



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 23, 1996

The Honorable Carl E. Lewis
Nueces County Attorney
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

Letter Opinion No. 96-100

Re: Whether a county civil service commission may, by rule, include within the county's civil service system the personnel of a county attorney's office even though Government Code section 41.105 deems the county attorney's personnel terminable at will (RQ-891)

Dear Mr. Lewis:

Local Government Code chapter 158 authorizes a county civil service commission to extend civil service coverage to persons other than those who may perform only ministerial governmental functions. By contrast, under Government Code section 41.105, all personnel of a county attorney's office serve at the county attorney's will, regardless of the employee's or officer's authority to exercise discretion. This office previously has concluded that a statute deeming the personnel of a certain office terminable at will prevails over the civil service provisions. You ask now whether a county civil service commission by rule may extend coverage to the personnel of the county attorney's office. Consistently with our precedent, we conclude that Government Code section 41.105 prevails over the civil service provisions; accordingly, personnel of the county attorney's office are at-will employees who cannot be included within the county's civil service system under the Local Government Code.

Under Local Government Code chapter 158, a county with a population over 199,999 may create a county civil service system to include all county employees who are not exempt by law or judicial decision.¹ For purposes of the chapter, an employee is an appointee who may not perform governmental functions involving the exercise of discretion unless the county civil service commission has, in accordance with Local Government Code section 158.009, enacted a rule that includes the individual within the definition of "employee."² Additionally, the civil service commission is explicitly authorized to adopt a

¹Local Gov't Code § 158.002. The population of Nueces County is approximately 291,145. See Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population: General Characteristics: Texas 3 (1992).

²Local Gov't Code § 158.001(2).

rule defining "county employee."³ You explain that in 1992 the Nueces County civil service commission issued an order stating that, except for the top three staff positions, the county attorney's personnel are included within the county's civil service system.⁴

You believe, however, that the civil service commission's rule contravenes Government Code section 41.105, which makes all personnel of a county attorney's office terminable at will by the county attorney.⁵ In your opinion, Government Code section 41.105 is a special provision that excepts the county attorney's employees from the civil service provisions, which apply generally to all county personnel. Indeed, under the Code Construction Act,⁶ where a general provision conflicts with a special provision, the special provision constitutes an exception to the general provision, "unless the general provision is the later enactment and the manifest intent is that the general provision prevail."⁷ A provision stating that a particular employee is terminable at will conflicts irreconcilably with the civil service provisions,⁸ which provide an employee a right to appeal a demotion or termination.⁹ We must consider, therefore, whether Government Code section 41.105 prevails over the civil service provisions.

Consistently with the Code Construction Act, we address first which provision, Government Code section 41.105 or the civil service provisions, is more specific. This office considered a similar question in Attorney General Opinion H-619 concerning assistant county auditors. Under the statutory predecessor to Local Government Code section 84.021, V.T.C.S. article 1650,¹⁰ a county auditor may request the district judges that appoint him or her to appoint a number of assistant auditors.¹¹ Upon approval by the district judges, the assistants are appointed, and, the statutory predecessor provided, "no assistant

³*Id.* § 158.009(a)(1).

⁴We assume the Nueces County civil service commission promulgated its rule in accordance with Local Government Code section 158.009.

⁵Gov't Code § 41.105; *see also id.* § 41.101 (defining "prosecuting attorney").

⁶Gov't Code ch. 311.

⁷*Id.* § 311.026(b).

⁸*See Clark v. Young*, 787 S.W.2d 166, 168 (Tex. App.--Fort Worth 1990, writ denied).

⁹*See* Local Gov't Code § 158.012(a).

¹⁰*Repealed by Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 49(1), 1987 Tex. Gen. Laws 707, 1307.*

¹¹*See id.* § 84.021(a).

shall be employed" by any other means.¹² According to the opinion, article 1650 thus conflicted with the civil service provisions, but the opinion determined that "the more particular provisions" of article 1650, pertaining solely to assistant county auditors, "must control over" the county civil service provisions, which apply "to county employees in general."¹³

We consequently conclude that, because Government Code section 41.105 pertains solely to the personnel of a county attorney's office, it is a special provision relative to the civil service provisions, which apply to county employees generally. Before we may conclude that section 41.105 prevails over the civil service provisions, however, we must examine relevant dates of enactment and, if necessary, the legislative motivation for the enactments. The legislature originally enacted the substance of Government Code section 41.105 in 1973,¹⁴ and it has not substantively amended the provision since that time.¹⁵ By contrast, the legislature amended the civil service provisions in 1989 to permit a county civil service commission to provide civil service coverage for county personnel other than those who may perform only ministerial governmental functions.¹⁶ Specifically, prior to 1989 a county civil service commission could not by rule expand the definition of an employee to include persons other than those who are unauthorized to perform governmental functions involving the exercise of discretion.¹⁷ In 1989, however, the legislature amended the statutory definition of employee to encompass "a person [] included by a local civil service rule."¹⁸ The legislature further required a county civil service commission to define "county employee."¹⁹

¹²Attorney General Opinion H-619 (1975) at 3 (quoting V.T.C.S. art. 1650, *repealed by* Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 49(1), 1987 Tex. Gen. Laws 707, 1307); *cf.* Local Gov't Code § 84.021(a). Oddly, Attorney General Opinion H-619 did not cite the material now found in Local Government Code section 84.021(e), which permits a county auditor to discharge an assistant and the district judges annually to withdraw their approval of one or more assistants. *Cf.* V.T.C.S. art. 1650, *repealed by* Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 49(1), 1987 Tex. Gen. Laws 707, 1307.

¹³Attorney General Opinion H-619 (1975) at 4.

¹⁴*See* Act of May 3, 1973, 63d Leg., R.S., ch. 127, § 4, 1973 Tex. Gen. Laws 275, 275.

¹⁵The legislature codified the provision in 1985, but the codification was nonsubstantive. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 480, sec. 1, § 41.105, 1985 Tex. Gen. Laws 1720, 1920; *see also id.* § 27, 1985 Tex. Gen. Laws 1720, 2049.

¹⁶*See* Act of May 22, 1989, 71st Leg., R.S., ch. 881, §§ 1, 2, 1989 Tex. Gen. Laws 3879, 3879.

¹⁷*See* Local Gov't Code §§ 158.001, .009, *amended by* Act of May 22, 1989, 71st Leg., R.S., ch. 881, §§ 1, 2, 1989 Tex. Gen. Laws 3879, 3879.

¹⁸*See* Act of May 22, 1989, 71st Leg., R.S., ch. 881, § 1, 1989 Tex. Gen. Laws 3879, 3879.


¹⁹*See id.* § 2, 1989 Tex. Gen. Laws 3879, 3879.

Although the amendments to the civil service provisions succeeded the 1973 enactment of Government Code section 41.105, we do not believe the legislature manifestly intended that the civil service provisions prevail over Government Code section 41.105. We find nothing in the language of the 1989 amendment of Local Government Code section 158.001(2) evidencing such a manifest intent, nor do we find anything in the legislative history of the amendment.²⁰ We conclude, therefore, that Government Code section 41.105, the more specific provision, prevails over the inconsistent provisions in Local Government Code chapter 158. Accordingly, the county civil service commission may not by rule include personnel of the county attorney's office in the civil service system.

S U M M A R Y

Government Code section 41.105, which deems all personnel of a county attorney's office terminable at will, prevails over Local Government Code chapter 158, which provides for a civil service system for county employees generally. Consequently, a county civil service commission may not adopt a rule including within the county's civil service system employees or officers of the county attorney's office.

Yours very truly,


Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

²⁰From the legislative history of the 1989 amendments to Local Government Code sections 158.001(2) and 158.009(a), we deduce that the legislature was reacting to a 1988 district court decision that deputy constables are not employees for purposes of the civil service provisions because they are authorized to perform governmental functions requiring the exercise of discretion. See House Comm. on State Affairs, Bill Analysis, S.B. 1006, 71st Leg., R.S. (1989). The legislation thus was intended to "ensure that constables are included in the definition of a county civil service employee." *Id.*