



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 21, 2019

The Honorable John T. Hubert
Kleberg and Kenedy Counties District Attorney
Kleberg County Courthouse
Post Office Box 1471
Kingsville, Texas 78364

Via E-Mail

Re: Applicability of the constitutional resign-to-run provision to a county constable
(RQ-0315-KP)

Dear Mr. Hubert:

We received your request for an attorney general opinion and have designated it as Request No. 0315 -KP. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that deadline the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE § 402.042(c)(2). We received your request on November 20, 2019, setting a due date for your opinion of May 18, 2020.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefing on your questions if they have a special interest or expertise in the subject matter. If you are aware of other interested parties, please forward this request for briefing to them or let us know, so that we may notify them as soon as possible. We ask that the briefs be submitted by December 23, 2019, to ensure that this office will have adequate time to review and consider arguments relevant to the request from all interested parties. Briefs may be submitted by e-mail to opinion.committee@oag.texas.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Virginia K. Hoelscher".

Virginia K. Hoelscher
Chair, Opinion Committee

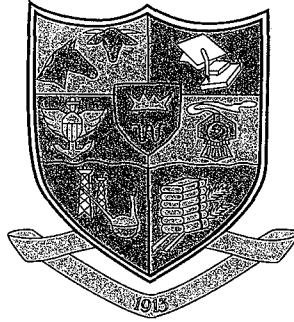
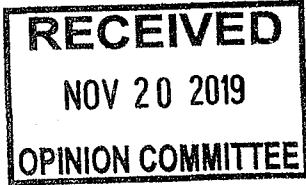
VKH/som

Attachment: Request No. 0315-KP

cc: The Honorable Ruth R. Hughs, Texas Secretary of State
Mr. Adam Bitter, General Counsel, Office of the Secretary of State
The Honorable Robert “Buck” Alegria, Kenedy County Constable
The Honorable Louis E. “Bud” Turcotte, III, Kenedy County Judge
The Honorable Ramon Salinas, III, Kenedy County Sheriff
Ms. Johanna Meade, General Counsel Division, Office of the Governor

JOHN T. HUBERT
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COUNTY of KLEBERG
KINGSVILLE, TEXAS

KLEBERG & KENEDY COUNTIES

KLEBERG COUNTY COURTHOUSE
P.O. Box 1471
KINGSVILLE, TEXAS 78364

November 14, 2019

Attorney General of Texas
Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for An Opinion

Dear Committee,

RQ-0315-KP

FILE # ML-48654-19

I.D. # 48654

I am seeking an Attorney General's Opinion on one issue:

Whether or not a finder of fact could reasonably conclude as a matter of law, that, under the facts presented, a Constable's statements and the seeking of signatures to place his name on the ballot for Sheriff in Kenedy County is considered "candidacy" or "an announcement" for the purposes of the automatic resignation (resign-to run) provisions of Article XVI, section 65 of the Texas Constitution.

I. Facts

The following facts presented are from a letter given to me as the District Attorney in a letter from the Kenedy County Judge, Louis E. Turcotte. For the purpose of analysis, all statements are taken as true but I do not have knowledge of an independent investigation by a law enforcement agency.

1. The current term for the Constable in question ends at midnight on December 31, 2020.
2. "On August 12, the Kenedy County Constable came to the Kenedy County Sheriff's Office and told the Kenedy County Sheriff, Ray Salinas, "I want to let you know that I am running for Kenedy County Sheriff. I hope there will not be any hard feelings, I want to better myself.""

3. "On August 22, 2019 Sandra Garci-Burns, County Tax Assessor/Collector returned the Constable's phone call and the Constable said: "I am running for the Kenedy County Sheriff. Will you support me and will you set up a meeting with your family so that I may go to seek their support: I have new ideas that I want to share with them.""

4. "The Constable came to Commissioner Cindy Gonzales and her husband, Johnny Gonzales', residence and said: "I am running for County Sheriff. Will you sign my Petition in Lieu of a Filing Fee?" Cindy and Johnny Gonzalez signed the Petition in Lieu of a Filing Fee."

NOTE: Prior to filing of this request for an opinion, on November 14, 2019 Commissioner Gonzalez contacted the Kleberg & Kenedy Counties District Attorney's Office to state that she was not contacted prior to the addition of her name to the facts above and to clarify that "Constable Alegria told her that he was thinking of running for office" and that she signed the petition with the understanding that "I will sign your petition but that doesn't mean I will vote for you." To her knowledge, her husband was not approached and did not sign the petition. Commissioner Gonzalez's office is open to the public but she stated that there was only the Commissioner present in the room with the Constable at the time.

5. "The Constable called Lonnie Allen Brown, Kenedy County Fire and ESD#1 Commissioner at Armstrong, Texas and told him: "I am running for Kenedy County Sheriff. Will you support me?""

6. "The Constable came to Pepe Gonzalez, Kenedy County employee's residence and told him, "I am running for Sheriff. Will you support me?"

7. "The Constable came to Eliza and David Castillo's residence in Sarita and told them: "I am running for Kenedy County Sheriff. Will you support me by signing my Petition in Lieu of a Filing Fee?" They did sign. The Constable further told them: "I will donate food for your daughter's quinceniera."

8. "The Constable came to Joe and Sally Gonzales' home in Norias and said to them: "I am running for Kenedy County Sheriff Will you support me by signing my Petition in Lieu of a Filing Fee?" They did sign."

9. "The Constable came to Diana Serna, County Employee's home in Sarita and said to her: "I am running for Kenedy County Sheriff Will you support me by signing my Petition in Lieu of a Filing Fee?" She did sign."

10. "The Constable came to Nito Serna, School Board member's residence in Sarita and said to him: "I am running for Kenedy County Sheriff Will you support me by signing my Petition in Lieu of a Filing Fee?" He and his son, Luis Serna, signed."

11. "The Constable has obtained the minimum of 28 Kenedy County resident signatures on his Petition in Lieu of a Filing Fee."

12. It is assumed as a fact that the unexpired term of office for the Constable in question exceeds one year.

II. Relevant Law

A. General Law

Article XVI, Section 65 of the Texas Constitution is known as the "resign-to-run" provision. It requires holders of certain offices, including constables, to automatically resign their office if they announce their candidacy or become a candidate in fact for another elected office, if the unexpired portion of the term exceeds one (1) year and thirty (30) days of the office they currently hold. *See* Tex. Const. art XVI, § 65 (a)-(b)." Opinion GA-0643.

The questions, as expressed in Tex. Att'y Gen. Op. Nos. GA-0643 (2008) and GA-0210 (2004) are twofold. 1) Is the statement one that is made, without qualification, demonstrating intent to run for a particular office? If so, then the person has announced a candidacy. 2) Is the statement made in a public setting or otherwise available to the public? For the purposes of this request, I am going to consider this a two prong test.

The Election Code weighs in heavily in this analysis. It states that, "The circulation of a petition to be filed under this subchapter in connection with a candidate's application for a place on the ballot does not constitute candidacy or an announcement of candidacy for purposes of the automatic resignation provision of Article XVI, Section 65, or Article XI, Section 11 of the Texas Constitution." TEX. ELEC. CODE ANN. § 172.021 (d). The Election Code also states that "before permitting a person to sign, point out and read to the person each statement pertaining to the signer that appears on the petition;..." TEX. ELEC. CODE ANN. § 141.064. This appears to try to assure the signer that he or she understands what they are signing.

It should be noted that a mere expression of intent, an announcement of a consideration to run or qualified statements of intent are not enough. In fact, it has been held that appointing a campaign treasurer is not an announcement under this standard. Tex. Att'y Gen. Op. Nos. GA-0643 (2008) *citing* TEX. ELEC. CODE ANN. § 251.001(1)(A). Something "more" has to be present.

B. Burden of proof / standard

The burden of proof for a trial is different than that for an the standard in an opinion as a matter of law. The standard for an opinion is much higher.

The case of *Standley v. Sansom*, 367 S.W.3d 343 (Tex. App. San Antonio, 2012) has been pointed out to my office. While *Standley*, helps with the burden of proof if this case goes to trial, it is not the same burden as that for an opinion. Specifically, it appears that in a court of law, the burden of proof for this type of case is the preponderance of evidence to determine

whether the actions of the Constable in question amounted to a "candidacy" or "an announcement" under Article XVI. *Id.* at 348-49.

Significantly, a request for an opinion is a request for a finding as a matter of law. A proposition is established as a matter of law when a reasonable finder of fact could draw only one conclusion from the evidence presented. *Tex. Att'y Gen. Op. No. GA-0643* at 9, citing *RAJ Partners, Ltd. v. Darco Constr. Corp.*, 217 S.W.3d 638, 648 (Tex. App. -Amarillo 2006, no pet.).

III. Analysis

Whether statements are made as an "announcement" or "otherwise available to the public" appears to be fact dependant. According to the Kenedy County Profile, as compiled by The County Information Program, Texas Association of Counties, the population of Kenedy County is 442 residents in 2018. <https://www.txcip.org/tac/census/profile.php?FIPS=48261> It is reasonable that Kenedy County's unique population levels should be considered in this analysis.

A. Oral Statements

First, let's address the oral statements. It appears that all of the statements made by the Constable in question appear to be made without qualification. Multiple instances of statements made about the intent appear to negate any confusion. Consequently, the first prong of the analysis as to the oral statements is met.

However, the facts are less clear as to the statements being made in a public setting or otherwise available to the public. Are statements made to one person (the Sheriff) considered public or intended for the public? Judging from the context given, it appeared to be a one on one conference, therefore there is no public announcement given.

The next question is, "Are the statements made over the phone or at someone's residence rising to the level of an "announcement" or "otherwise available to the public"? Statements made at a residence appear to be almost presumptively private. That would appear to be negated if the statements were made in so many homes that it would be statistically significant. But, that does not appear in the facts given. An off-hand comment in a friend's house would appear to be private. While approaching people's homes to get signatures may have less of an expectation of privacy, this does not appear to rise to the standard where a reasonable finder of fact could draw only one conclusion from the evidence presented.

To quote *Tex. Att'y Gen. Op. No. GA-0643* at 6-7,
".....based on the generally understood meaning of the constitutionally used term "announce," this office has advised that the statement must be made in a public setting or be otherwise available to the public. *See Tex. Att'y Gen. Op. No. GA-*

0210 (2004) at 2 (citing Tex. Att'y Gen. Op. Nos DM-377 (1966), WW-1253 (1962)). Thus, a statement while certain as to the person's intention to run for an office, but made in a private conversation does not constitute an announcement of candidacy for the purpose of article XVI, section 65. *See* Tex. Att'y Gen. Op. No. GA-0219 (2004) at 2-3."

The request for a meeting with family members might be considered a request for publication. While this comment lacks a time frame reference and the statement appears to lack the qualification of "after January 1st", it seems doubtful that the intent was to have the constituent wait four months before alerting family members. Rather, the statement appears as a general request with no limitation of time frame. Conversely, there is an expectation of privacy in family discussions. Additionally, there is a request for a meeting with family members, not a request for the constituent to publicize the intent to seek office. As such, this does not appear to be an "announcement" or "otherwise available to the public" in this comment alone.

B. Solicitation of Signatures

Second, is the solicitation of resident signatures on a petition in lieu of a filing fee considered a "statement" without qualification of intent to run and an "announcement" or "otherwise available to the public"?

It can be safely assumed that the residents knew they were signing a petition allowing the Constable to run for the office of Sheriff. Therefore, it appears that the solicitation of signatures on a form that states a candidate's intention to run is an unqualified intent. However, because the Election Code specifically draws an exception for the circulation of a petition in connection with a candidate's application for a place on the ballot, it will not meet the first prong of the test. TEX. ELEC. CODE ANN. § 172.021 (d)

The second prong of the test is whether asking people to sign a petition is an "announcement" or "otherwise available to the public". The Constable obtained the minimum of 28 Kenedy County resident signatures on his petition in Lieu of a Filing Fee. That means at least 6% of the population was contacted regarding an intent to run. However, the Election Code requires the that the person circulating the petition ensure that the people signing the petition understand what they are signing. TEX. ELEC. CODE ANN. § 141.064. Further, the request of, "Will you support me" can be seen as just another way of explaining what the signature represents.

Interestingly enough, there is a mention that the Constable told one family that he would donate food for the daughter's quinceañera. However, with the facts presented, the statement was made after the request for a signature and the actual signing of the petition. Consequently, there does not appear to be even the appearance of a "quid pro quo" on the face of the facts given.

Filing for a Campaign Treasurer and Circulating a Petition in Lieu of Filing Fee can be analogous. Both have specific provisions which exclude them from triggering the automatic resignation provisions. When dealing with the Campaign Treasurer issue, Opinion GA-0643 states that "...while the statute **does not** state that a treasurer appointment filing **may not** be considered as relevant to whether a person has announced a candidacy for office or become a candidate. By its terms, the statute merely precluded the filing **by itself** to constitute candidacy or announcement of candidacy triggering the automatic resignation provision of article XVI, Section 65." (emphasis added) Consequently, circulating a petition may or may not be relevant. But, it will not trigger the automatic resignation provision.

C. Comparison to materials provided

It is noteworthy that the facts and standards (the Courts abandoned the separation of legal and factual sufficiency) in *Standley* were different enough from the case concerned that they can be easily distinguished. In *Standley*, the Candidate

"... stipulated he told a dozen people in the county that he was running for sheriff Many of the conversations took place in public settings. The conversations were not confidential. One of the people Standley told he was running for sheriff was the editor of the local newspaper. Standley's conversation with the newspaper editor was "on the record." Id. at 347.

Two of the aforementioned conversations took place in front of a Post Office and another in front of a feed store. The conversations in front of the Post Office "were not supposed to be confidential and could have been overheard by others." Id. at 352. Another conversation was held at a New Year's Eve party and that "...there were many people around when these statements about Standley's candidacy were made." Id. at 353.

In the facts presented, several of the facts differ from *Standley*. First, the statements in *Standley* were made in a public setting. In the facts presented, they do not appear to be in a public setting where others could overhear. Second, in *Standley* a statement was made to the media "on the record." In the facts presented, no statement was made to the media.

Likewise, in the letter opinion provided relating to a Bexar County Constable, the facts can be distinguished. In that opinion it states that, in addition to written articles and a web presence, the Constable gave two separate interviews to local media. Both interviews declared that Constable's intent to run for Sheriff and were publically broadcast. In at least one broadcast the Constable stated, "We are going to go ahead and make it formally announce today, right now that yes, I will be seeking the chair and the seat of the sheriff's office within Bexar County." See Opinion Letter, J. Gonzalez, Bexar County Criminal District Attorney to N. Wolff, Bexar County Judge dated Sept. 25, 2019. In the facts given regarding the Constable in Kenedy County, there is no allegation of contact with mass media.

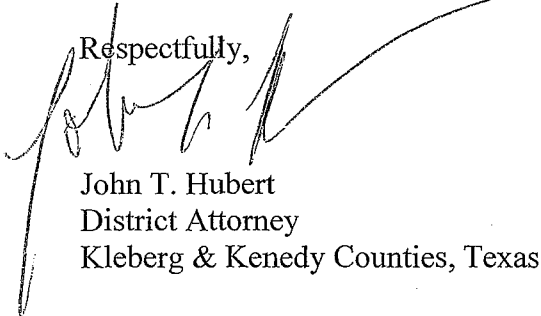
IV. Conclusion

The District Attorney's Office feels that the facts here (as provided) are ambiguous as to whether an "announcement" was made by the Constable. There does not appear to be any attempt to contact the media nor to make statements in a public area where many can overhear. Additionally, because the Election Code specifically draws an exception to the "resign to run" provision for the circulation of a petition in connection with a candidate's application for a place on the ballot, seeking signatures will not trigger this exception. TEX. ELEC. CODE ANN. § 172.021 (d).

As stated in Opinion GA-0643, "...while a finder of fact considering the totality of the reported events here could reasonably conclude that the constable announced his candidacy, this office cannot conclude that a finder of fact would do so as a matter of law." Because a reasonable finder of fact could draw more than one conclusion from the evidence presented, the District Attorney's Office could draw no conclusion as to whether the facts given trigger the automatic resignation provision of article XVI, section 65.

On November 1, 2019, the District Attorney sent the foregoing information to the Kenedy County Judge with the explanation that the Attorney General may disagree with the analysis and offering to forward the request to the Attorney General. On November 13, 2019 the Kleberg and Kenedy County District Attorney's Office received a request (dated November 5, 2019) from the Kenedy County Judge requesting that this issue be forwarded to the Texas Attorney General's Office for a formal opinion. Consequently, I am asking the Attorney General to review the facts, analysis and law mentioned above and provide an opinion. If I can be of any further assistance in the resolution of this matter, please feel free to contact me.

Respectfully,



John T. Hubert
District Attorney
Kleberg & Kenedy Counties, Texas