



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2020

The Honorable Scott R. Peal
Chambers County Attorney
Post Office Box 1200
Anahuac, Texas 77514

Opinion No. KP-0345

Re: Authority to remove a county auditor and procedure to do so (RQ-0359-KP)

Dear Mr. Peal:

You tell us that Chambers County (the “County”) received a complaint from a county employee regarding the behavior of the county auditor.¹ You relay that all concerned parties seek guidance “in order to fully and properly address the aggrieved employee’s complaint.” Request Letter at 3. You seek particular guidance regarding the procedural aspects of a statutory provision governing removal of a county auditor in the event of official misconduct. *Id.* at 1–2 (referencing Local Government Code section 84.009). Before addressing your specific questions, we consider the overall framework governing the removal of county officers.

Article V, section 24 of the Texas Constitution authorizes the removal of certain named officers, not including the auditor, as well as “other county officers” by district judges for official misconduct and other causes, upon the cause “being set forth in writing and the finding of its truth by a jury.” TEX. CONST. art. V, § 24. This provision, in place since 1876, is self-executing. *See Trigg v. State*, 49 Tex. 645, 652–53 (1878). Nonetheless, the Legislature enacted a statutory removal process for county officers in subchapter B of chapter 87 of the Local Government Code. *See generally* TEX. LOC. GOV’T CODE §§ 87.011–.019 (Removal by Petition and Trial). Chapter 87 authorizes the removal of a county officer for official misconduct and other causes by petition to the district judge, a formal citation on the officer, and a trial by jury, with the right to appeal the court’s final judgment. *See id.* §§ 87.015 (petition), .016 (citation), .018 (trial), .019 (appeal). Officers subject to removal by petition and trial under chapter 87 include fourteen named officers, not including the county auditor, as well as “a county officer, not otherwise named by [section 87.012], whose office is created under the constitution or other law of this state.” *Id.* § 87.012(15).

¹*See* Letter from Honorable Scott R. Peal, Chambers Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (June 23, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0359KP.pdf> (“Request Letter”).

The office of county auditor is created by statute. *See id.* § 84.002 (providing for the appointment of a county auditor by district judges).

But in providing for the appointment of a county auditor, the Legislature also enacted a removal provision that applies specifically to the county auditor. Subsection 84.009(a)(1) of the Local Government Code authorizes the removal of “[a] county auditor . . . if, after due investigation by the district judges who appointed the auditor, it is proven that the auditor . . . has committed official misconduct.” *Id.* § 84.009(a)(1). Unlike the general provisions governing county officers in chapter 87, section 84.009 contains no provisions governing the procedural aspects of removal. The question whether the procedural aspects of the general removal statutes apply to the county auditor appears to be one of first impression. *See* 36 David B. Brooks, *Texas Practice Series, County and Special District Law* § 19.5 (acknowledging the lack of judicial or other guidance on the applicability of general county officer removal provisions to the county auditor). Against this background, we address your specific questions.

We first address whether the removal of the county auditor rests “within the sole discretion” of the district judges.² Request Letter at 1, 2. The general removal provisions in chapter 87 of the Local Government Code begin the process with the filing of a petition setting forth the alleged grounds for removal in a district court of the county where the officer resides, addressed to the district judge. TEX. LOC. GOV’T CODE § 87.015(a)(1), (c). The person filing the petition must then apply to the district judge for an order of citation to be served on the officer. *Id.* § 87.016(a). The district judge, at his or her discretion, may issue the order for citation or refuse to do so, a decision from which “[t]he person may not take an appeal or writ of error.” *Id.* § 87.016(c). Thus, the initial decision whether to proceed with fact finding at all under chapter 87 rests solely with the district judge with whom the petition is filed. Similarly, the county auditor removal provision in section 84.009 incorporates an initial level of discretion by district judges by requiring that any proof made that the county auditor has committed official misconduct occur “after due investigation by the district judges.”³ *Id.* § 84.009(a)(1) (emphasis added). If district judges do not conduct an investigation under section 84.009, there can be no further action resulting in removal. On the back end of the process, “the power to find facts” pursuant to article V, section 24 of the Texas Constitution rests with a jury, but “the power to remove [an officer], in response to such findings, rests within the discretion of the judge.” *State ex rel. Hale v. O’Meara*, 74 S.W.2d 146, 147 (Tex. App.—San Antonio 1934, no writ). The discretionary language of the constitutional removal provision supports this view. *See* TEX. CONST. art. V, § 24 (“county officers . . . may be removed by the Judges of the District Courts”) (emphasis added). Thus, a court would likely conclude that the removal of the county auditor rests within the sole discretion of the district judges. However, under the general removal provisions “[e]ither party to a removal action may appeal the final judgment to the court of appeals in the manner provided for other civil

²“In other words,” you ask, “is the [district judges’] decision to remove the Auditor subject to any standard of review, and if reviewable, by whom?” Request Letter at 2.

³We do not address whether the Legislature, in using the phrase “it is proven that the auditor . . . has committed official misconduct” in section 84.009, contemplated that the district judges would be the fact-finders as to the truth of the allegation through the conduct of their investigation, or that a jury would determine the facts, with the due investigation by district judges serving as an initial gatekeeping step similar to considering whether to grant an order for citation in subsection 87.016(c). *See* TEX. LOC. GOV’T CODE §§ 84.009(a)(1), 87.016(c).

cases.” TEX. LOC. GOV’T CODE § 87.019(a). And while the county auditor removal provision, section 84.009, establishes no administrative procedure to appeal the district judges’ decision, that does not foreclose the possibility of court review under certain circumstances, such as a mandamus action for abuse of discretion.

Next, we address whether the auditor is entitled to any form of due process, such as a public hearing, in connection with the removal process. Request Letter at 1, 2. The general removal provisions for county officers include a written citation and a trial by jury. See TEX. LOC. GOV’T CODE §§ 87.016(d), .018(a). The county auditor removal provision, section 84.009, contains no similar provisions. But “[a]n officer’s interest in his elected position, though not ‘property’ in the conventional sense, is a recognizable interest for purposes of procedural due process analysis.” *Tarrant Cnty. v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982); see also *Guerrero v. Refugio Cnty.*, 946 S.W.2d 558, 571 (Tex. App.—Corpus Christi 1997, no writ) (applying procedural due process analysis in the context of a county auditor), *disapproved of on other grounds by NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142 (Tex. 1999). “At a very basic level, deprivation of a protected interest requires notice and an opportunity to be heard.” *Tarrant Cnty.*, 635 S.W.2d at 423 (footnote omitted). The type of notice and hearing required, however, depends on the facts of the situation. *Id.* Here, the constitutional removal provision requires that an allegation of official misconduct be “set forth in writing” and that its truth be found “by a jury.” TEX. CONST. art. V, § 24. Thus, a court would likely conclude that a county auditor is entitled to written notice of possible removal and some type of forum in which the auditor may be heard by those conducting the fact-finding into the allegation underlying that removal.

You also ask about a report prepared by a third-party investigator retained by the County to conduct an independent investigation into the allegation. Request Letter at 1. You question whether the district judges may consider this report, which summarizes the facts discovered, “as evidence supporting any decision to remove the auditor for official misconduct” pursuant to section 84.009 “as opposed to conducting its own investigation.” *Id.* at 1, 2. By its plain terms, subsection 84.009(a) authorizes removal only after “due investigation *by the district judges.*” TEX. LOC. GOV’T CODE § 84.009(a) (emphasis added). Thus, the district judges must perform some level of investigation themselves. However, the statute does not define a “due investigation” nor specify the manner of its conduct. The term “due” means “of the proper quality or extent; adequate.” NEW OXFORD AM. DICTIONARY 535–36 (3d ed. 2010); see also *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) (courts typically first consult dictionary definitions in determining the plain meaning of undefined words in a statute). An “investigation” is “a formal inquiry or systematic study.” NEW OXFORD AM. DICTIONARY 914 (3d ed. 2010) (also defining the verb “investigate” as “carry[ing] out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth”). To “prove” something means “[t]o establish or make certain; to establish the truth of (a fact or hypothesis) by satisfactory evidence.” BLACK’S LAW DICTIONARY 1420 (10th ed. 2014). Provided the district judges inquire into the facts in a formal, systematic, and appropriate manner, subsection 84.009(a)(1) does not preclude them from considering an independent investigative report procured by the County. See Tex. Att’y Gen. Op. No. GA-0442 (2006) at 3 (noting the discretion of the district judges to prosecute the auditor’s removal even after establishing that the auditor committed official misconduct).

Finally, you ask whether the reference to official misconduct in chapter 84 of the Local Government Code, where the term is undefined, “is the same as or different from the definition of official misconduct” in chapter 87 of that code. Request Letter at 1, 2. Section 87.011 defines “official misconduct” as “intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.” TEX. LOC. GOV’T CODE § 87.011(3). This office previously addressed whether behavior constituting official misconduct according to subsection 87.011(3) was also “official misconduct” under section 84.009. *See* Tex. Att’y Gen. Op. No. GA-0442 (2006) at 2. Opinion GA-0442 concluded that district judges acting pursuant to section 84.009 could consider the elements of the offense of official misconduct as articulated in subsection 87.011(3). *Id.* at 2–3. Thus, district judges considering the question of official misconduct under section 84.009 of the Local Government Code may rely on the definition of official misconduct in subsection 87.011(3) of that code.

S U M M A R Y

A court would likely conclude that the removal of a county auditor rests within the sole discretion of the district judges. However, two avenues exist for judicial review of that decision. Pursuant to section 87.019 of the Local Government Code, applicable to county officers generally, a party to a removal action may appeal the final judgment to the court of appeals. Section 84.009 of that code, applicable to county auditors exclusively, establishes no administrative procedure to appeal the district judges' decision, but that does not foreclose the possibility of court review under certain circumstances, such as a mandamus action for abuse of discretion.

A court would likely conclude that a county auditor is entitled to written notice of possible removal and some type of forum in which the auditor may be heard by those conducting the fact-finding into the allegation underlying that removal.

Provided the district judges inquire into the facts in a formal, systematic, and appropriate manner, subsection 84.009(a)(1) does not preclude them from considering an independent investigative report procured by the county.

Judges considering the question of official misconduct under section 84.009 of the Local Government Code may rely on the definition of official misconduct in subsection 87.011(3) of that code.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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