kern cites Canon 3C(4) of the Code of Judicial Conduct, which states in part that: "A judge shall exercise the power of appointment impartially and on the basis of merit."

The Judge of the 328th District Court, Judge Ronald Pope, requested an opinion from this office as to his authority to appoint an associate judge without input and/or consent from any other judge. *See Exhibit F*. In response to the opinion issued by this office, Judge Pope appointed an associate judge for his court.

Question No. 5: What responsibility does a judge have to those persons who timely applied for a posted associate judge position, participated in the interview process and met the posted

requirements, but were overlooked, but not rejected, in favor of another applicant?

The same comments and legal arguments for Question No. 4 are applicable to Question No. 5. However, I include the following cases for your consideration:

Sharyl Teneyuca v. Bexar County, Bill White, and Charles T. Conaway, 767 F.2d 148 (5th Cir. 1985) is a case involving an assistant district attorney in Bexar County and whether such assistant was considered an "employee" for purposes of Title VII of the Civil Rights Act. The court in *Teneyuca* affirmed the lower court's grant of summary judgment based on the assertion that the person holding the position of assistant criminal district attorney is not an "employee" for purposes of Title VII because the assistant criminal district attorney is a member of the "personal staff" of the Bexar County Criminal District Attorney. *See Exhibit G.*

Similarly, in *Owens v. Rush*, 654 F.2d. 1370 (10th Cir. 1981), the court looked to the nature and circumstances of the employment relationship between the complaining individual and the elected official to determine if the "personal staff" exception to Title VII is applicable. The factors considered by the court include the following:

1. Whether the elected official has plenary powers of appointment and removal;
2. Whether the person in the position at issue is personally accountable to only that elected official;
3. Whether the person in the position at issue represents the elected official in the eyes of the public;
4. Whether the elected official exercises a considerable amount of control over the position;
5. The level of the position within the organization's chain of command; and
6. The actual intimacy of the working relationship between the elected official and the person filling the position.

Under *Owens*, the court held that an undersheriff was a member of the personal staff of the elected sheriff because the sheriff had plenary powers of appointment and removal, the undersheriff was personally accountable to the sheriff, and because that level of accountability was reasonable. Additionally, the undersheriff had a very close working relationship with the sheriff, and the undersheriff was second in authority to the sheriff. *See Exhibit H.*

Both *Teneyuca* and *Owens* are applicable to show that the position of an associate judge for a specific court and/or elected official qualifies as a "personal staff" position. If your office determines that the appointment of an associate judge lies solely with the court receiving the authority of commissioners' court, under the standards of *Owens*, the appointing judge has plenary or absolute powers of appointment and removal of the

associate judge; the associate judge is second in authority and an immediate adviser to the appointing judge, who is personally accountable only to the appointing judge, and the associate judge is the highest non-elected position within the organization's chain of command. Whereas *Teneyuca* illustrates that multiple assistants of an elected official may be considered "personal staff," it is certainly more true that the associate judge to an elected judge would qualify under the same standard. However, Judge Kern makes the distinction that the position of an associate judge is created by the legislature; therefore, it may be argued that the position is not personal, but statutory. Also, Judge Kern argues that since the judges involved elected to pursue standard hiring processes of posting, accepting applications and conducting interviews, and the applicants were so notified, the decision is not a personal one.

Question No. 6: If the commissioners' court approved the appointment of a family court master at a maximum salary, is it interpreted to authorize the appointment of a family code associate judge at a greater salary without further action?

Please see comments and legal arguments under Question No. 3.

Question No. 7: Does such authorization to the only then sitting family court to appoint a master extend, upon the legislative creation of a second family court, to authorize either the appointment of an associate judge for the second court or the appointment of one associate judge for both courts?

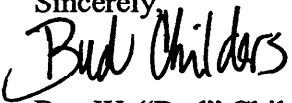
Please see comments and legal arguments under Question No. 2.

Summary

In 1984, the Fort Bend County Commissioners Court authorized Judge Stansbury to employ a master for the 328th District Court. To date, the order of the Commissioners Court has not been amended and/or repealed and the allocation of the master and/or associate judge of the 328th District Court remains in the certified county budget. Any changes to the power or appointment of the master, also referred to an associate judge, of the 328th District Court must be with the approval of the Commissioners Court. The sharing of the services of an associate judge for two or more courts require approval of the commissions court pursuant to Section 201.001(c) of the Family Code.

Thank you in advance for your time and consideration with regard to this matter. If you require any additional information to make a determination in this case, please do not hesitate to contact me.

Honorable Greg Abbott
June 6, 2003
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Sincerely,

Ben W. "Bud" Childers,
Fort Bend County Attorney

Enclosure: Exhibits A - H

cc: Fort Bend County Commissioners Court
Fort Bend County Board of Judges
James Edwards, County Budget Officer