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OPINION COMMITTEE

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February 21, 2008

FILE # ML-45567-08
I.D. # 45567

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P. O. Box 12548
Austin, TX 78711-2548

RQ-0681-GA

RE: Request for Opinion

Dear Attorney General Abbott,

I hereby request an opinion of the Attorney General regarding the validity of an adopted personnel policy of San Jacinto County prohibiting rehire for one year after termination.

Questions:

1. Is a county policy prohibiting rehire for one year after termination or separation of a full time employee valid and constitutional?
2. Is a county policy prohibiting rehire for one year after termination an unconstitutional restriction on the right of an elected constable to employ a deputy of his choice?

Fact Situation

On October 2, 2006, the Precinct Four Constable hired a deputy constable for six months.

On April 30, 2007, funds were transferred to pay the deputy constable for the remainder of the fiscal year. San Jacinto County's fiscal year runs from October 1 through September 31.

On October 1, 2007 a payroll change notice was received changing the deputy's salary from \$11.98 per hour (full time payroll account) to \$12.34 per hour from the part time payroll account. The change notice was executed by the Constable on October 29, 2007. The county treasurer also received a time sheet for 9/22/07 - 10/05/07 requesting the deputy constable be paid for her vacation and any monies due her.

On October 12, 2007, check number 54559 was issued to that effect.

On 10-18-2007 the county treasurer received a payroll change notice indicating the former deputy constable had been hired full time for the San Jacinto County Sheriff's Department.

On 10-27-2007, the county treasurer received a Notice of Employee Separation indicating the employee had "accepted another job."

San Jacinto County has established a policy on Separation and on Layoffs (see enclosed). San Jacinto County has also established a county policy on termination, 4.05. Section 4.05.3 states

When an employee terminates from San Jacinto County, the employee is not eligible for rehire for a period of one year, unless the employee was classified as a part-time employee and rehired as a full time employee. (See enclosed).

According to the personnel records, the deputy constable left part-time employment with the constable's office to accept full time employment with the San Jacinto County Sheriff's Department. The notice of separation from the Sheriff's Department simply noted the former deputy constable resigned full time employment from the Sheriff's Department to accept another job. Under the prevailing county policy, she is not eligible for rehire for one year after resigning full time employment.

This policy was approved and adopted by the San Jacinto County Commissioner's Court on February 16, 2007, and applies to all county employees.

The former deputy constable and the elected constable now claim an unfettered right to employee deputy constables of his "own choice", citing subchapter B, Chapter 86, Texas Government Code, *Commissioner's Court of Shelby County v. Ross*, 809 S.W.2d 754, 756 (Tex. App. - Tyler 1991, no writ.), *Garcia v. Reeves County, Tex.*, 32 F.3d 200, 203 (5th Cir. 1994), *William v. Bagley*, 875 S.W.2d 808, 811 (Tex. App. - Beaumont 1994, no writ), *Abbott v. Pollock*, 946 S.W.2d 513 (Tex. App. - Austin, 1997), and Tex. Atty. Gen. Op. JC-0214.

None of the cases or opinions cited by Constable's counsel address the policy making authority of the commissioner's court in relation to all county employees. Many counties have established policies requiring drug screening as a prerequisite for employment and the requirement of a criminal history check for positions requiring the use of computers, access to master keys, or other sensitive positions. This appears to provide some restriction to an elected official's ability to hire whomever he chooses and is separate from an issue regarding the commissioner's court control over department budgets to dictate whom an elected official may hire.

The former deputy constable, Constable or their legal counsel have not raised the issue of discriminatory practices singling out the former deputy constable. The issue raised is the authority of the county, via its policy, to prohibit rehire of the deputy constable.

Therefore, I am requesting the above questions be answered to clarify the policy-making authority or restrictions in such, related to the rehire policy.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Bill Burnett", written in a cursive style.

Bill Burnett
Criminal District Attorney

Attachments:

Letter from Paul G. Aman Attorney at Law
County Policy 2.07
County Policy 4.05
County Policy 5.01
County Policy 5.02

cc: Paul G. Aman
Attorney at Law
712 Westcott Street
Houston, Texas 77007

Fritz Faulkner
County Judge
San Jacinto County, Texas

PAUL G. AMAN
ATTORNEY AT LAW, P.C.

712 Westcott Street • Houston, Texas 77007
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DAVID R. DONAHUE
Legal Administrator

February 4, 2008

Honorable Fritz Faulkner, County Judge
SAN JACINTO COUNTY, TEXAS
1 State Hwy 150, Room 5
Coldspring, Texas 77331

RE: Lou Rogers, Constable Precinct Four, San Jacinto County

SUBJECT: *Denial of Continued Employment of Deputy Constable Belinda Faye Adams*

Dear Judge Faulkner:

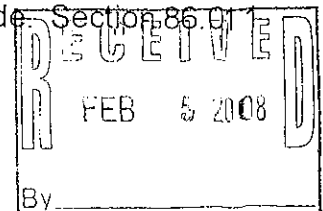
Please be advised that I have been retained to represent the interest of San Jacinto County Constable Lou Rogers concerning whether he has the authority to hire and fire personnel within his department.

Constable Rogers hired Belinda Faye Adams in October, 2007, after being a full time Deputy with total benefits afforded to all full time officers with one full year service. Mrs. Adams was hired as a full time peace officer with the San Jacinto County Sheriff's Department but had to resign from the San Jacinto County Sheriff's Department after only a few days. Mrs. Adams was never terminated nor resigned from her employment with Constable Rogers.

On November 13, 2007, Constable Rogers while attending Commissioner's Court, was informed by you that he could no longer employ Mrs. Adams because the San Jacinto County Policy states if an employee is terminated that they cannot come back to work for the county for a period of one year.

I do not believe that San Jacinto County Commissioner's Court has the authority to prevent Constable Rogers from retaining Mrs. Belinda Faye Adams as a Deputy Constable. Elected officers occupy spheres of authority which is delegated to that officer by Constitution and laws, which another officer may not interfere with or usurp. Both the offices of the Constable and County Sheriff are established in Article V of the State Constitution.

The appointment of a new employee by a county officer, such as a constable is governed by subchapter B of Chapter 86 of the Local Government Code, Section 86.01



commands an officer "who desires to appoint a deputy" to apply to in writing to the Commissioner's Court for such appointment and show that it is necessary to appoint a deputy in order to properly handle the business of the constable's office that originates in the constable's precinct. The application must state the name of the proposed deputy. Neither commissioner's court nor a member of the court may attempt to influence the appointment of any person. Texas Local Government Code § 151.004.

The principal power of the Commissioner's Court with respect to other county officers like the sheriff is the power of the purse strings. One of the statutory powers given the Commissioner's court of Texas counties, exercisable in that court's constitutional power over county business, is the legislative power of budget-making. Commissioner's court may limit the number of deputies authorized, but it has no power over naming the individuals to be appointed. Commissioner's Court of Shelby County v. Ross, 809 S.W.2d 754, 756 (Tex.App. - Tyler 1991, no writ.); Garcia v. Reeves County, Tex., 32 F.3d 200, 203 (5th Cir. 1994); William v. Bagley, 875 S.W.2d 808, 811 (Tex. App-Beaumont 1994, no writ.); Tex. Atty. Gen. Op. JC -0214, 2000 WL 552170 (Tex. A.G.)

I do not believe San Jacinto County Commissioner's Court has the authority to restrict who Constable Rogers chooses to employ at his office. An elected county officer, despite the commissioners court's control over the officer's budget, is free to select assistants of his or her "own choice." Abbott v. Pollock, 946 S.W.2d 513 (Tex. App.-Austin, 1997).

Because of the current case law and Attorney General Opinions cited, we are requesting that you vacate the order given to Constable Rogers instructing him not to continue employment of Belinda Faye Adams. Please let me know within ten (10) days of receipt of this letter, if you are in agreement or if you wish to discuss this matter. Thank you for your attention to this matter.

Very truly yours,



Paul G. Aman

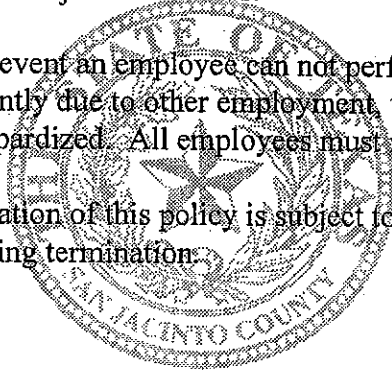
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SAN JACINTO COUNTY

POLICY ON OUTSIDE EMPLOYMENT AND ACTIVITIES/SECOND JOBS

OUTSIDE ACTIVITIES

1. Employees of San Jacinto County are expected to report to work each day and perform the essential functions and carry out their job responsibility in an efficient, safe, and professional manner. San Jacinto County considers itself to be the principal employer by providing both wages and significant benefits to its employees. Consequently, there is concern about an employee being unable to perform his/her duties due to fatigue caused by a second job or if the type of work they are performing may bring discredit on the office holder and San Jacinto County.
2. An employee contemplating accepting other employment or second job, (other than an incidental couple of hours here and there) while still employed by San Jacinto County should secure his/hers Department Head/Elected Official's approval prior to beginning the second job or business.
3. In the event an employee can not perform his/her job safely and efficiently due to other employment, the employee's county job may be jeopardized. All employees must report to their job fit for duty.
4. A violation of this policy is subject to disciplinary action, up to and including termination.



POLICY APPROVED AND ADOPTED BY: COMMISSIONERS' COURT

DATE: 6/28/06

2.07

Page 1 of 1

SAN JACINTO COUNTY POLICY ON TERMINATION

TERMINATION PAY

1. If an employee leaves the service of the County his/her final pay check shall include:
 - A. Pay for all hours worked but for which payment has not been received including, where applicable, time and one-half (1 1/2) for overtime worked, calculated at time earned;
 - B. Where applicable, pay for compensatory time which has been earned but not yet used;
 - C. Pay for any leave time for which payment is due under the provision of the San Jacinto County Personnel Policy Manual;
 - D. Deduction for any indebtedness to the County which the employee may have incurred but which has not been paid
 - E. In the event that an employee leaves a position of employment with San Jacinto County in order to fill an appointed or elected position with the County, the prior position is considered terminated. All leave time for which payment is due under San Jacinto County Personnel Policies shall be included in the last paycheck for the terminated position. Seniority is not affected.
2. In order to ensure that the proper amount is paid to a terminating employee, the final time sheet must be submitted to the Treasurer's office as soon as possible, after the employee's last day to work.
 - A. If an employee's last day to work is in the middle of a pay period, he/she will receive a paycheck on the regular scheduled payday.
 - B. The paycheck for any accumulated leave balances, if any, will be issued as soon as possible on the payday following an employee's last day to work provided that the final time sheet has been received in time to calculate the amount due to the terminating employee.
3. When an employee terminates from San Jacinto County, the employee is not eligible for rehire for a period of one year, unless the employee was classified as a part-time employee and rehired as a full time employee.

EFFECTIVE DATE OF TERMINATION

4. An employees' termination date shall be his/her last day physically present on the job.

POLICY APPROVED AND ADOPTED BY: COMMISSIONERS' COURT

Date: 2/16/07

4.05

Page 1 of 1

SAN JACINTO COUNTY POLICY ON SEPARATION

TYPES

1. All separation from employment with County shall be designated but not limited to one of the following types:
 - A. Resignation;
 - B. Retirement;
 - C. No Fault;
 - D. Dismissal;
 - E. Disability;
 - F. Reduction in Forces (layoff); or
 - G. Death.

RESIGNATION

2. A resignation shall be classified as any situation in which an employee voluntarily leaves his/her employment with San Jacinto County and the separation does not fall into one of the other categories.
3. Employees should notify his/her supervisor of the intent to resign at least ten (10) working days prior to the last day of work. The employee shall be responsible to return any County property in their care, custody or control to the County including this manual. Any property that has not been turned in on or before employees last day of employment, San Jacinto County will withhold replacement cost from employee final pay check.
4. A department head shall be responsible for notifying the County Treasurer as soon as an employee announces her/her intent to resign.
5. The department head is responsible for completing and submitting a "Separation Form" on the separating employee on or about the day of separation so the County's unemployment carrier can be notified.

RETIREMENT

6. Employee's requirements for resignation applies to retirement except for the fact that the employee should notify his/her supervisor and the County Treasurer at least thirty (30) days prior to the last day of work so that any retirement benefits due may be started promptly.

**SAN JACINTO COUNTY
POLICY ON SEPARATION**

- DISMISSAL**
7. A dismissal shall be any involuntary separation from employment which does not fall into one of the other categories of separation.
 8. San Jacinto County is an at-will employer and a department head may dismiss an employee at any time for any reason or no reason at all.

REDUCTION IN FORCE

9. An employee shall be separated because of reduction in force when his/her position is abolished or when there is lack of funds, lack of work, or the position does not receive budgetary funding.
10. Separation for reduction in force is subject to the provisions of the POLICY ON LAYOFFS (5.02)
11. If an employee dies while in the service of the County, his/her designated beneficiary or estate shall receive all earned pay and payable benefits.
12. An employee on Workers' Compensation will be replaced at the discretion of the Elected Official or Department Head as necessary, so as the business of San Jacinto County can proceed. It is the desire of the County for the employees to return to full medical improvement and productive full time status. The injured employee will be notified of the "Return to Work Policy," (3.18) and San Jacinto County will follow the guidelines as it pertains to the Policy on Family Medical Leave Act.

POLICY APPROVED AND ADOPTED BY: COMMISSIONERS' COURT

Date: 6/28/06

5.01

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**SAN JACINTO COUNTY
POLICY ON LAYOFFS**

REASON

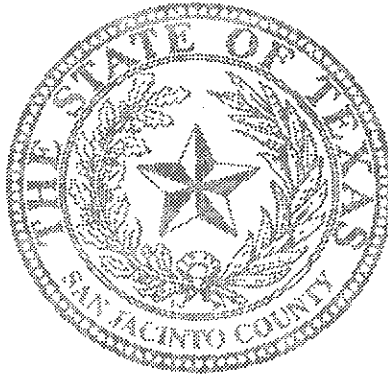
1. While such action is avoided whenever possible, employees of San Jacinto County may be laid off where a department head deems it necessary because of shortages of funds or work, the abolition of a job or jobs, other material changes in the organization or for other reasons which are beyond the control of the employees.
2. A layoff shall not reflect discredit on an employee or on his/her ability to do the job in which he/she was employed.

TRANSFERS

3. Whenever possible, employees who are laid off in one department shall be integrated into other departments by transfer.

SEQUENCE

4. If layoffs are required, they shall be based first on demonstrated job performance and efficiency and, secondly, on length of service.
5. Laid off employees may apply for new openings, but previous employment shall not be considered as guaranteeing any right to another job.



POLICY APPROVED AND ADOPTED BY: COMMISSIONERS' COURT

Date: 6/28/06

5.02

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