



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 3, 1998

The Honorable Scott W. Rosekrans
Criminal District Attorney
San Jacinto County
P.O. Box 430
Coldspring, Texas 77331

Letter Opinion No. 98-037

Re: Whether a commissioners court is required to
fill a vacancy in the office of justice of the peace
(RQ-1061)

Dear Mr. Rosekrans:

You have requested our opinion as to whether a commissioners court is required to fill a vacancy in the office of justice of the peace. You indicate that a justice of the peace in San Jacinto County was removed from office in November, 1997. Since the particular position is on the general election ballot for November 1998, the commissioners court would prefer to leave the position vacant until after the election.

Section 87.041 of the Local Government Code provides, in relevant part: "The commissioners court of a county *may* fill a vacancy in the office of: . . . justice of the peace; or . . . The person appointed by the commissioners court to fill the vacancy shall hold office until the next general election." (Emphasis added.) On the other hand, article V, section 28 of the Texas Constitution, provides that "[v]acancies in the office of County Judge and Justices of the Peace *shall* be filled by the Commissioners Court until the next succeeding General Election." (Emphasis added.) You note that the statute seems to give the commissioners court discretion to appoint a person to fill the vacancy, while the Constitution appears to make such appointment mandatory.

Two prior opinions of this office have addressed this issue. In Attorney General Opinion V-178, the attorney general said:

Section 28 of Article V of the Constitution of Texas makes it the mandatory duty of the Commissioners' Court to fill a vacancy in the office of Justice of the Peace. Moreover, there is no constitutional or statutory provision authorizing a special election in such cases.

Attorney General Opinion V-178 (1947) at 3. Likewise, in Attorney General Opinion WW-279, the attorney general declared:

The office of Justice of the Peace is a constitutional office created by the provisions of Section 18 of Article V of the Constitution of Texas. Vacancies in the office of Justice of the Peace are required to be filled by the Commissioners' Court by the provisions of Section 28 of Article V of the Constitution of Texas. Therefore, you are advised that it is the duty of the Commissioners' Court to fill the vacancies that exist in the offices of Justices of the Peace of Borden County, regardless of whether the County Court of Borden County has jurisdiction of cases referred to in your question.

See also Attorney General Opinions H-1088 (1977), M-742 (1970); DAVID B. BROOKS, COUNTY & SPECIAL DISTRICT LAW, § 23.7 (Texas Practice 1989).

We see no reason to depart from these prior rulings. Clearly, in a conflict between a state statute and the Texas Constitution, the Constitution prevails. In this instance, the Constitution directs the commissioners court to fill any vacancy in the office of justice of the peace. You do not specifically request a determination as to whether any particular delay in filling a vacancy would constitute a dereliction of the commissioners court's duty under the constitution. It is for a court, and not this office, to determine how much time would be reasonable.

S U M M A R Y

A commissioners court is required to fill a vacancy in the office of justice of the peace.

Yours very truly,



Rick Gilpin
Deputy Chair
Opinion Committee