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OCT 28 2010

OPINION COMMITTEE



FILE # ML-46611-10

I.D. # 46611

RQ-0927-GA

SMITH COUNTY COURTHOUSE
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TYLER, TEXAS 75702

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Smith County

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October 28, 2010

Via certified mail & facsimile

Honorable Greg Abbott
Attn: Intergovernmental Relations
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

*In re: Request for Attorney General Opinion Pursuant to Texas Government
Code § 402.043*

Dear Attorney General Abbott:

The Smith County District Attorney's Office is filing a request for an opinion from the Texas Attorney General at the request of Jim Seaton, Smith County Fire Marshal. In the interest of justice, this office kindly requests an opinion from the Texas Attorney General to address an issue of importance with regard to the proper legal parameters that a county fire marshal may take in appointing fire marshal "assistants".¹ Specifically, it has come to our attention that a question has been recently raised

¹ Tex. Gov't Code § 402.43 (Stating that "The attorney general shall advise a district or county attorney of this state, on the attorney's request, in the prosecution or defense of an action in which the state is interested before a district or inferior court if the requesting attorney has investigated the question involved and submitted a brief to the attorney general.").

surrounding the scope of authority for a County Fire Marshal to appoint deputy reserve officers even though there is express authority for appointment of fire marshal assistants.

Background & Facts

During a recent audit by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”), the Smith County Fire Marshal was informed that there is a lack of express authority for reserve deputy officers in the office of the County Fire Marshall. The TCLEOSE representative conducting the audit gave the Fire Marshall a copy of an Attorney General’s Opinion (Op. Tex. Att’y Gen. GA-0709 (2009)) that opines that only county sheriffs, county constables, municipal police departments, and navigation districts have express authority for reserve deputies. The TCLEOSE representative also indicated that the Fire Marshall should seek the legal opinion of the county’s attorney with regard to his authority to have reserve deputies in his office. The Smith County Fire Marshal’s Office was originally authorized by the Smith County Commissioners Court to appoint six (6) “Volunteer Assistant Fire Marshals” on July 28, 1986.

Question Presented

Whether or not the Smith County Commissioners authorization for the County Fire Marshal to appoint six (6) “Volunteer Assistant Fire Marshals” is sufficient for commissions to be issued to the fire marshal assistants as “reserve deputies”?

Discussion

The definition of “reserve law enforcement officer” is limited in the Occupations Code to include officers appointed by a sheriff, a constable, a municipal police force, or a “navigation district”.² **Tex. Occ. Code § 1701.01; see also, Op. Tex. Att’y Gen. GA-0709 (2009) (indicating that a County Attorney is not authorized to appoint reserve peace officers).** The express provisions addressing reserve deputies in the Local Government Code include sections 85.004 (sheriff), 86.012 (constables), and 341.012 (municipal police force). **Tex. Loc. Gov’t Code §§ 85.004, 86.012, & 341.012.**

The provision authorizing the creation of the County Fire Marshal’s Office only refers to the term “assistants” and does not use the terms “reserve officer” or “reserve deputy.” **Tex. Loc. Gov’t Code § 352.011 (stating that “The commissioners court of a county may establish the office of county fire marshal and provide ... assistants ...**

² Pursuant to Section 60.0775 of the Texas Water Code.

for that office).³ The Local Government Code was codified by combining local government code statutes without making any substantive changes to existing law in 1987. **Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.** The bill digest for SB 896 offers no commentary or historical notes regarding the “legislative intent” of the term “assistants” for a County Fire Marshal. **SEN. COMM. ON STATE AFFAIRS, BILL DIGEST, Tex. S.B. 896, 70th Leg., R.S. (1987).** The underlying source law (Tex. Rev. Civ. Stat. art. 3912k) pertaining to fire marshal assistants dates back to 1951. **35 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 31.54 (Texas Practice 1989).** It appears there is no available legislative history or notes with regard to the use of the term “assistants” for county fire marshals.⁴

The Smith County Fire Marshal did obtain an order from the Commissioners Court allowing appointment of six (6) “Volunteer Assistant Fire Marshals” on July 28, 1986. **Attached Exhibit “A,” incorporated herein as if copied in full.** The authorization given is specifically for “volunteers” and does not designate payment of any salary. *Id.* Nevertheless, what remains unclear is the status of these Fire Marshal Volunteer Assistants as “reserve officers” or “reserve deputies.”⁵ It appears that either the definition of “reserve law enforcement officer” in the Occupations Code needs to be amended to expressly incorporate Loc. Gov’t Code section 352.011 (County Fire Marshal) or an opinion from the Attorney General is needed to clarify that County Fire Marshal assistants are indeed qualified to be deputy reserves. Failure to clarify the status of these assistants could compromise their testimony in future cases that they need to testify in.

Request for Legal Opinion:

While the law pertaining to County Fire Marshals allows for authorization of “assistants,” it is unclear if such assistants fall within the scope of “reserve law enforcement officer.” Based on the foregoing, the Smith County Criminal District Attorney’s Office is requesting that the Texas Attorney General issue a legal opinion with regard to the express authority of county fire marshals to appoint deputy reserves. Without a legal opinion clarifying this important issue, fire marshal assistants will be

³ The statute does not indicate that the Commissioners Court is obligated to provide for payment of salaries for County Fire Marshal assistants. Therefore, a County is authorized to approve Fire Marshal assistants who serve on a part-time volunteer basis.


⁴ This issue may also be relevant to Emergency Service Districts that carry unpaid volunteer deputies.

⁵ In addition to carrying their commission as peace officers, the County Fire Marshal desires to have these assistants certified as arson investigators.

greatly limited in their ability to help in fire and arson investigations and their potential as investigative witnesses for legal proceedings will be damaged.

Thank you in advance for your time and attention to this matter.

Sincerely,



Stan O. Springerley
Civil Assistant District Attorney

Cc: Hon. Jim Seaton, Smith County Fire Marshal
Hon. Judge Joel P. Baker, Smith County Judge

Encl.

EXHIBIT A

MINUTES OF COMMISSIONERS COURT July 28, 1986

At a special meeting of the Commissioners Court of Smith County, Texas, with County Judge Bob H. Hayes presiding and Commissioners B. J. Payne, Jerry Shamburger, Gene Chandler, and Andrew R. Melontree, being present, the following business was transacted, pursuant to the notice being duly posted, to-wit:


Agenda Items 13: Consider authorizing the appointment of Volunteer Assistant Fire Marshals.

Motion was made by Commissioner Jerry Shamburger, seconded by Commissioner B. J. Payne, which motion carried unanimously that the Commissioners Court authorize the appointment of six (6) Volunteer Assistant Fire Marshals.

APPROVED: S/R. H. Hayes
Chairman, Commissioners Court

ATTESTED:
Mary Morris, COUNTY CLERK
Smith County, Texas
By S/Lynn Garrett
Lynn Garrett, Deputy

THE STATE OF TEXAS, COUNTY OF SMITH: I, JUDY CARNES, Clerk of the County Court, in and for Smith County, Texas do hereby certify that the above and foregoing is a true and correct copy of a part of a Minute of Commissioners Court of Smith County, Texas as appears of record in the Commissioners Court Minutes Records of Smith County, Texas. GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 8th Day of June, 2001.

JUDY CARNES, Clerk County
Court, Smith County, Texas
By  Deputy
Jennette Steveson