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MEMORANDUM

TO: JUDGE CYNDI TAYLOR KRIER
BEXAR COUNTY JUDGE

FROM: *SH* STEVEN C. HILBIG
BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY

DATE: DECEMBER 13, 1994

RE: APPOINTMENTS TO BOARDS AND COMMISSIONS *DA-94-018*

In a letter dated December 8, 1994, you have asked the following question:

Can a Commissioners Court with members whose terms end on December 31, 1994 and whose composition is changing can make prospective appointments for terms which do not begin until after the new Commissioners Court takes office?

Your letter also contained a second question which I have interpreted as a "follow-up" question, namely:

If the end of this Court's term is not the end of its appointive powers, when is [sic]? Can this Commissioners Court bind the new one by making prospective appointments which do not begin until February or July or 1996 or 1997?

In your request you cited certain legal authority regarding prospective appointments. I will discuss their applicability below.

state, 195 W 2d 674
In Dobkins v. Reece, *17 S.W.2d 81*, (Tex. Civ. App. - Ft. Worth 1929, motion on rehearing, no writ), an incumbent sheriff died after he was re-elected but before his new term began. In December Commissioners Court appointed Dobkins to "fill the unexpired term of [the

decendent], and until his successor has been duly elected and qualified as provided in the Revised Statutes of the State of Texas." In January of 1929, the composition of the Commissioners Court changed and Reece was appointed by the new Court to fill the vacancy created by the death of the incumbent sheriff for the new two-year term. A suit was filed and the case appealed to the Fort Worth Court of Appeals.

Dobkins argued that the appointment was for the unexpired term plus the term for which his predecessor had been elected. The appellate court ruled that Reece was entitled to serve the new two-year term, and Dobkins had been appointed to serve only the unexpired term. While the court spent some time discussing whether public policy favored placing the power to make the appointment in the "new" or "old" Commissioners Court power, the case eventually turned on the application of the election statutes.

The court concluded that under the election laws in force at the time of the incumbent's death, a vacancy did not exist in the new term until January 1st. Under prior and current statutes¹, Commissions Court is empowered to appoint a sheriff only when there exists a vacancy in the office. Thus the "old" Commissioners Court did not have the legal authority to appoint Dobkins to the new term at the time the appointment was made. The appointment of Reece by the "new" Commissioners Court was the one that had legal effect.

Dobkins should be contrasted with Rice v. English, 742 S.W.2d 439 (Tex. App. - Tyler 1987, writ den'd). Rice involved an incumbent County Commissioner who died shortly before the election. The county judge, whose term expired on December 31st, appointed Rice to the position in November for a term commencing on date of appointment and continuing until the next general election. The new county judge who took office in January appointed English as commissioner and argued that the "old" county judge had no power to appoint for a term of office that had not begun.

The court of appeals concluded that the appointment by the "old" county judge covered both the unexpired term as well as the new term, at least until the next general election. Once again the issue turned on whether there was a vacancy in the office. The court cited changes in the election laws which statutorily created a vacancy in the commissioner's position as soon as the vote was canvassed. Thus the "old" county judge had the power to appoint since there was a vacancy in the office at the time the appointment was made.

You also referred me to a discussion of law contained in 63 American Jurisprudence 2d § 104. This "legal encyclopedia" cites authority from other jurisdictions for the proposition that a public body having a power of appointment cannot forestall the rights and prerogatives of a successor by making a prospective appointment to fill an office where the appointee's term is not to begin until the appointing powers' own term has expired. The section states in part that "[t]he general rule is that a governmental body may not, in the exercise of its powers, appoint

¹The current statute is found in Section 87.041, Local Government Code.

an individual to a term extending beyond the term of the office of the governmental body."

Although American Jurisprudence 2d provides some authority for a public policy argument that there should be no authority to make prospective appointments, there is no Texas case law which holds that such appointments are presently illegal. Our research failed to disclose any similar statutory or constitutional prohibition. One might make a similar "public policy" argument that government does not cease to operate due to a change in elections. However, the resolution of which is the better public policy is not necessary to a determination of your questions.

A. DISCUSSION OF APPOINTMENTS TO VIA BOARD

In your letter you express concern about the Commissioners Court purported appointment of individuals to the VIA board. I presume that you wished me to express an opinion as to the legality of this appointment. In order to do so, the statute under which VIA was established must be examined.

The VIA board was created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1118x. Section 4(b) of that Article, which relates to appointments and filling of vacancies, states:

On expiration of the terms of office of the members of the board, all or any may be reappointed or another person may be appointed to replace a member for the succeeding term.

(emphasis added).

Research reveals no cases or Attorney General Opinions construing this provision; however, a fair reading of § 4(b) indicates that the right to appoint does not arise until the expiration of the previous term. By way of comparison and in support of this conclusion, the enabling statute for the Civil Service Commission and the Sheriff Civil Service Commission (Local Government Code, Chapter 158) do not contain similar limiting language as to when appointments shall occur. The law presumes that the Legislature intended for the entire statute to be effective. Tex. Gov't. Code Ann. § 311.021(2) (Vernon 1968). It is a generally accepted maxim that the law does not require a useless thing, and all language is to be given effect. See Dobkins, 17 S.W.2d at 84. Accordingly, we must presume that there was a legislative purpose in including the language "on expiration of the terms of office", that is, that the actual appointments would not occur until the prior terms had expired.

B. DISCUSSION OF APPOINTMENTS TO CENTER FOR HEALTH CARE SERVICES

You also express concern about an item that is scheduled for action concerning appointment to the Center for Health Care Services (the "Center"). The Center, previously known as the Mental Health and Mental Retardation agency, was created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 5547-201 (Vernon 1908), now recodified in part in Texas Health & Safety Code Ann., Ch. 534 (Vernon Supp. 1994). A review of the applicable statute reveals that the

legislature has not determined the manner of selecting the board members, and has left the procedure to be agreed upon by the participating agencies. Health & Safety Code § 534.004. Thus the answer to your question lies in whatever procedures the participating agencies have agreed to establish.

The only document that this office was able to discover that was apparently executed by all participating agencies regarding the Center appears to be a resolution executed in 1989. The portion of the agreement pertaining to the selection process states that the selection of board members shall be made on the second Wednesday of December by a body comprised of representatives sent by each agency. The 1989 resolution has been modified by the recent legislative changes which required appointment of board members by the participating agencies rather than appointment by agency representatives.

I have been informed that the Center is now undergoing a reorganization and a new document was previously approved by Commissioners Court in 1992. However, I have been informed that no other agency has approved that document.

I have also been told that a new contract has been prepared. Although many of the terms of the new contract have been agreed upon in principle by the participating agencies, neither the County nor any of the other agencies have formally executed the document. Therefore, any new appointment is controlled by the 1989 resolution as changed by recent legislation.

The 1989 resolution states that the terms of the board members commence on January 15th. I understand that all current members are serving in a "holdover" capacity. Thus, any appointment by Commissioners Court would be effective for a term beginning January 15th, unless the appointment is for the unexpired term of a member.

CONCLUSION

There is no Texas constitutional, statutory, or case law expressly making prospective appointments illegal. The validity of any such appointment depends upon the applicable statutes.

The statute which authorizes the establishment of the VIA board requires that the appointment be made on the expiration of the current term. By law, the term of appointment ends December 31st. Thus any appointment made prior to this time is void.

Any appointment to the board of the Center for Health Care Services is governed by the agreement among the participating agencies. The controlling agreement appears to be the 1989 resolution. Under the terms of the resolution, the term of office for a new board member begins on January 15th.

cc: Commissioners Court