

May 23, 1996

The Honorable Steve Holzheuser
Chair, Energy Resources Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 96-056

Re: Whether an elected official must file the statement required by article XVI, section 1 of the Texas Constitution as a prerequisite to performing his duties of office (ID# 35216)

Dear Representative Holzheuser:

You point out that article XVI, section 1(a) of the Texas Constitution requires elected and appointed officers to take an oath of office. Article XVI, section 1(b) requires elected and appointed officers to sign and file a statement with the secretary of state before taking the oath of office. The statement to be signed by elected officers is as follows:

I, _____, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected so help me God. (footnote 1) [Footnote added.]

You ask whether elected officials may perform their duties if they do not have the statement on file with the Secretary of State. If they are prohibited from taking any action, you ask what happens to the actions they have taken and how does a citizen resolve this situation. In *Howell v. State*, (footnote 2) the court stated that members of a state bar grievance committee did not have to take the constitutional oath of office, because the "office" of grievance committee member was created by rule promulgated by the Supreme Court of Texas pursuant to statute, and not by the Constitution of Texas, and the constitutional oath required of officers appointed pursuant to a specific or implied constitutional grant is not required. The elected officers you inquired about do not appear to be within the exception stated in the *Howell* case.

Elected officers qualify for office by taking the oath of office and filing a bond, if one is required. (footnote 3) The courts have not determined whether filing the signed statement required by article XVI, section 16 of the Texas Constitution is necessary to qualify for office, but in answering your question, we will assume that it is. If a person who is elected or appointed to an office does not complete some step necessary to qualify for the office, he or she may still be a "de facto officer," defined as follows:

A de facto officer is one who has the reputation of being the officer, and yet is not a good officer in point of law; in other words, the de facto officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take the oath, give a bond, or the like. (footnote 4)

The law validates the acts of de facto officers as to the public and third parties, thus protecting the interests of individuals and the public who have been affected by their acts. (footnote 5)

Determining that someone is a de facto officer requires the resolution of fact questions, (footnote 6) which cannot be done in the opinion process. However, the Texas courts have in various cases applied the de facto doctrine to an elected or appointed officer who failed to take the oath of office or to file his commission or appointment with the appropriate authority. The Texas Court of Criminal Appeals has concluded an individual was a de facto deputy sheriff, even though his appointment and oath were not recorded in the county clerk's office, as required by former article 6869, V.T.C.S. (1925) (now Local Government Code section 85.003), and neither his deputation card nor bond indicated that he had taken the oath. (footnote 7) The de facto doctrine has also been applied to an assistant county attorney, even though he had not taken the oath of office, and no written deputation had been filed with the county clerk, (footnote 8) to a deputy clerk, though no jurat (footnote 9) was attached to his oath of office, (footnote 10) and to a school district tax assessor-collector who never took the oath of office or gave the bond required by law. (footnote 11) We note, however, that the Texas Court of Criminal Appeals has held that without taking the oath prescribed by the constitution, "one cannot become either a de jure or de facto judge, and his acts as such are void."

(footnote 12) No court has addressed the status of a judge who has taken the oath of office, but has not filed the statement required by article XVI, section 1 of the Texas Constitution. We have no basis for concluding that an individual's acts as judge are void if the required statement is not on file with the secretary of state.

We conclude that an elected officer who has not filed the statement required by article XVI, section 1 of the Texas Constitution may nonetheless be shown to be a de facto officer, whose acts the law validates with respect to third parties and the public. Whether the de facto doctrine will apply in a given case is a fact question that cannot be resolved in an attorney general opinion.

You also ask how a citizen resolves questions about the status of an officer for whom the statement required by article XVI, section 1 is not on file with the secretary of state. As a general rule, the authority of a de facto officer may not be questioned in a collateral proceeding. (footnote 13) The proper remedy to question the authority of a de facto public official is a quo warranto proceeding brought in the name of the state. (footnote 14) A quo warranto action may be brought by the attorney general or the county or district attorney of the proper county, but a decision whether or not to bring a quo warranto action is entirely discretionary with the officer who has jurisdiction of the matter. (footnote 15) An officer with authority to file quo warranto suits cannot be compelled to do so against his or her will by mandamus brought by interested private persons. (footnote 16)

SUMMARY

An elected officer who has not filed with the Secretary of State the signed statement required by article XVI, section 1(b) of the Texas Constitution may nonetheless be shown to be a de facto officer, whose acts the law validates with respect to third parties and the public. Whether the de facto doctrine will apply in a given case is a fact question.

The proper remedy to question the authority of a de facto public official is a quo warranto proceeding brought in the name of the state.

Yours very truly,
Susan L. Garrison
Assistant Attorney General
Opinion Committee

FOOTNOTES

[1] Tex. Const. art. XVI, § 1(b). Before 1989, the provisions relating to bribery now found in the written statement were included in the spoken oath. See H.R.J. Res. 40, 71st Leg., R.S., 1989 Tex. Gen. Laws 6428, 6428-29 (proposing amendment to article XVI, section 1 of Texas Constitution); HOUSE RESEARCH ORG., 1989 CONSTITUTIONAL AMENDMENTS 45 (1989). The "lengthy recitation concerning methods of corruption" was removed from the spoken oath because it was thought to be outdated, overly negative in tone, and inappropriate for the spoken oath taken in a public setting. HOUSE RESEARCH ORG., *supra*, at 47.

[2] 559 S.W.2d 432 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.).

[3] *Flatan v. State*, 56 Tex. 93, 98 (1882); see also *State v. Jordan*, 28 S.W.2d 921, 922, 924 (Tex. Civ. App.--Amarillo 1930, writ dismissed).

[4] *Williams v. State*, 588 S.W.2d 593, 595 (Tex. Crim. App. [Panel Op.] 1979) (quoting *Weatherford v. State*, 21 S.W. 251, 251 (Tex. Crim. App. 1893)); see also *Forward v. City of Taylor*, 208 S.W.2d 670, 673 (Tex. Civ. App.--Austin), *aff'd*, 214 S.W.2d 282 (Tex. 1948); *Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. 607, 609 (Tex. Civ. App.--Waco 1924, writ ref'd).

[5] *Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. at 609; see also Attorney General Opinion DM- 381 (1996) (addressing application of article XVI, section 1 to city police and addressing validity of acts taken by police officers who had not filed statement with secretary of state pursuant to article XVI, section 1).

[6] See *Henry v. State*, 828 S.W.2d 312, 314-15 (Tex. App.--Fort Worth 1992, pet. ref'd); *Williams v. State*, 588 S.W.2d 593, 595 (Tex. Crim. App. 1979) (review of evidence showed that individual was de facto peace officer).

[7] *Williams v. State*, 588 S.W.2d at 594-95; see also *Henry v. State*, 828 S.W.2d at 314-15 (court stated in dicta that even if constable did not take the oath of office he still qualified as de facto constable).

[8] *Ex parte Grundy*, 8 S.W.2d 677, 678 (Tex. Crim. App. 1928); see also *Dane v. State*, 35 S.W. 661, 662 (Tex. Crim. App. 1896) (deputy county attorney whose appointment had not been formally recorded with county clerk).

[9] A jurat is the certificate of the officer or other person administering the oath. *Murphy v. State*, 103 S.W.2d 765, 766 (Tex. Crim. App. 1937); see Gov't Code § 602.002 (certificate of fact that oath was given).

[10] *Calvert, W. & B.V. Ry. v. Driskill*, 71 S.W. 997, 999 (Tex. Civ. App. 1903, no writ).

[11] *Martin v. Grandview Indep. Sch. Dist.*, 266 S.W. at 609.

[12] *French v. State*, 572 S.W.2d 934, 939 (Tex. Crim. App. 1977) (opinion on second rehearing).

[13] *Bell v. Faulkner*, 19 S.W. 480 (Tex. 1892); *Hagler v. State*, 31 S.W.2d 653, 654 (Tex. Crim. App. 1930); *Keel v. Railroad Comm'n*, 107 S.W.2d 439, 441 (Tex. Civ. App.--Austin 1937, writ ref'd).

[14] *Pyote Indep. Sch. Dist. v. Estes*, 390 S.W.2d 3, 5 (Tex. Civ. App.--El Paso 1965, writ ref'd n.r.e.); *Bowen v. School Trustees*, 16 S.W.2d 424, 425 (Tex. Civ. App.--Texarkana 1929, no writ); see Civ. Prac. & Rem. Code ch. 66 (governing quo warranto suits); Gov't Code § 22.002(a) (authorizing supreme court to issue writs of quo warranto against judges).

[15] *State v. Clarendon Indep. Sch. Dist.*, 298 S.W.2d 111, 117 (Tex. 1957).

[16] *Id.*