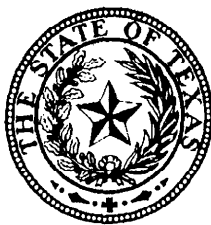


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NOV 04 2005

OPINION COMMITTEE

FILE # ML-4441-05

I.D. # 4441

November 2, 2005

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0410-GA

Re: Request for Attorney General Opinion

Dear Mr. Abbott:

I am writing to request your opinion on the following questions:

- Question One: Does every individual who qualifies as a "magistrate" under Section 2.09 of the Code of Criminal Procedure have an equal mandatory duty to serve as a magistrate, or is it only a justice of the peace who has a mandatory duty to serve as magistrate?
- Question Two: A county judge is entitled to a state salary supplement if forty percent (40%) of his/her duty include the performance of "judicial functions." Does the phrase "judicial function" include the performance of magistrate duties by a county judge?
- Question Three: (A) Is the state salary supplement a "salary increase" obligating compliance with all state statutory rules relative to an increase in the salary of an elected official?
(B) May the county pay the federal and state withholdings after the adoption of the county budget wherein those expenditures were not included?

QUESTION ONE

Does every individual who qualifies as a “magistrate” under Section 2.09 of the Code of Criminal Procedure have an equal mandatory duty to serve as a magistrate, or is it only a justice of the peace who has a mandatory duty to serve as magistrate?

QUESTION ONE DISCUSSION

The first question has arisen in Guadalupe County as a result of the recent refusal of all four justices of the peace to magistrate arrestees brought to the county jail. This conflict, which seems to have now been resolved, resulted from two of the justices historically undertaking the majority of magistrate duties due to their close proximity to the county jail; one of whom offices in the same building as the jail facility. Currently, all arrestees are taken to the county jail, unless arrested for municipal violations only, in which case they are magistrated by municipal judges. The justices have asked us to advise them whether all qualified magistrates have an equal duty to magistrate (which includes the district judges, county court at law judges, county judge, etc.), or if the justices of the peace have the sole or a higher duty to serve as magistrate.

The confusion, as to the applicability of the statute to all magistrates, stems from an opinion by your office stating that a justice of the peace has a mandatory duty to serve as a magistrate. Tex. Att’y. Gen. Op. No. GA-0193 (2004) at 3. The basis of this opinion was Tex.Code Crim.P.Ann. art. 15.17 (Vernon Supp. 2004), which states when an arrested person is taken before a magistrate, “[t]he magistrate shall inform the person arrested” of the charge brought against the person and of the person’s rights. Tex. Att’y. Gen. Op. No. GA-0193 (2004)(citing Tex.Code Crim.P.Ann. art. 15.17(a)(Vernon Supp. 2004)). Because the issue was not raised in that opinion whether every magistrate has the same mandatory duty, we are compelled to ask it now.

The legislature, in the 1925 Code of Criminal Procedure (Art. 33), designated those officials who were 'magistrates.' *O’Quinn v. State*, 462 S.W.2d 586,587 (Tex.Crim.App. 1971). Included within that statute were justices of the peace and the mayor or recorder of incorporated cities, or towns. *Id.* The title “magistrate” has come to connote one having duties which are judicial in nature. *Id.* As early as 1884, the Texas Court of Appeals made the following comments regarding the duties of the justice of the peace when serving as a magistrate:

A justice of the peace is a magistrate. (Code of Criminal Procedure, Article 42) When a justice sits for the purpose of inquiring into a criminal accusation against any person, he sits not as a justice of the peace but as a magistrate, and the court which he then holds is not a justice’s but ‘an examining court.’ (Code of Criminal Procedure, Article 63) When holding such a court, his functions as a magistrate are the same as those of the judges of the county, district, supreme, or court of appeals, when they sit as magistrates

to hold an examining trial. The same rules govern each. (*Hart v. State*, 15 Tex.Ct.App. 202. *Kerry v. State*, 17 Tex.Ct.App. 178.) *Id.*

Historically, discussions of the duties of the justices of the peace mention repeatedly service as magistrate. This fact tends to support the conclusion that service as magistrate is one of the primary functions of a justice of the peace. That being said, that conclusion could be extended to impose a greater duty to magistrate upon justices of the peace than on all other officers named in Article 2.09. Tex. Code Crim. Proc., art. 2.09 (Vernon Supp. 2000).

Each of the following officers is a magistrate within the meaning of the Code of Criminal Procedure: the justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and judges of the municipal courts of incorporated cities or towns. Tex. Code Crim. Proc., art. 2.09 (Vernon Supp. 2000). All magistrates of a county have co-equal jurisdiction as magistrates, no matter which court the officer ordinarily holds. Tex. Att'y Gen. Op. No. MW-581 (1982)(citing *Ex parte Clear*, 573 S.W.2d 224, 228 (Tex.Crim.App. 1978)).

According to Article 2.10 of the Code of Criminal Procedure, it is the duty of every magistrate...to issue all process intended to aid in preventing and suppressing crime.” Further, under Texas law, an arrested person must be timely brought before a magistrate, who must inform the person of the charges and of the person’s rights. Tex. Code Crim. Proc. Ann. arts. 14.06, 15.17 (Vernon Supp. 2004), see also *Ex Parte Knight*, 904 S.W.2d 722, 726 (Tex. App.-Houston [1st Dist.] 1995, pet. ref’d).

The Knight case explained that a justice of the peace has two roles: (1) a justice’s general criminal jurisdiction, and (2) jurisdiction as a magistrate. While *Knight* has been overruled on other grounds, the Houston Court of Appeals discussion of the duties of magistrates is germane to this discussion. The court in *Knight* said the following about the duties of a magistrate:

The Texas Code of Criminal Procedure lists the justice of the peace as one of the officers that can function as a magistrate. Tex.Code.Crim.P.Ann. art 2.09 (Vernon Supp. 1995). Also listed are judges of the district courts. *Id.* The duties of a magistrate include: (1) issuing arrest warrants pursuant to Tex.Code Crim.P.Ann. art. 15.03 (Vernon 1977); (2) filing complaints, which are the affidavits upon which warrants are based; *See* Tex.Code Crim.P.Ann. arts. 15.03, 15.04, 15.17 (Vernon 1977 & Supp. 1995); (3) giving statutory warnings to an arrested person, pursuant to Tex.Code Crim.P.Ann. art. 15.17 (Vernon 1995); (4)

issuing search warrants pursuant to Tex.Code Crim.P. Ann. art. 18.01 (Vernon Supp. 1995); and (5) conducting examining trials pursuant to Tex.Code Crim.P. Ann. art. 16.01 (Vernon Supp. 1995).

The statute assigns these duties to all officers who are magistrates under Article 2.09 of the Code of Criminal Procedure. It is our opinion that the above-stated duties must be equally imposed on all persons who have the authority to act as a magistrate. The Texas Government Code Section 311.021, "The Code Construction Act," provides the following guidance:

[I]n the legislature's enactment of a statute, it is presumed: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.

Tex.Gov't Code Ann. §311.021 (Vernon 1999). Furthermore, the Code of Criminal Procedure states that all words, phrases and terms are to be taken and understood in their normal use in common language, except where specifically defined. 67 Tex.Jur.3d Statutes §100 (citing Tex.Code Crim.P. art. 3.01).

The Code Construction Act tells us that the entire statute is presumed to be effective, which clearly means that each of the officers named therein should have an equal duty to serve as magistrate. By singling out the justices of the peace as the only officers with a "mandatory" duty, the statute is weakened and inequitably applied; therefore, the goal of timely magistrating all persons arrested cannot be successfully and efficiently obtained. In a county with eight separate law enforcement departments, there are several arrests on a regular basis. If only four of the possible magistrates have a mandatory duty to perform this important function, the presumption that each statute should have a just and reasonable result that is feasible to execute is defeated and the statute rendered ineffective. Finally, if the legislature had intended to single out justices of the peace as magistrates, or impose upon them a higher duty, then mandatory language could have been added.

CONCLUSION

Taking into account the rules of statutory interpretation, Article 2.09 of the Code of Criminal Procedure should be understood to apply equally to each officer named therein as magistrate, imposing an equal mandatory duty for each officer to serve as magistrate.

QUESTION TWO

This conclusion relates to our third question, which involves the county judge's service as magistrate. However, while we are seeking an opinion as to whether a county judge's

state salary supplement must be approved during the county's regular budget session, an ancillary question has arisen. A county judge is entitled to a state salary supplement if forty (40%) of his/her duties include the performance of "judicial functions." Does the phrase "judicial functions" include the performance of magistrate duties by a county judge?

QUESTION TWO DISCUSSION

The Texas Government Code allows a salary supplement for county judges who spend at least forty percent of their time performing judicial functions. Tex. Govt. Code Ann. §26.006(a)(Vernon Supp. 2001). In a July 29, 2005 letter to all county judges, the Office of Court Administration stated the following examples of judicial functions that would meet this requirement: "...conducting probate hearings, trial of misdemeanor cases, mental health hearings, protective orders in family cases, alcoholic beverage permit hearings, and juvenile hearings." ¹ The letter excluded from qualification as a judicial function, "...presiding over commissioners court meetings, time spent on county budgets, and other duties as chief administrator of the county." A function left out of both lists is that of serving as magistrate.

We have drawn our own conclusion that every magistrate has an equal statutory duty to serve as magistrate. However, there are two Attorney General Opinions that clearly hold that both justices of the peace and district court judges cannot be paid additional compensation for performing this statutory duty. The two opinions we refer to are Attorney General Opinion Number JM-695, which concludes district judges cannot receive additional compensation for sitting as magistrate; and Attorney General Opinion Number GA-0193, which concludes a county may not pay a justice of the peace amounts over and above the justice's salary for conducting inquests and serving as a magistrate. The obvious inference being, if certain identified officers serving a statutory duty to magistrate are not entitled to additional compensation for performing said duty, a county judge should not receive additional compensation for performing the same statutory duty. This is exactly what happens however, when a county judge applies for the salary supplement from the State, and includes time spent serving as a magistrate as a judicial function in order to qualify for the forty percent required by Section 26.006 of the Government Code. Tex. Gov't Code Ann. §26.006(a)(Vernon Supp. 2001).

A counter argument for allowing the inclusion of a county judge's time as magistrate for the purpose of a salary supplement is that a county has the ability to make increases, and decreases, in a justice of the peace's salary to reflect time spent conducting inquests or serving as magistrate. Tex.Att'y.Gen Op.No.GA-0193 (2004)(citing Tex.Att'y Gen.Op.No. DM-51 (1991)). This effectively allows the commissioners' court to consider the amount of time performing a statutory duty to magistrate when determining the justice's compensation. (Granted, this must occur during the regular budget session.) This could be construed as additional compensation for performing a statutory duty.

¹ A letter dated July 29, 2005 was sent by the Office of Court Administration to all Texas county judges, advising them of their right to claim a state funded salary supplement in accordance with Section 26.006 of the Texas Government Code. A copy of this letter is attached at the end of this request.

CONCLUSION

There is an obvious discrepancy between the different magistrates' (justices of the peace vis-à-vis county judge) entitlement to additional compensation for performance of their duty as a magistrate under Article 2.09 of the Code of Criminal Procedure. Tex. Code Crim. Proc., art. 2.09 (Vernon Supp. 2000). We believe such an inequitable result was not intended by the legislature. Common sense would dictate that a person performing the duties of a magistrate would clearly be performing a "judicial function." However, we cannot conclude that the performance of the statutory duty to magistrate should not be included as a judicial function for the purpose of calculating the amount of time a county judge spends performing judicial functions for the purposes of Section 26.006 of the Government Code. Therefore, we must seek your guidance on this issue. Tex. Gov't Code Ann. §26.006(a)(Vernon Supp. 2001).

QUESTION THREE

Assuming *arguendo* that a county judge is entitled to a State salary supplement, the county is still obligated to pay, using county funds, the applicable federal and state withholdings on that supplement. (A) Is the State salary supplement a "salary increase" obligating compliance with all state statutory rules relative to an increase in the salary of an elected official? (B) May the county pay the federal and state withholdings after the adoption of the county budget wherein those expenditures were not included?

QUESTION THREE DISCUSSION

The Guadalupe County Judge recently applied for the state salary supplement afforded county judges who spend forty percent (40%) or more of their time performing judicial functions. Tex. Gov't Code Ann. §26.006(a)(Vernon Supp. 2001). The salary supplement funds specifically cannot be used to pay applicable federal and state withholdings. Those withholdings must be paid from county funds. This request was made on August 17, 2005. The approved 2005-2006 county budget did not include expenditures for applicable federal and state withholdings. On October 11, 2005, during a regular session of County Commissioners' Court, the transfer of the funds necessary to pay the benefits on the first installment of the Judge's supplement from the State, was placed on the agenda. This led one of the County Commissioners to ask whether paying the benefits from the County's General Fund was legal, as it results in an increase in the Judge's salary, and this increase was not included in the 2006 budget. We now seek an opinion as to whether a state salary supplement is an increase in salary for budget purposes?

The position of County Judge is established by the Texas Constitution. Vernon's Ann. Tex. Const. Art.5, §15. One of the duties of county judge is to preside over the constitutional county court, whose jurisdiction includes misdemeanor criminal cases, juvenile matters, civil and probate matters. Vernon's Ann. Tex. Const. Art.5, §§16, 17. A county judge who presides over county court is entitled to an annual supplemental salary from the state of \$10,000.00, if at least 40 percent of the functions that the judge performs are judicial functions. Tex. Gov't Code Ann. §26.006(a)(Vernon Supp. 2001). The same statute provides that if a county judge is entitled to the supplemental salary, the

commissioners court may not reduce the county funds provided for the salary or office of the county judge as a result of the salary supplement. *Id.* §26.006(c). Similarly, the commissioner's court may not use the salary supplement to pay the employer's share of the employment taxes on the state-provided funds. Tex. Att'y Gen. Op. No. JC-0397 (2001), see also Tex. Att'y Gen. Op. No. JC-0227 (2000)(concluding that the effect of using state funds appropriated for the state salary supplement to pay for the employer's share of employment taxes on the supplement would be to shift the burden of those taxes from employer to employee). A county judge who wishes to apply for the state salary supplement must file an affidavit verifying that 40% of the judge's time is devoted to performing judicial functions; such affidavit is filed with the state comptroller's office for consideration. However, this office was not asked to determine whether the Guadalupe County Judge is entitled to the state salary supplement, but rather, whether such a supplement can only be approved during a county's regular budget session and in accordance with statutory rules relative to increasing the salary of an elected official.

Section 152.013(a) of the Local Government Code requires a commissioner's court to set the salaries of all elected officials "at a regular meeting of the court during the regular budget hearing and adoption proceedings." Tex. Loc. Gov't Code Ann. §152.013(a) (Vernon 1999). Unless an elected official meets the exception set forth in Section 152.017 of the Texas Local Government Code, his/her salary can only be increased during a regular budget session. It is possible that the Guadalupe County Judge, not having met any of the exceptions set forth in Section 152.017 of the Texas Local Government Code, is not eligible for a salary increase until the next regular budget session in 2006. Tex. Loc. Gov't Code Ann. §152.013(a) (Vernon 1999).

When can the salary of an elected county official be increased? Elected county officials salaries may be changed only once a year. Tex. Att'y Gen. Op. No. JC-0147 (1999) at 1. The Attorney General's Office has cited the language of Section 152.013(a) of the Texas Local Government Code, in repeatedly making the determination that the county commissioners court may consider and adopt elected county officials salaries only during the regular, annual budget hearing and adoption proceedings. Tex. Att'y Gen. Op. No. GA-0162 (2004), citing Tex. Att'y Gen. Op. No. LO-95-018, at 2; Tex. Att'y Gen. Op. Nos. JM-839 (1988) at 6. H-11 (1973) at 4; Tex. Loc. Gov't Code Ann. §152.013(a) (Vernon 1999). Furthermore, before the 10th day of the budget meeting, the commissioners court must publish in a newspaper of general circulation in the county a notice of (1) any salaries, expenses, or allowances that are proposed to be increased; and (2) the amount of the proposed increases. Tex. Loc. Gov't Code § 152.013(a)(Vernon 1999). The Attorney General's Office has also opined that the required notice, posted under Section 152.013(b), must inform the public of the "maximum potential salary increases for elected county officials." Tex. Att'y Gen. Op. No. JC-0255 (2000) at 5. The reason being it allows the public to scrutinize proposed salary increase for county officials and officers. *Id.* at 3. Salary increases above the published proposals are invalid because the public had insufficient notice. See *id.* at 5.

However, the state-funded salary supplement could be deemed separate and apart from the county commissioner court-determined salary, because a state salary supplement is

not part of the salary set by the commissioners' court; it is an amount determined and paid by the State of Texas. This would exclude the salary supplement from the salary amount that posted for the public during the annual budget session. Assuming this conclusion, it would be possible to approve a budget amendment to allow the salary increase and pay the employment taxes on the state-funded supplement. The conclusion then is the commissioners court would legally be able to approve the budget amendment, which is required to pay the employment taxes on the state-funded salary supplement, and the County Judge would receive his supplement this year, rather than next.

On the other hand, Texas Local Government Code Section 152.017, which sets out exceptions to the posting and notice requirement of 152.013, specifically excepts county judges of counties with a population of 2.5 million or more people, and judges of courts of record. Tex. Loc. Govt Code Ann. §152.017 (Vernon 1999). The Guadalupe County Judge is neither of these. The determination that the Guadalupe County Judge is not the judge of a court of record comes from the definition of court of record which is a court that is required to keep a record of its proceedings and that may fine and imprison. Blacks Law Dictionary, 6th Ed. (1990). According to Section 26.045 of the Texas Government Code, a county court that is in a county with a criminal district court does not have any criminal jurisdiction. Tex.Gov't Code Ann. §26.045 (Vernon 1999). Therefore, the Guadalupe County Court does not have criminal jurisdiction, and cannot fine or imprison, which excludes the Guadalupe County Judge from being a judge of a court of record.

Typically, when particular groups or individuals are excepted from a particular rule or statute, the legislature is presumed to have considered this and purposefully included all others who are not excepted. See Tex.Gov't. Code Ann. §311.021 (Vernon 1999). Since the Guadalupe County Judge is not a judge of a court of record, and is not the county judge of a county with more than 2.5 million people, his salary is not excepted from the posting requirement; and therefore, cannot be increased until the regular budget session of 2006.

Furthermore, the county will have to pay the employment taxes on the state supplement. This obviously requires a budget amendment, and the payment of employment taxes above those already budgeted for the county judge's salary. This argument is bolstered by the fact that the salary supplement is one for which the judge must make an application, not one that is automatically appropriated by the State (such as that of the county attorney). Therefore, it could be argued that because the judge decided to seek this supplement, it should be presented to public scrutiny. And, because additional employment taxes must be paid, the public should be afforded notice of this budget increase.

CONCLUSION

The advice of this office to the Commissioners Court was to seek an opinion from the Attorney General's Office, as there is no clear guidance on this issue. A county judge has the right to request the state salary supplement when circumstances warrant. The statute

specifies which elected and county officials are entitled to exemption from the salary-posting requirement, but those do not apply to the Guadalupe County Judge. The query is compounded by the obligation to pay the employment taxes on the salary supplement with county funds, heretofore not appropriated for such an expense. Based upon the current wording of applicable statutes, case law, and AG opinions, it is problematical to suggest any particular conclusion that would be supported by legal authority. We reiterate our questions: (1) is the state salary supplement an increase in salary obligating compliance with all state statutory rules relative to an increase in the salary of an elected official; and if so, (2) may the county pay the federal and state withholdings after the adoption of the county budget wherein those expenditures were not included?

Your guidance on these matters is greatly appreciated. If we may provide any assistance or additional information, please do not hesitate to call.

Respectfully submitted,



Elizabeth Murray-Kolb
Guadalupe County Attorney

CC: Honorable Donald Schraub
Guadalupe County Judge

Honorable Roger Baenziger
Guadalupe County Commissioner
Precinct One

Honorable Cesareo Guadarrama
Guadalupe County Commissioner
Precinct Two

Honorable Jim Wolverton
Guadalupe County Commissioner
Precinct Three

Honorable Judy Cope
Guadalupe County Commissioner
Precinct Four

Honorable Darrel Hunter
Guadalupe County Justice of the Peace
Precinct One

Honorable Edmundo Castellanos
Guadalupe County Justice of the Peace
Precinct Two

Honorable Roy Richard
Guadalupe County Justice of the Peace
Precinct Three

Honorable Larry Morawietz
Guadalupe County Justice of the Peace
Precinct Four



OFFICE OF COURT ADMINISTRATION

CARL REYNOLDS
Administrative Director

June 29, 2005

The Honorable Donald L. Schraub, Sr.
Guadalupe County Judge
307 W. Court St., Suite 200
Seguin, Texas 78155

COPY

Re: State Salary Supplement for County Judges

Dear Judge Schraub:

Section 26.006 of the Government Code provides for a salary supplement for constitutional county judges if at least forty percent (40%) of their functions are judicial. Section 26.006 provides as follows:

Section 26.006. SALARY SUPPLEMENT FROM STATE FOR CERTAIN COUNTY JUDGES

(a) A county judge is entitled to an annual salary supplement from the state of \$10,000 if at least 40 percent of the functions that the judge performs are judicial functions.

(b) To receive a supplement under Subsection (a), a county judge must file with the Office of Court Administration of the Texas Judicial System an affidavit stating that at least 40 percent of the functions that the judge performs are judicial functions. The office of court administration shall send the affidavit to the comptroller.

(c) The commissioners court in a county with a county judge who is entitled to receive a salary supplement under this section may not reduce the county funds provided for the salary or office of the county judge as a result of the salary supplement required by this section.

You are entitled to the state salary supplement if at least forty percent (40%) of the functions that you perform are judicial functions. "Judicial functions" means the functions of a county judge that are judicial rather than administrative. For example, judicial functions include conducting probate hearings, trial of misdemeanor cases, mental health hearings, protective orders in family cases, alcoholic beverage permit hearings, juvenile hearings, etc. Not included as judicial functions are presiding over

FROM :County Attorney

FAX NO. :8303799491

Nov. 09 2005 06:21PM P3

SENT BY:8303798828

:11- 9- 5 : 4:53PM ;

SEGUIN GAZETTE-
JUDICIAL COUNTY

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The Honorable Donald L. Schraub, Sr.
June 29, 2005
Page 2

commissioners court meetings, time spent on county budgets, and other duties of a county judge as the chief administrator of the county.

The first \$5,000 of the \$10,000 salary supplement is funded out of the State's appropriated general funds. After September 1 (the first day of the State's fiscal year), the comptroller will make a lump sum payment of \$5,000 to those counties whose judges have filed an affidavit with our office. The county then will pay the judge the supplement. Because the State will make only one lump sum payment to each county each year, and because more than one judge may be in office during a fiscal year, we recommend that the county not pay the judge the entire sum at the beginning of the fiscal year.

The second \$5,000 of the \$10,000 salary supplement is funded pursuant to Section 26.008 of the Government Code. Because this stream of funding is dependent on fee and cost collections, there is no guarantee that each county will receive the full \$5,000. Beginning in September, the comptroller will make monthly payments of varying amounts to each county that collects fees and costs under Section 51.703 of the Government Code. These monthly payments will continue for twelve months or until a total of \$5,000 has been paid to the county, whichever comes first. At the conclusion of the State's fiscal year, the comptroller will determine if an "excess" (as defined by Section 26.008) exists. If an excess exists, the comptroller will make a final payment to each county in accordance with Section 26.008. This final payment could result in a county receiving a total of more than \$5,000. Any amount received over \$5,000 would not go to supplement the salary of the county judge, but would instead be used only for court-related purposes for the support of the judiciary as provided by Section 21.006 of the Government Code.

Please be advised that there is legislation pending in the 79th Legislature, First Called Session, which would increase the amount of the state supplement from \$10,000 to \$15,000. If the legislation passes, this office will notify you. The enclosed affidavit will suffice for you to claim the supplement, whether or not the amount of the supplement changes.

If you are entitled to the salary supplement, please complete the enclosed affidavit and return it to me by August 1, 2005.

Very truly yours,

COPY

Ted Wood
Special Counsel to Trial Courts

TW:lmo

cc: County Treasurer or Auditor (w/o encl)