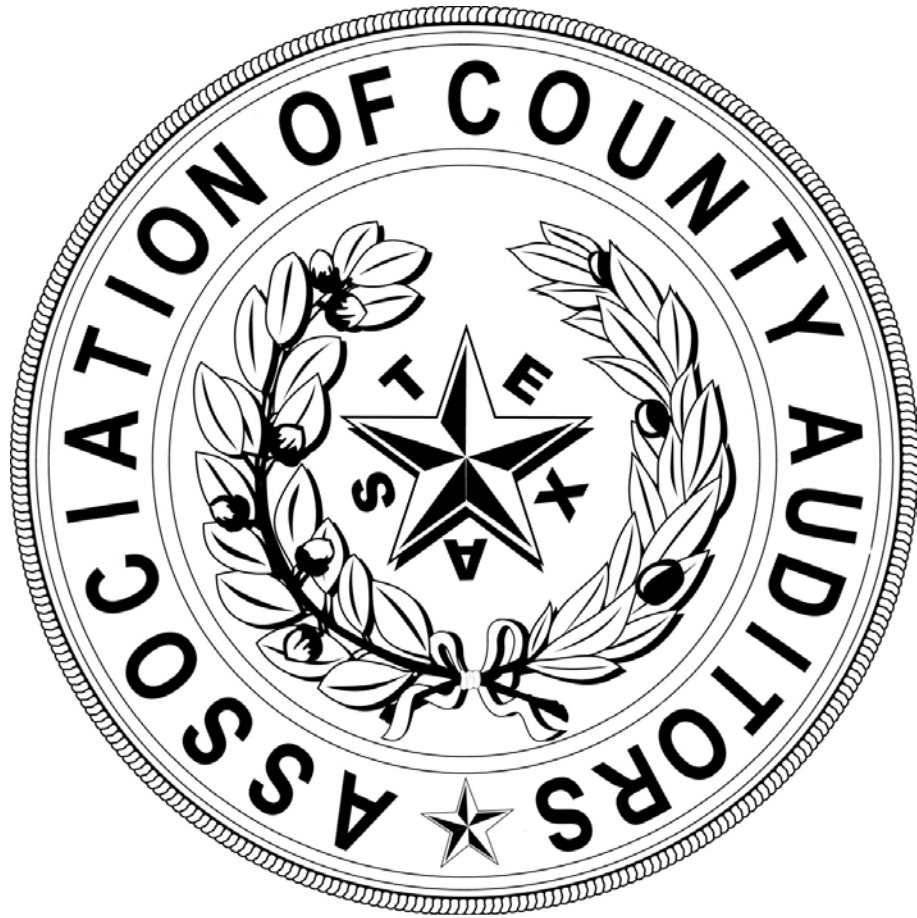


# Texas County Auditor

## Handbook



Presented by the

Texas Association of County Auditors

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## **WARNING!**

THE MATERIAL IN THIS DOCUMENT IS FOR REFERENCE ONLY. CONSIDERATION SHOULD BE GIVEN TO LEGISLATIVE CHANGES ENACTED SINCE PUBLICATION AS MANY SECTIONS MAY BE CURRENTLY OUTDATED OR SUPERCEDED BY STATE AND FEDERAL LAW, CASE LAW, OR ATTORNEY GENERAL OPINIONS.

As ordered by the Texas Association of County Auditors Board of Directors, October 11, 2005.

Forward

**Congratulations  
on your appointment as  
County Auditor!**

You will find the job of a Texas County Auditor a very exciting and challenging career. To assist you in getting started on your new endeavor, the Texas Association of County Auditors (TACA) takes great pleasure in presenting you with this copy of the "Texas County Auditor Handbook."

The Board of TACA wishes you the best and we trust that this handbook along with the TACA Directory will assist you in getting your feet on the ground. In addition to the handbook, the entire TACA organization stands ready to help you with your new duties in any manner possible.

As you will read in your handbook, TACA provides a "mentor" program for newly appointed Auditors. Please feel free to contact your mentor with any questions, concerns, or to simply have someone to talk with who has been in your shoes at some point in their career. We also encourage you to contact any TACA Board Member or Director for assistance. Board Members and Directors are listed in your handbook.

We encourage you to participate in the TACA organization. By participating you will not only develop relationships with your colleagues, but you will also benefit educationally.

**We at TACA look forward to meeting you, and once again, congratulations on your appointment!**

## Schedule of Amendments and Changes

- 10/11/2005 TACA Board includes warning statement on current status of statutes, to existing copy of the Handbook from October 2001.
- 1/29/2010 Updated handbook for current statute references, content, formatting, inserted hyperlinks to references.

# County Auditor Handbook

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I. What is a Texas County Auditor?

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## What is a Texas County Auditor?

You may find yourself in an awkward position in your new job. You have an impressive title, you're told that you have some authority, and you're just beginning to understand what working in the courthouse is all about. But for some reason people in the offices around the county are wary of you. You knew that any job with the word auditor in the title would be a challenge, but what is this all really about? Where did the position of County Auditor come from? Exactly what can you do, and more importantly what can't you do? These are questions that we all ask. You are not alone, and with some advice from this handbook you can benefit from the many great auditors that have gone before us and blazed a trail. You can also hopefully avoid many of the pitfalls that will come along the way.

In order to understand the question "What is a Texas County Auditor," a more basic understanding of county government and the history behind it are necessary. Below is an excerpt from prepared remarks by Bob Bass of Allison, Bass & Associates LLP that gives a good history and explanation in short form.

The following discussion is based upon a study of county government contained in volumes 2 and 3 of the South Texas Law Journal, authored by former Harris County Attorney Burke Flolman, and professor James Rowland Gough. See *A Study of County Government in Texas*, Volume 2, page 197 (Spring 1956) and *Evaluation of the Office of County Auditor*, Volume 3, page 1 (Summer 1957). Also of assistance is a more basic academic study of the Texas Constitution, *Citizens Guide to the Texas Constitution*, prepared for the Texas Advisory Commission on Intergovernmental Relations by the Institute of Urban Studies, the University of Houston (Austin, 1972).

The American form of county government (and Texas, with perhaps unique modifications upon the American standard) is based upon the earlier English shires. During the late 18<sup>th</sup> century, English shires were governed by a body known as the Court of Quarter Sessions, which was made up of a variable number of Justices of the Peace under the presidency of a Lord Lieutenant. There was also a Court of Petty Sessions which had administrative duties, while the Sheriff served as law enforcement officer although his powers had been greatly reduced from the days of Robin Hood. The Court of Quarter Sessions, the Court of Petty Sessions, the Lord Lieutenant, and the Sheriff along with individual Justices of the Peace held legislative, military/law enforcement, administrative and judicial powers.

The American system of local government grew into being in a vast and largely untamed wilderness, populated by individualists whose distrust of government was deep seated. The imposition of local government in Texas was late in developing and was heavily influenced by the presidency of Andrew Jackson, who was a fierce opponent of the principles of federalism contained in the United States Constitution. Jacksonian philosophy insisted upon the election of virtually all governmental officers (including such officers as the county trapper and hide inspector, and county weights and measures officer), the autonomy of each elected officer over the operation of their department, but corresponding legal and fiscal limitations upon whatever meager powers were vested in those officials. The result is a compartmentalized and generally unwieldy form of government tied to an overly complex constitutional framework, i.e. the Texas Constitution of 1876 (which in turn was a backlash against the "carpetbagger" constitution of 1868).

The Constitution of 1876 deals with the formation of county government in Article V, where the executive branch of county government is created in Sections 15, 16, 17, and 18. By a strange permutation of the old English system, which had separate entities exercising executive, judicial and

legislative powers, the Texas form of county government vest judicial, legislative and executive powers upon a single body called the Commissioners Court, which is created along with other judicial entities. Early Texas Jurisprudence (11 Tex. Jur. 559) stated the intermingling of functions as follows:

“The jurisdiction and powers of the Commissioners Court are dual, some being judicial while others are legislative. The Commissioners Courts are part of the judicial system of the State, and also constitute the executive boards for administering the affairs of the county. They exercise legislative power of the County and most of their powers and duties are political.”

Prior to 1891, the prevailing legal opinion of the day that judicial courts had no power to review the political acts made the determinations of the Commissioners Court absolute and final, except in cases where the result was clearly outside of the jurisdiction of the Commissioners Court or a clearly capricious act, and therefore void. However, an amendment to the Constitution of 1876 granted supervisory powers to the district court to review acts of the Commissioners Court, although the legislature failed to provide for explicit avenues of appeal from the Commissioners Court to the district court.

Onto this stage emerged a new player, who in time would be called the lynchpin around which the county government turns – the county auditor. Created in 1905 by statute rather than Constitutional amendment, the county auditor emerged fourteen years after the grant of supervisory jurisdiction to the district courts, and thus appears to be a legislative act by those responsible for creating the office of county auditor intended as an adjunct to the district courts exercise of supervisory jurisdiction over the Commissioners Court. See also D. Brooks, *35 Texas Practice Series*, section 19.5, note 2. Initially, the auditor was appointed by the county and district judges having jurisdiction in the county. The Legislature subsequently amended the statute to provide for the appointment of the county auditor by only the district judges. Act of March 29, 1917, 35<sup>th</sup> Legislature, R.S. chapter 134 section 2, 3, and 1917 Texas General Laws 337, 338 (current version at Texas Local Government Code 84.002).

In practice, the county auditor is the most centralized and strategic concentration of power within the entire structure of county government. The powers of the county auditor reach into every corner of the county courthouse, including district officers, to the inclusion of virtually every other officer including the Commissioners Court. The county auditor has financial oversight for all county offices and officers and may dictate the accounting procedures for all county officers, including the district clerk and district attorney. See Attorney General Opinion H-183 (1973). Attorney General Opinion M-579 (1970) confirmed that the auditor, and not the Commissioners Court, has the authority to establish accounting procedures to be followed by all county officers. The county auditor may disapprove the payment of claims against the county, and the county Commissioners Court may not pay a claim without auditor approval. Chapter 113 and 115, Texas Local Government Code.

The auditor must counter-sign all warrants or checks and thus controls disbursements. While the Commissioners Court is not required to pay a claim which has been approved by the auditor, they are absolutely without power to pay one which has been disallowed by him. *Anderson v. Ashe*, 90 S.W. 872, 874 (Texas 1906). An officer who refuses to comply with a request for information by the auditor may be convicted of a misdemeanor and removed from office. Article [114.003](#), Texas Local Government Code. Unlike either the county judge or the Commissioners Court, the county auditor may request an attorney general’s opinion, and utilize that opinion to compel other county officials to comply with the determinations of the county auditor. Article [402.042 \(b\)\(8\)](#), Texas Government Code.

“Since the auditor has the authority to impose a budget upon the county because of his power to stop payment on all warrants not drawn strictly according to the law, he has been in a position to dominate county finances.” W.C. Murphy, *County Government and Administration in Texas* (27 University of Texas Bulletin 1933); D. Brooks, 35 *Texas Practice Series*, Section 19.1.

Perhaps most critically, the County Commissioners Court has little power over the budget of the County Auditor. In Commissioners Court of Harris County v. Fullerton, 596 S.W. 2d 572 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.], 1980, writ referenced n.r.e) the court held that only if the County Auditor’s budget request was found to be clearly unreasonable could the Commissioners Court deny the request, again subject to review by the District Judges. This case treats the County Auditor in an entirely different manner than any other county officer making a budget request. In regard to all other county officers, the budget authority of the Commissioners Court is paramount, absent an abuse of discretion by the Commissioners Court in denying a requested budget. Randall County Commissioners Court v. Sherrod, 854 S.W. 2d 914 (Tex. App. – Amarillo, 1993).

The most curious thing about the office of County Auditor is the underlying concept present in the minds of those who framed the original legislation which created the office. The County Auditor is not appointed by or responsible to any elected officer or elected body charged with administration and policy determination for the County. Instead, the selection of the Auditor is vested upon the District Judge(s) whose district(s) include the county. District Judges are not primarily chosen with a view to their interest in, their knowledge of, or their policies toward local government. They are elected on the basis of their technical competence and their temperamental fitness to discharge the office of trial judge in a judicial court of general jurisdiction.

Within this context, it is clear that the system of choosing a County Auditor is generally incompatible with the principal of local self-government and specifically with the doctrine of separation of powers. It is well established that the county itself is an entity of limited authority, capable of exercising only those powers derived from particular constitutional or statutory enactment. Canales v. Laughlin, 214 S.W. 2d 415 (Tex. 1948). There is likewise little doubt that the State has full power to establish such officers and agencies as it sees fit to assure that local government authorities comply with the law. It is interesting to note, that while the County Auditor is charged with the establishment of county accounting policy and practices, the County Auditor in turn is guided by standards and forms promulgated by the State Comptroller of Public Accounts §112.003 Local Government Code, a State financial officer, rather than any local authority.

The treatise of Burke Holman and James Gough concluded with a proposal for improvement of County government. This proposal sought to formally recognize what the authors believed was implicit, i.e. the County Auditor should be considered a State officer whose primary function was to insure that the local government operated within the bounds of State law. This individual, who is supposed to be an independent official who will work for the best interest of the county taxpayers, is governed in most instances by express legislative enactment. When the Auditor finds need for clarity on issues of law, he is empowered with the authority to request and Attorney General’s opinion, but when necessary, he is free to act on his own largely unfettered discretion. In Smith v. McCoy, 533 S.W. 2d 457 (Tex. App. – Dallas, 1976), the delicate system of checks and balances created to protect county funds was described, and the vast discretionary powers of the County Auditor were upheld.

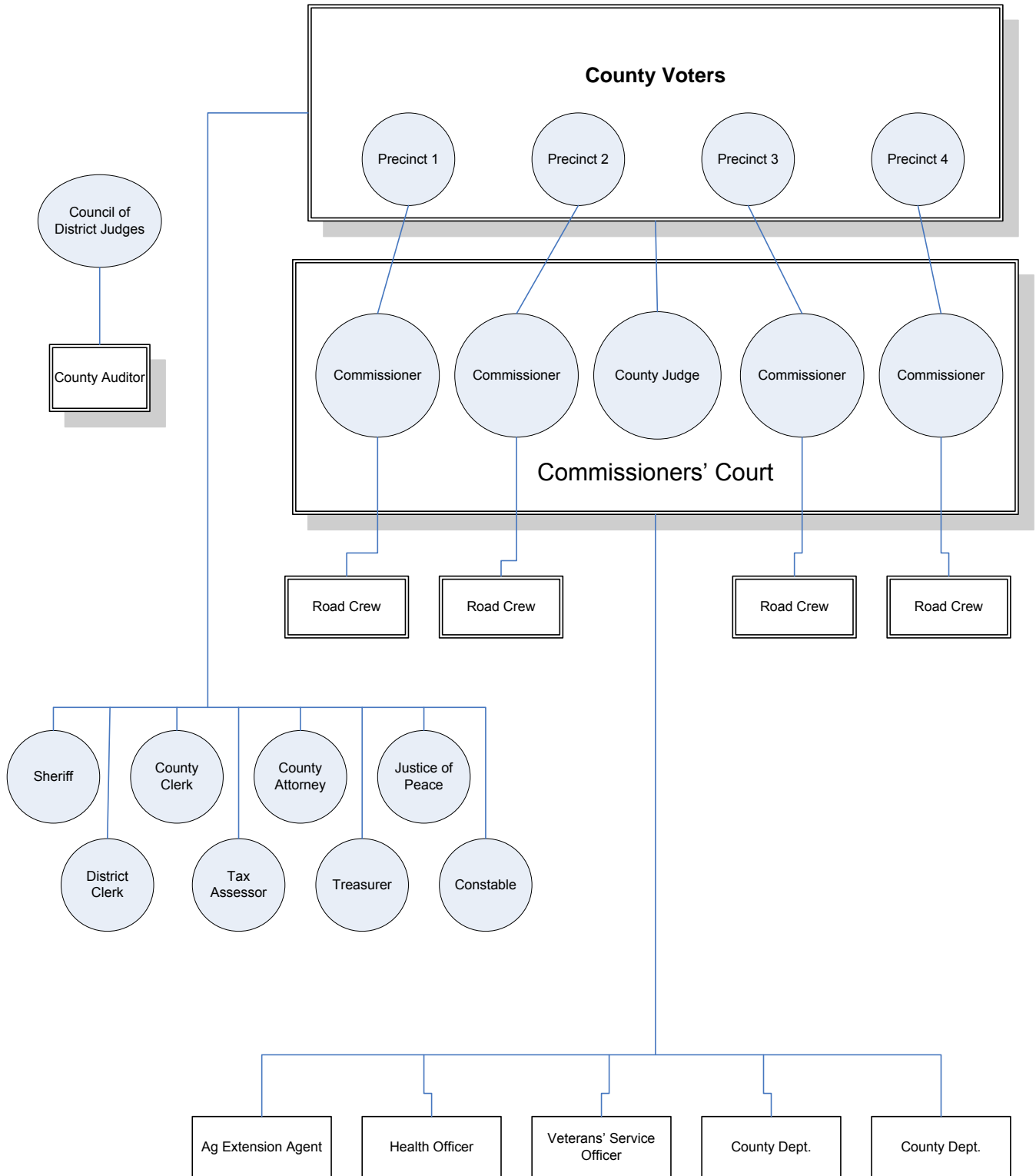
Texas Attorney General's opinions have long struggled with the duties of the County Auditor. In Atty. Gen. Op. [JM-911](#), P. 4545, perhaps the clearest of these opinions, the issue of constitutional checks and balances is generally discussed.

“Under our republican form of government, the power to govern is vested in the people; the duty to govern is vested in offices created under the Constitution and discharged by officers responsible to the people... Each constitutional office is essential to the whole scheme of freedom and sovereignty established by the Constitution because it has at its core certain irreducible functions which make up the threads of the office. In turn, each constitutional office is a part of the whole fabric of republican government.” See, e.g. Wiecek, “*Republican Form of Government*” 3 Encyclopedia of the American Constitution 1558 (1986).

Weaver v. Commissioners Court of Nacogdoches County, 146 S.W. 2d 170, 174 (Tex. Comm. App. §A, 1941), held that the creation of a public office is a peculiarly legislative matter. In discussing the purpose of the County Auditor, the Court stressed that “it is of the highest public concern that such officer [county auditor] be left entirely free from the control of these officers [county commissioners]...”

In a purely academic study, George D. Braden clearly separated the functions of the County Auditor from the balance of county government, and placed the auditor clearly under the autonomy of the District Court. While the County Auditor may be only loosely considered a “county official,” there can be no doubt that the method of creating, determining and controlling the salary of the County Auditor is a creature of the Texas Legislature, who in turn delegated those powers to the judiciary. Judicial functions are uniquely “state” action under law, as opposed to any sense of “local” authority. See Vitgopil v. Ware, 280 S.W. 2d 378, (Tex. App. – Waco, 1955). The proposition that the County Auditor is unique is also supported by the fact that he alone may be removed from office without benefit of a jury trial. Article V, §24 of the Texas Constitution provides that county officers may be removed by district judges only upon findings by a jury. However, under §87.012 of the Local Government Code, the County Auditor is conspicuously missing from the list of officials subject to removal. The auditor can be removed from office by simple judicial fiat. See §84.009, Local Government Code.

# Organization of County Government in Texas



Source: Adapted from George D. Braden, Citizens' Guide to the Texas Constitution, prepared for the Texas Advisory Commission on Intergovernmental Relations by the Institute of Urban Studies, the University of Houston (Austin, 1972), p. 51.

# Someone Knew What They Were Doing

By

Tommy I. Tompkins, CPA

Bexar County Auditor

And

Past President of the Texas Association of County Auditors

Prior to the late nineteenth century, judicial courts did not have the authority to review political acts, which made the determinations of Commissioners Court absolute and final. Exceptions to this would be in cases where the result of the determination was clearly outside of Commissioners Court jurisdiction, or found to be a capricious act, and therefore void. An amendment to the Constitution of 1876, however, granted supervisory powers to the District Courts to review acts of the Commissioners Court.

The County Auditor was introduced into the District Court supervisory role in 1905. The office was created by statute rather than Constitutional amendment and thus appears to be a legislative act intended as an adjunct to the District Courts' exercise of supervisory jurisdiction over Commissioners Court.

Initially, the County Judge and the District Judges having jurisdiction in the county appointed the County Auditor jointly. The legislature subsequently amended the statute to provide for the appointment of the County Auditor by only the District Judges.

The powers and responsibilities of the County Auditor reach into every corner of the courthouse, including district officers, and virtually every other officer, including the Commissioners Court. The County Auditor has financial oversight for all county offices and officers, and may prescribe the accounting procedures for all county officers, including the District Clerk and District Attorney. The County Auditor has responsibility to establish internal controls and may disapprove the payment of claims against the county. Commissioners Court may not pay a claim without the County Auditor's approval and the County Auditor must countersign all checks, other than checks to jurors.

Unlike the County Judge or the Commissioners, the County Auditor may request and Attorney General's opinion, and utilize that opinion to encourage other county officials to comply with the determinations of the Attorney General.

Another major difference, which sets the Auditor apart from elected officials is Commissioners Court has little authority over the budget of the County Auditor. In a 1979 court case, the court held that only if the County Auditor's budget request was found to be clearly unreasonable could the Commissioners Court deny the request, again subject to review by the District Judges. This case treats the County Auditor in an entirely different manner than any other county officer making a budget request. In regard to all other county officers, the budget authority of the Commissioners Court is paramount, absent an abuse of discretion by the Commissioners Court in denying the requested budget.

In view of these powers and responsibilities, and most notably the oversight authority granted the County Auditor, it is not surprising that numerous situations of "ill will" toward the County Auditor have surfaced over the years and will likely continue into the future. It is also not surprising that quite often the County Auditor finds that they are not the most popular officials in the courthouse. A quote by a District Judge from a recent

newspaper article summarizes this point well. "Being a County Auditor is a thankless position, because the very nature of the job makes it, in some ways, antagonistic to what department heads want to do." Another quote from the same newspaper article by a twelve-year County Commissioner states, "When there is no controversy, it means everything is being rubber-stamped. But when there is (controversy), it means... department heads don't agree with the Auditor and all that... because she is doing a good job, and she is not rubber-stamping everything that they request."

In addition to the numerous responsibilities cited above, the Local Government Code dictates, "the County Auditor shall see to the strict enforcement of the law governing county finances." County Auditors find themselves in a very unpopular situation when they are forced to "step-up" and make the difficult call that a given action is not in compliance with the law. With the responsibilities and oversight authority vested in the County Auditor mixed with the highly charged political environment of Counties, it is no wonder that the job of a Texas County Auditor is one of the most difficult positions in the state.

SO... HOW DOES A COUNTY AUDITOR FUNCTION IN AN EFFECTIVE MANNER IN THIS ENVIRONMENT?

BECAUSE... "SOMEONE KNEW WHAT THEY WERE DOING!"

If the statutes had not been adopted to allow for the level of independence the County Auditor has today, the County Auditor would not be able to carry out these duties and responsibilities in a proper manner. The underlying concept, present in the minds of those who framed the original legislation which created the County Auditor's office, was that the County Auditor is not appointed by, or responsible to, any elected officer or elected body charged with administration and policy determination for the County. Instead, the selection of the County Auditor is vested upon the District Judge(s) whose district(s) include the county. District Judges are not primarily chosen with a view to their interest in, their knowledge of, or their policies toward local government. There can be no doubt that the method of creating, determining and controlling the salary of the County Auditor is a creature of the Texas Legislature, who in turn delegated those powers to the judiciary. A quote from a 1997 U.S. Court of Appeals, 5<sup>th</sup> Circuit court case states, "In other words, Texas gives County Auditors responsibility for guarding the public purse and using the authority of the Auditor's office to ensure that local governments comply with the law."

The Texas Association of County Auditors encourages the public, State Representatives, State Senators, and County officials to take the time to understand the difficult but critical role County Auditors play in this state. Although no one enjoys oversight and on occasion questioning of their actions/decisions, in today's environment the County Auditor may be the best friend and safety net the county has. There are those who will argue that other county officials may assume the duties of a County Auditor in a county with no Auditor, however, the statutes establishing the County Auditor set forth specific qualifications in order to hold this office and there is no other office in the county which possesses the level of independence to properly execute and enforce the duties and responsibilities of a Texas County Auditor. We live in a society, which is becoming more knowledgeable about and dependent on access to public data through technology and taxpayers today are demanding greater fiscal accountability from their state and local government. Additionally, the Governmental Accounting Standards Board is now requiring new accounting and financial reporting requirements which will focus more attention than ever before on the accountability and effectiveness of county programs. Texas counties can ill afford to expose themselves by failing to meet these requirements.

A County Auditor not only provides oversight for the public but will also assist in ensuring that Texas counties are able to meet the increasing demands of fiscal accountability in the future.

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II. Is the County Auditor a County Employee?

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## Is the County Auditor a County Employee?

The County Auditor is a “public official” as opposed to a “public employee,” as determined by the test created in Aldine Independent School District v. Standley, 280 S.W. 2d 578 (Tex. 1955). The criteria for a “public official” was held to be:

- A “term” of office of two years or more,
- A requirement for bond and oath,
- Statutory qualifications for office required,
- “The determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.”

In Laord v. Como, 137 S.W. 2d 880 (Tex. Civ. App. – Fort Worth, 1940, writ referenced), the distinction between a public official and an employee was again drawn.

“There are material distinctions between one occupying an official position and another who performs duties purely by virtue of employment. An official may be and often is elected by the resident electors; he subscribes the oath of office and is entrusted with the performance of some of the sovereign functions of government; is subject to removal for failure to so perform the duty or for misconduct or malfeasance in office; his election or appointment is for a definite period of time and his services hereby become continuing and permanent, rather than temporary and transitory, as is the case of an employee under a contract.”

Thus, unlike employees or agents who may have contractual rights for continued employment with a county, a public official has no property or contractual rights in his office. Carver v. Wheeler County, 200 W.W. 537 (Tex. Civ. App. – Amarillo, 1918, no writ). See also Guerrero v. Refugio County, 946 S.W.2d 558 (Tex. App. – Corpus Christi, 1997, no writ).

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### III. The Appointment Process

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## The Appointment Process

### Appointment of the County Auditor:

The County Auditor is an appointed position ([Local Government Code 84.002](#)) and reports directly to the district judge(s) that appointed the position. The procedure for appointment and the term of office, [LGC 84.003](#) and [LGC 84.005](#), two years, are consistent for all counties, except those greater than 2,000,000 in population. The qualifications for the County Auditor are established by [LGC 84.006](#), and the bond and oath are set out in [LGC 84.007](#). In addition, [LGC 84.008](#) establishes guidelines for joint employment in more than one county. [LGC 84.009](#) sets out the criteria for the removal of the County Auditor.

Once the County Auditor has been appointed by the district judge(s), it is then the County Auditor's responsibility to work within the available budget to hire and appoint assistants in accordance with [LGC 84.021](#). Anyone who works for the County Auditor is an assistant county auditor. The County Auditor must receive 40 hours each term of continuing education in courses relating to the duties of the County Auditor and certify the same to the district judge(s) per [LGC 84.0085](#). The County Auditor has the ability to buy materials and supplies to run the office and this is established by [LGC 84.901](#). The County Auditor's operating budget is established by the County Auditor and included in the budget adopted annually by the Commissioners Court. The district judge(s) may set the County Auditor's salary at a level which is determined to be adequate within the limitations described in [LGC 111.013](#).

The County Auditor's salary and the salary of the assistant county auditors are set annually by order of the district judge(s) which is given to the Commissioners Court in accordance with [LGC 152.031 through LGC 152.034](#). The County Auditor's salary and the salary of the assistants are exempt from the compensation statutes as set out in [LGC 152.001 through LGC 152.017](#). The County Auditor is permitted to be reimbursed for the use of a personal automobile in the performance of the duties of the office, by [LGC 152.035](#).

The district judge(s) will hold a public hearing annually to set the salaries of the County Auditor and assistant county auditors according to [LGC 152.905](#). Please see the end of this section for a summary of the appointment process and sample forms for the appointment can be found in the appendices.

### Appointment of Assistant County Auditors:

The appointment of an assistant(s) is found in [LGC 84.021](#). "From time to time the County Auditor may certify to the district judge(s) a list stating the number of assistants to be appointed, the name, duties, qualifications, and experience of each appointee, and the salary to be paid each appointee." Assistants must take the usual oath of office for faithful performance of duty and the Auditor may require a bond and may determine the terms of the bond. The County Auditor may discharge an assistant.

## Section Summary

### Process for Appointment of County Auditor [Local Government Code 84.002 through 84.007](#)

1. District Judge(s) appoint the County Auditor for a two year term,
2. District Judge(s) sign a Court Order appointing the County Auditor,
3. The Auditor must obtain a \$5,000 bond payable to the District Judge(s) and subject to their approval,
4. District Judge(s) files the Court Order appointing the County Auditor with the District Clerk,
5. Complete a Statement of Appointed Officer and send to (or fax) to the Secretary of State,
6. Execute an Official Oath of Office ([Constitution, Article XVI, Section 1 \(c\)](#)),
7. Execute a Written Oath of Office,
  - a. Send original Court Order, Public Official Bond, Oath of Office, and Written Oath of Office to the administrative office of the District Courts with a transmittal letter requesting inclusion on the Commissioners Court agenda,
8. District Judge(s) prepares a Court Letter for Commissioners Court with the original Court Order and Public Official bond.

*Note: Please see the appendices to this handbook for samples of all the orders, oaths, and letters mentioned in this summary.*



## IV. The County Auditor's Statutory Responsibilities

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# The County Auditor's Statutory Responsibilities

## Introduction

The authority of the County Auditor is probably best summarized in a statement made by W.C. Murphy in his article, County Government and Administration in Texas (University of Texas Bulletin, 1933), "Since the auditor has the authority to impose a budget on the county, because his power to stop payment on all warrants not drawn strictly according to the law, he has been in a position to dominate county finances." Since the creation of the position of County Auditor in 1905, the County Auditor has been referred to as the "connector" and the "lynch-pin" of county government, due to the fact that the position is not elected. The County Auditor is appointed by the district judge(s) having jurisdiction over the county, and as such the County Auditor is not controlled by the Commissioners Court. The real significance of the County Auditor's authority stems from the oath of office ([Texas Constitution, Article XVI, Section 1](#), with the added wording "will not become personally interested in a contract with the county") and the obligation to ensure strict enforcement of state laws and the duty to disallow any expenditures of county funds he believes to be unlawful.

The County Auditor is called on in many instances to reach a legal decision (and most often the auditor is not an attorney) based upon the examination of underlying documents and an interpretation of state laws. The chief role of the position is the role of financial officer of the county. As such the County Auditor has full comprehensive authority to direct accounting procedures, stop illegal payments, and to establish internal control procedures for the custodial maintenance of county assets.

Today it is required that all counties with a population in excess of 10,200 will have a County Auditor appointed, as stated by [LGC 84.002](#). The County Auditor has the responsibility and the authority to audit all areas that have custody of money or property that belongs to the county, is intended for county use, or is held in some official capacity by a county official. This responsibility is an "audit" function, and has the general objective to ensure that the financial integrity of the county's financial operations is maintained.

The County Auditor should never equate the authority and responsibility of the office to "power." The duties of the County Auditor are prescribed by state law, prescribed by the standards and ethics of the profession, inherited, and some duties are assigned because no one else wants to do them.

Once appointed, the County Auditor often needs the skills to be an accountant, an auditor, an economist, a public relations manager, a financial forecaster, a budget expert, a personnel director, a purchasing agent, and a politician, among many others.

All Texas counties have the same constitutional offices (with few exceptions) in which the County Auditor has certain statutory responsibilities. These offices are listed below and a brief description of each office may be found on the Texas Association of Counties website, [www.county.org](http://www.county.org).

- |                           |                         |                     |
|---------------------------|-------------------------|---------------------|
| 1. Commissioners Court    | 5. Sheriff              | 9. District Clerk   |
| 2. County Judge           | 6. Justice of the Peace | 10. County Clerk    |
| 3. Tax Assessor-Collector | 7. Constable            | 11. County Attorney |
| 4. District Attorney      | 8. Treasurer            |                     |

## **County Auditor Authority**

It is often difficult to determine where “authority” stops and “responsibility” starts. Statutory authority establishes the legal rights that enhance the County Auditor’s ability and make it possible to fulfill statutory responsibility. There are four types of statutory authority conferred upon County Auditors, all of which overlap with each other throughout the statutes.

- Oversight Authority
- Access Authority
- Prescriptive Authority
- Verification Authority

## **Oversight Authority**

### [Local Government Code 112.006](#)

- a. The County Auditor has general oversight of the books and records of a county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county.
- b. The County Auditor shall see to the strict enforcement of the law governing county finances.

### [Local Government Code 324.097](#)

- Concerning the oversight responsibility when a Recreation District exists.

Oversight generally means watchful and responsible care for. Watchful and responsible care for implies not only access to the books and records, but also the authority to help ensure that those books and records are properly maintained. In Smith v. McCoy, 533 S.W. 2d 457 (Tex. Civ. App., 1976), it was determined that the County Auditor has responsibility, before approving a claim against the county, to determine whether the claim strictly complies with the laws governing county finances.

NOTE: When the County Auditor is required to deal with statutes that have population brackets, it should be remembered that the population that is being referred to is based on the last Federal census.

## **Access Authority**

### [Local Government Code 115.001](#)

The County Auditor shall have continual access to and shall examine and investigate the correctness of:

- The books, accounts, reports, vouchers, and other records of any officer;
- The orders of the Commissioners Court relating to county finances.

In many instances the authority established by the statutes are very broad, but they are specific. The above statute would include all reports made by all offices to the Commissioners Court and would include all evidentiary matter, i.e. books of original entry, accounts maintained, reports other than those made to the court, vouchers, and any other records deemed necessary. Financial records and documents would not be limited to fiscal evidence, but would also include internal policies and internal controls. Reports dealing with collection of money, bank reconciliations, deposits, disbursements, court records, and safeguarding of assets would be essential.

#### [Local Government Code 140.003](#)

- g. The County Auditor, if any, of the county that manages a specialized local entity's funds has the same authority to audit the funds of the entity that the auditor has with regard to county funds.

NOTE: A specialized local entity is a district, a criminal district attorney, a juvenile board, a juvenile probation office, an adult probation office, or a judicial district.

#### [Code of Criminal Procedure 103.011](#)

The County Auditor has the authority to examine the receipt books of officials collecting fines and fees in criminal cases for the county to determine whether the money collected has been properly disposed of.

Access generally means the liberty to enter, look at or review. This would include all specialized local entities. Generally speaking, the County Auditor may look at anything that pertains to county finances. See Attorney General's opinions [M-756](#), [H-1185](#), and [H-1212](#).

### **Prescriptive Authority**

#### [Local Government Code 112.001](#)

In a county with a population of less than 190,000, the County Auditor may adopt and enforce regulations, not inconsistent with law or with a rule adopted under [LGC 112.003](#), that the auditor considers necessary for the speedy and proper collecting, checking, and accounting of the revenues and other funds and fees that belong to the county.

#### [Local Government Code 112.002](#)

- a. In a county with a population of 190,000 or more, the County Auditor shall prescribe the system of accounting for the county. See Attorney General's opinions [JM-1275](#) and [Letter Opinion 92-050](#) for additional references.

Prescribe generally means to require or dictate, and this type of authority allows, and in some cases requires, County Auditors to prescribe accounting and/or bookkeeping systems, and to prescribe frequency, format, and content of reports. Attorney General's opinions have extended this authority to the County Attorney's "hot check fund" and to the Sheriff's "commissary fund."

[Local Government Code 114.002](#)

The County Auditor shall determine:

- a. The time and the manner for making reports to the auditor, and
- b. The manner for making an annual report of:
  1. Office fees collected and disbursed, and
  2. The amount of office fees refunded to the county in excess of those that the officer is permitted by law to keep.

[Local Government Code 130.902](#)

Any county official that collects public funds may request that the county make a change fund available, and the Commissioners Court may set aside funds from the general fund for such a purpose, once the County Auditor has approved the amount and the purpose.

[Local Government Code 130.905](#)

In counties with a population of 1.3 million or more, the county may establish a welfare petty cash fund to provide support for paupers. The fund is established under a system provided and installed by the County Auditor.

[Local Government Code 154.044](#)

In Counties with a population of more than 190,000, all district, county and precinct officers are required to file by the 5th day of the month a report (as specified by the county auditor) with the county auditor which details the fees and commissions collected for the previous month and an itemized sworn statement as to the expense claims paid during the period.

**Verification**

[Local Government Code 113.064](#)

- a. In a county that has the office of county auditor, each claim, bill, and account against the county must be filed in sufficient time for the auditor to examine and approve it before the meeting of the Commissioners Court. A claim, bill or account may not be allowed or paid until it has been examined and approved by the auditor.
- b. The auditor shall stamp each approved claim, bill or account. If the auditor considers it necessary, the auditor may require that a claim, bill, or account be verified by an affidavit indicating its correctness.
- c. The auditor may administer oaths for the purposes of this section.

Additional References:

[Att. Gen. Op. M-955, 1971](#)

[Att. Gen. Op. 0-6784, 1945](#)

[Att. Gen. Op. JM-192, 1984](#)

This type of authority relates to the claims approval process and allows auditors to obtain sworn statements or testimony relating to the validity of claims, bills or accounts.

#### [Local Government Code 154.043](#)

In Counties with a population of more than 190,000, a payment may not be made from the salary fund to an employee for a service performed before the person has taken the constitutional oath of office, if applicable, and the authorized appointment and oath, if any, have been filed with the county clerk and the county auditor.

#### [Tax Code 26.044](#)

The county auditor is required to certify' the number of "paper ready" inmates and the number of inmate days that were spent in the county jail facility by "paper ready" inmates awaiting transfer to a division of the Texas Department of Correction. The county auditor is to verify the amount that the county spent in a twelve month period for the maintenance and upkeep of these prisoners that are awaiting transfer. The verification is based on a review of the records maintained by the county sheriff.

### **County Auditor – Audit Responsibilities**

There are three offices in county government which have the statutory responsibility to audit: Commissioners Court, county treasurer and the county auditor. All have the responsibility to ensure that:

1. All funds due to the county are being collected within some reasonable assurance;
2. All funds being held by the county are being adequately safeguarded;
3. All funds being collected are being disposed of properly;
4. All county property is being used and managed properly;
5. All county assets are accounted for; and
6. There are responsible parties held accountable for county property.

All are required to support the efforts of the other offices in strengthening the financial management and responsibility of the county. The responsibilities of the county auditor are much broader than those given to either the Commissioners Court or the county treasurer. Often the position of the county auditor is viewed as a bookkeeping function, rather than one of accounting and auditing.

The statutes contain three separate audit responsibilities for all county auditors:

#### [Local Government Code 115.002](#)

- a. The county auditor shall carefully examine and report on all reports about the collection of money for the county and that are required to be made to the Commissioners Court.
- b. At least once each quarter the county auditor shall check the books and shall examine the reports of the county tax assessor, county treasurer, and all other officers. The auditor shall verify the footings and the correctness of those books and reports. The auditor shall either stamp the books and reports approved or shall note any differences, errors, or discrepancies.
- c. The auditor shall carefully examine the report made under [LGC 114.026](#) by the county treasurer together with the cancelled warrants (checks) that have been paid. The auditor shall verify those warrants with the register of warrants issued as shown on the auditor's books.

In addition:

[Local Government Code 115.003](#)

The county auditor is required to verify that the funds maintained by the county treasurer are intact and correctly reported.

[Local Government Code 115.0035](#)

At least once each county fiscal year the county auditor is to fully examine the accounts of all precinct, county, and district officials. This statement seems to be repeated at:

[Local Government Code 114.041](#)

- a. In a county with a population of 190,000 or less, a district, county or precinct officer shall keep, as part of a record provided for the purpose, a statement of fees earned by the officer and of the money received by the officer as deposits for costs, trust fund deposits in the registry of a court, fees of office and commissions. "The officer must make an entry in the record when the fees or commissions are earned or the deposits are made and when the money is received. The county auditor shall annually examine the records and accounts of each officer and report the findings of the examination to the next grand jury or district court.

[Local Government Code 115.004](#)

This section has special requirements for county auditors in counties with a population of more than 190,000.

[Local Government Code 115.901](#)

The county auditor shall examine the accounts, dockets and records of each clerk, justice of the peace, constable and of the sheriff and county tax assessor-collector to determine if any money belonging to the county and in the possession of the officer has not been accounted for and paid over according to law.

The word "accounts" is often used throughout the statutes and should be understood to mean all public funds subject to the control of any precinct, county or district official, including money seized by law enforcement agencies and the attorney for the state; but it does not include funds received by the attorney for the state from the comptroller under the General Appropriations Act, or federal or state grant-in-aid funds received by an official, [LGC 115.0035](#).

Money may be paid out of a registry fund maintained by a court, but these disbursements must be submitted to the county auditor for review, verification and countersignature, [LGC 117.121](#). In addition to the auditing procedures of a county auditor, these funds held in a registry fund are to be audited annually by a independent certified public accountant or firm, and a written report delivered to the county judge, each commissioner, and the clerk of the court 90 days after the last day of the fiscal year. The audit is a public document and should be held available for public inspection, [LGC 117.123](#).

[Local Government Code 351.0415 \(d\)](#)



At least once each county fiscal year, or more often if the Commissioners Court desires, the auditor shall, without advance notice, fully examine the jail commissary accounts. The auditor shall verify the correctness of the accounts and report the findings of the examination to the Commissioners Court of the county at its next term beginning after the date the audit is completed.

### [Human Resources Code 152](#)

Each county auditor should consult this chapter to understand how the juvenile board and its related activities are to be treated. Not all juvenile boards are the same in composition or subject to the same requirements of the statutes. This chapter deals with the creation and authority of the juvenile boards, and the collection and distribution of support service fees.

### **Auditing Other County Offices**

The extent of audits performed on other county offices depends on many factors. One of the most critical is personnel. The county auditor in a small county with a staff of one has the same responsibility (established by the statutes) and authority as does the county auditor that has a larger staff. The office is often called upon to perform many financial functions relating to personnel, payroll, purchasing, grants, insurance, etc. These functions are for the most part above and beyond the statutory responsibilities of the office; i.e. to produce financial reports, audit accounts payable records, audit payroll records, and ensure that there is strict enforcement of the laws governing county finances. Chances are if the county auditor is performing all the mandated responsibilities in a county with minimal staff, then audits of other offices are very possibly backlogged.

The authority and responsibility that is vested in the county auditor is derived from the Vernon's Texas Codes Annotated, which is a codification of the statutes and laws passed by the Texas legislature. From these statutes the county auditor has four derived audit objectives:

1. To ensure that an official has collected all the funds or other property that he/she is entitled to; the money/property is actually checked within the official's possession, making sure that the proper amounts have actually been received. This procedure should include the evaluation of supporting documentation for the amounts received, and a review of internal controls to evaluate if a diligent effort is being made to collect past due amounts.
2. To ensure that the funds collected by a county official are remitted to the appropriate party; to include the county treasurer, the state, refund claimants, and others. An effort should be made to insure that remittances are made in a timely manner in conformity with the statutes, contract, or the rapid deposit law. All refunds and dismissals should be handled in a timely manner.
3. All funds and property that is the responsibility of the county is properly managed and safeguarded (insured, bonded, safe deposit, internal controls). It should be documented that all investments and deposits are in compliance with the law and local depository and investment policies. All equipment and machinery owned by the county is being used solely for county purposes. And the county auditor is to ensure that all grant administrators are in compliance with grant provisions.
4. All funds and other property is properly expended, accounted for and reported. Ensure that all disbursements are made from the proper fund, in compliance with statutes, contracts and the budget. Ensure that all amounts disbursed are to the correct party, are legally owed, and are in compliance with the prompt payment act. The accounting system is established in accordance with statute and reflects

what has actually occurred within the county. The bookkeeping systems employed throughout the county are to reflect the actual occurrences. Ensure that all reports are accurate and timely.

### **Purchasing and the Approval of Claims**

The county auditor has the authority to disapprove claims against the county, but this authority is not absolute. The statutes have established basic criteria for all claims against the county:

#### [Local Government Code 113.901](#)

- a. Except as provided by subsection (c), a county auditor may not audit or approve an account for the purchase of supplies or materials for the use of the county or of a county officer unless a requisition, signed by the officer ordering the supplies or materials and approved by the county judge, is attached to the account. The requisition requirement is in addition to any other requirements of law.
- b. The requisition must be made, signed, and approved in triplicate. The original must be delivered to the person from whom the purchase is to be made before the purchase is made. The duplicate copy must be filed with the county auditor. The triplicate copy must remain with the officer requesting the purchase. This subsection does not apply to a county that operates an electronic requisition system.
- c. The Commissioners Court of a county that has the office of county auditor may, by a written order, waive the requirement of the county judge's approval of requisitions. The order must be recorded in the minutes of the Commissioners Court. If the approval of the county judge is waived, all claims must be approved by the Commissioners Court in open court.

Note: This aspect of the county auditor's office is probably the most litigated, due to the authority of the county auditor to disapprove a claim.

The auditor shares the responsibility for approving claims against the county with the Commissioners Court. The county auditor may be required by the Commissioners Court to act as the purchasing agent, [LGC 262.012\(a\)](#). That responsibility normally falls to the county judge in counties where there has not been a purchasing agent designated by the district judge(s) or the Commissioners Court, [LGC 262.011](#). It is the responsibility of the Commissioners Court to "audit and settle all accounts against the county" and to authorize their payment, [LGC 115.021](#).

In counties with a population of greater than 100,000, the Commissioners Court may employ a person to act as the county purchasing agent, [LGC262.0115](#). When this option takes place then the person so appointed shall carry out the functions prescribed by law for the county auditor with regards to county purchases and contracts, and shall administer the procedures prescribed by law for notice and public bidding.

Each claim, bill and account against the county must be filed with the county auditor and approved by him before the Commissioners Court is allowed to authorize payment, [LGC 113.064](#). The prerequisites for approval of these claims are established by [LGC 113.065](#) and [LGC 113.901](#). Any claim must have been "incurred as provided by law," and the purchase of all materials and supplies must have a pre-approved purchase order by the county judge (or purchasing agent). The issuance of any county warrant (check) must be co-signed by the county auditor, except for those issued in payment of jury service, [LGC 113.043](#). The county auditor is required to keep a register of these warrants (checks) issued by the county judge and by the district and county clerks, [LGC 113.046](#).

When the law requires the county to follow competitive bidding procedures in making a purchase in excess of \$50,000 and there is only one supplier from whom an item can be bought, the county auditor or other county officer or employee may not refuse payment for the purchase, because competitive bidding procedures were not followed, [LGC 262.003](#).

The Commissioners Court is permitted to exempt various purchases from the competitive bidding requirement, [LGC 262.024](#). In the event that an exemption is granted, a copy of the authorization is to remain in the purchasing office for at least one year, or until the county auditor has had an opportunity to review the transaction.

There is no procedure outlined or stated in the statutes that gives the county auditor a guide for disapproving a claim. His failure to approve a claim in a reasonable time has been determined to be the criteria to allow a vendor (claimant) to sue the county for recovery (McLennan County v. Miller, 257 S.W. 680, Waco 1923; [AG Opinion O-6663](#)). The county auditor is not authorized to require, as a prerequisite to his approval of a claim for items of expense, that a requisition be signed and approved by him at the time the purchase is made or the expense is incurred, [AG Opinion LO93-91](#). In the competitive bid process the auditor is required to ensure that all bids are properly advertised as required by the County Purchasing Act, [LGC 262](#). The statutes provide for the establishment of exemptions, emergencies and exceptions to the standard procedure, [LGC 262.024](#) and [AG Opinion O-2315](#), established that the county auditor did not have the authority to question the Commissioners Court decision that an emergency existed.

#### [Local Government Code 351.902](#)

The sheriff may purchase equipment and supplies for a “bureau of criminal identifications,” but only in the manner prescribed by the county auditor.

### **Accounting Responsibilities**

The county auditor has the responsibility to be progressive and should continually strive to improve the financial record keeping and the financial reporting for the county. Many may not appreciate it, but the county auditor has the responsibility to help provide honest, effective and efficient government for the commercial and residential taxpayers in the county. Good county government will always be the result of a cooperative effort on the part of all county officials and county employees working towards common goals.

#### [Local Government Code 112.001](#)

In a county with a population of less than 190,000, the county auditor may adopt and enforce regulations not inconsistent with law or with a rule adopted under [LGC 112.003](#), that the auditor considers necessary for the speedy and proper collecting, checking, and accounting of the revenues and other funds and fees that belong to the county.

#### [Local Government Code 112.002](#)

- a. In a county with a population of 190,000 or more, the county auditor shall prescribe the system of accounting for the county.

[Local Government Code 112.005](#)

- a. The county auditor shall maintain an account for each county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county.
- b. In the account the auditor shall detail the items of indebtedness charged against that officer and the manner of discharging the indebtedness.
- c. The auditor shall require each person who receives money that belongs to the county or who has responsibility for the disposition or management of any property of the county to render statements to the auditor

[Local Government Code 112.006](#)

- a. The county auditor has general oversight of the books and records of a county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county.
- b. The county auditor shall see to the strict enforcement of the law governing county finances.

[Local Government Code 112.007](#)

The county auditor shall keep a general set of records to show all the transactions of the county relating to accounts, contracts, indebtedness of the county, and county receipts and disbursements.

[Local Government Code 113.023\(b\)](#)

The county treasurer is to ensure that a duplicate copy of all receipts issued shall be signed and rendered to the county auditor, who is responsible for seeing that the receipt is properly recorded in the general ledger and journals of original entry.

[Local Government Code 113.903](#)

With the consent of the Commissioners Court and the official to whom funds are owed, a district, county or precinct officer authorized by law may receive funds or collect an amount due to another county, district, or precinct office. The county auditor is responsible for setting up the accounting procedures to ensure that the funds are properly handled and accounted for.

**Reporting Responsibilities**

[Local Government Code 114.002](#)

The county auditor shall determine:

- 1. The time and manner for making reports to the auditor, and
- 2. The manner for making an annual report of:
  - a. Office fees collected and disbursed, and

- b. The amount of office fees refunded to the county in excess of those the officer is permitted by law to keep.

[Local Government Code 114.003](#)

- a. A county official or other person who is required under this subtitle to provide a report, statement, or other information to the county auditor and who intentionally refuses to comply with a reasonable request of the county auditor relating to the report, statement, or information, commits an offense.
- b. An offense under this section is a misdemeanor punishable by:
  1. A fine of not less than \$25 or more than \$200;
  2. Removal from office; or
  3. Both a fine and removal from office.

In counties with a population of more than 225,000 there is a monthly reporting requirement, [LGC 114.023](#), which includes a publication requirement. However, all county auditors are required to present to Commissioners Court at its regular monthly meeting a tabulation of the county's receipts and disbursements by fund for the month, and a tabulation of accounts, [LGC 114.024](#).

The county auditor is required to make monthly and annual reports to the Commissioners Court and to the district judge(s) of the county. These reports are to show the aggregate amounts received and disbursed from each county fund; the condition of each account on the books; the amount of county funds on deposit in the county depository; the amount of county bonded indebtedness and any other county indebtedness; and, any other point of interest that the county auditor feels is proper and informative, or that the Commissioners Court or the district judge(s) may require, [LGC 114.025\(a\)](#).

The annual report that the county auditor shall prepare must include a record of all transactions made during the fiscal year. The county auditor shall file the annual report at the regular monthly meeting on the Commissioners Court in April of the year following the end of the year. The county auditor shall file the same report with the district judge(s). At the time the report is rendered to the Commissioners Court and to the district judge(s), the county auditor shall send to the bonding company of each district, county and precinct officer a report indicating the condition of that person's office, [LGC 114.025\(b\),\(c\)](#).

In addition to the reporting requirements placed on the county auditor, the county auditor has the authority to require reports to be made by a district officer, county officer, or precinct officer. The county auditor may require these officers to provide monthly and annual reports regarding any money collected for taxes, fines, or fees, as well as money disbursed and remaining cash on hand. The county auditor may at any time count the cash in the custody of these officers and verify the amount of funds on deposit at the bank and in the custody of the officer, [LGC 114.043](#).

Any county officer that receives compensation based on fees collected must file an annual report by the first day of the second month following the end of the fiscal year setting out the fees collected and compensation paid. The report is to be filed with the county clerk, who must file a copy of the report with the county auditor within 30 days of the date that the report is filed in the county clerk's office, [LGC 114.046](#). The county auditor is required to annually (for the year ending December 31<sup>st</sup>) file the *Texas County Road and Expenditures Yearly Report* with the comptroller of public accounts for the State, [Transportation Code 256.009](#).

In counties of more than 190,000 county officers who hold funds in trust shall be required to make a report as prescribed by the county auditor, which details the money received and disbursed for the period under report.

All disbursements from these trust funds must be issued under order of the court and properly countersigned by the county auditor, [LGC 117.058](#).

### **External Audits and Reports**

In addition, there are audit and reporting responsibilities that lie with the Commissioners Court. Should the commissioners feel it is justified, they can employ a disinterested, competent public accountant to audit all the books of the county, including those maintained by the county auditor, [LGC 115.031](#). If the county does not have a county auditor, then the Commissioners Court is required to have an independent audit conducted of the county's records and books at least once every two years, [LGC 115.041](#). In counties with less than 25,000 in population, one or more counties may jointly employ competent personnel to perform an audit in whole or in part, [LGC 115.042](#). In counties of 239,000 to 242,000 the Commissioners Court shall have a biennial (in each even numbered year) independent audit performed of all county records, books and finances, [LGC 115.044](#).

In counties with a population of 350,000 or more an annual independent audit is required, [LGC 115.045](#). These audits as described are to be done in addition to those required by the county auditor. In counties with a population of 40,000 to 100,000, the district judge(s) on the request of a grand jury may appoint an auditor to examine the condition of records and county finances in a broad or a specific character, [LGC 115.043](#).

### **Budget Responsibilities**

Among the county auditor's more significant duties and responsibilities is preparation of the county's budget. In a county with a population of 225,000 or less the county budget officer is the county judge, who serves for the Commissioners Court, [LGC 111.001](#) and [LGC 111.002](#). The county auditor assists the budget officer. The two working together prepare a budget to cover all proposed expenditures of the county government for the succeeding fiscal year, [LGC 111.003](#). In counties that have a population of more than 225,000 the county auditor serves as budget officer for the Commissioners Court of the county, [LGC 111.032](#). Commissioners Court has the ability to appoint a budget officer. Once appointed, if the office is ever abolished, the county auditor shall immediately assume the duties of the budget officer, [LGC 111.062](#).

#### Local Government Code 111.034

- a. The county auditor shall itemize the budget to allow as clear a comparison as practical between expenditures included in the proposed budget and actual expenditures for the same or similar purposes that were made for the preceding fiscal year. The budget must show with reasonable accuracy each project for which an appropriation is established in the budget and the estimated amount of money carried in the budget for each project.
- b. The budget must contain a complete financial statement of the county that shows:
  1. The outstanding obligations of the county;
  2. The cash on hand to the credit of each fund of the county government;
  3. The funds received from all sources during the preceding fiscal year;
  4. The funds and revenue estimated by the auditor to be received from all sources during the preceding fiscal year;
  5. The funds and revenue estimated by the auditor to be received from all sources during the ensuing fiscal year; and

6. A statement of all accounts and contracts on which sums are due to or owed by the county as of the last day of the preceding fiscal year, except for taxes and court costs.

In the budget preparation process the county auditor and/or the budget officer may require any district, county, or precinct officer of the county to provide information necessary for the auditor to properly prepare the budget, [LGC 111.036](#) and [LGC 111.065](#). Once the proposed budget is prepared the county auditor will file a copy with the county clerk who will make it available for public inspection, [LGC 111.037](#). The budgeted expenditures that are approved by the Commissioners Court may not exceed the funds available at the beginning of the fiscal year and the estimated revenues for the fiscal year as provided by the auditor, [LGC 111.039](#). Therefore it is very important that the county auditor have a good understanding of unencumbered fund balances for all funds. Once the budget is approved the Commissioners Court is required to file a copy of the approved document with the county auditor and the county clerk, [LGC 111.040](#), [LGC 111.066](#) and [LGC 111.069](#).

The county auditor shall certify to the Commissioners Court the receipt of all public or private grant or aid money that is available for disbursement in a fiscal year, but not included in the budget for that fiscal year. On certification, the court shall adopt a special budget for the limited purpose of spending the grant or aid money for its intended purpose, [LGC 111.043](#). Duties which have not been expressly conferred to the budget officer by the statutes remain with the county auditor, [LGC 111.072](#).

On the final adoption and certification of a general or special county budget, the county auditor shall open an appropriation account for each main budgeted or special item in the budget. The county auditor shall enter to an appropriation account each warrant (check) drawn against that appropriation. The county auditor shall periodically inform the Commissioners Court of the status of the appropriation accounts, [LGC 111.091](#). The county auditor is to oversee the warrant process to ensure that expenses of any department do not exceed the budget appropriations for that department, [LGC 111.092](#).

In counties with a population of more than 225,000, the county auditor shall charge all purchase orders, requisitions, contracts, and salary and labor allowances to the appropriate accounts. Such a requisition, contract or purchase order is not binding on the county until the county auditor certifies that the budget contains ample provision for the obligation and that funds are or will be on hand to pay the obligation. The amount allocated in the budget for a requisition, contract or purchase order or labor account may not be allocated for any other purpose unless an unexpended balance remains in the account after full discharge of the obligations or unless the original charge is cancelled in writing by the order of the Commissioners Court for a valid reason, [LGC 111.093](#).

If the county plans to use "anticipation notes" to fund expenditures for which the notes may be used, then usually a recommendation for such use is made by the county auditor, [Government Code 1431.002](#).

### **Other Areas of Responsibility and Authority**

#### **Local Government Code 152.051**

By definition the county payroll officer means the county auditor unless the Commissioners Court has designated another county official to issue paychecks to county personnel.

#### [Local Government Code 154.045](#)

If a notice of indebtedness has been filed with the county auditor evidencing the indebtedness of a person to the state, the county, or a salary fund, a warrant may not be drawn on a county fund in favor of that person, or an agent, or an assignee, until the person owing the debt is notified that the debt is outstanding and the debt is paid.

Previously, the attorney general had ruled that delinquent taxes were not to be construed to be a debt for purposes of this chapter. The statutory language was recently amended however, and now specifically defines “debt” to include delinquent taxes, fines, fees, and indebtedness arising from written agreements with the county.

#### [Local Government Code 155.002](#)

A request for a payroll deduction is to be in writing, submitted to the county auditor, and state the amount to be deducted and the entity to which the amount is to be transferred. The request will remain in effect until the county auditor receives a written notice of revocation signed by the employee. A payroll deduction cannot exceed the amount stated in the request.

#### [Local Government Code 156.003](#)

The county is authorized to establish and operate an electronic fund transfer system and the county auditor shall establish the procedures for operating the system.

#### [Local Government Code 233.094](#)

In a county where the sheriff has the authority to regulate alarm systems, and a permit is required to operate an alarm system as prescribed by Commissioners Court, then the sheriff may authorize the county auditor to assess and collect such fees.

#### [Local Government Code 291.006](#)

A county official or an agent, deputy, or employee of a county official may not operate a private business on public property unless the person: files a report of receipts and disbursements with the county auditor on or before the 1<sup>st</sup> of January each year; the person must maintain accurate and detailed records; and, all records of receipts and disbursements are to be available for the county auditor to review. The net operating income from the operation (on a cash basis) is to be delivered to the county treasurer at various intervals along with required reports.



*Note: From time to time, it may be necessary for a county auditor to seek clarification concerning the statutes. The county auditor has several sources for such clarification including, but not limited to:*

1. Other county auditors,
2. The Texas Association of County Auditors,
3. The Local Government Division of the State Comptroller's Office,
4. Oral information from the Attorney General's Office,
5. The county's independent legal counsel,
6. The county or district attorney.

#### [Government Code 402.042](#)

- a. On request of a person listed in subsection (b), the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person.
- b. An opinion may be requested by:
  1. A county auditor, authorized by law. In practice, the county auditor must first request an opinion from his county or district attorney. If the county or district attorney refuses to issue an opinion or if the county auditor disagrees with the opinion, the county auditor may then send a request for a formal written attorney general's opinion.

#### [Government Code 511.016](#)

- a. Each county auditor shall provide the commission (on Jail Standards) with a copy of each audit of the county jail's commissary operations the auditor performs under [LGC 351.0415](#), and a copy of the annual financial audit of general operations of the county jail. The county auditor shall provide a copy of an audit not later than the 10<sup>th</sup> day after completing the audit.

#### [Water Code 60.204](#)

In counties where there is a navigational district organized under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution, the county auditor is to insure that each year the commission that controls the district set aside no more than 5% of its gross income from operations for the promotion and development fund. The county auditor may audit the disbursements from the fund, and is entitled to a monthly report.

#### [Water Code 61.174](#)

In counties where there is a navigational district created under Article III, Section 52, of the Texas Constitution, the county auditor is required to be the auditor for the district, and in this capacity make such additional reports and perform such accounting services in addition to those now required by law as may be reasonably incident to the proper conduct of the business district.

#### [Water Code 63.224](#)

In a "self liquidating" navigational district, the county auditor (or a certified public accountant) is required to perform on an annual basis an audit of all books maintained by the district, and to report the results of the audit to the district as soon as practical after January 1.

[Civil Statutes Article 1676](#)

(a,b) In counties having a county auditor and in which the population is not less than 75,000, nor more than 83,350 as shown by the last preceding federal census, and in which there are navigation districts, water improvement districts and water control and improvement districts, the county auditor shall not exercise any control over the financial affairs of these districts. But, annually between July 1 and October 1 the county auditor is required to conduct an audit of all books and accounts maintained by the district. Each month the districts will file with the county auditor a monthly report for the preceding month.

[Local Government Code 159.034](#)

A county or district officer or a candidate for a county or district office may be required to file a financial statement and other disclosures as required by subchapter A with the county clerk or the county auditor.

**Counties with a Population of 500,000 or More**

[Local Government Code 151.903](#)

The county auditor is required to prescribe the forms and systems to be used by elected officials and department heads for documenting departmental personnel and requests for pay.

[Local Government Code 157.002](#)

The Commissioners Court may adopt a rule to provide medical care, hospitalization and compensation for various county employees and other related parties. Such a rule is subject to the approval of the county auditor.

[Local Government Code 157.902](#)

The district judges in a county may by a majority vote establish rules to be applied to hours of work and the related benefits of probation officers, court reporters, and county auditors. Once the rule is adopted it must be evidenced as an order of the court and filed for record.

[Local Government Code 291.005](#)

The Commissioners Court has the authority to direct and control employees hired to operate and maintain the county courthouse and criminal court buildings. Such personnel so employed will be done so in writing and approved annually by the Commissioners Court. The number of employees appointed under this section is subject to the approval of the county auditor.

**Counties with a population of 600,000 or More**

[Local Government Code 293](#)

The Commissioners Court may put before the voters the proposition to establish a building authority. The purpose of the authority is to review existing county facilities, develop plans for the expansion of county facilities, perform surveys, create preliminary plans, and to make recommendations to the Commissioners

Court. In the event the authority is created, the county auditor shall appoint a comptroller to the authority subject to the approval of the board and the Commissioners Court, [LGC 293.025](#).

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V. Laws Governing County Finance and Financial  
Management

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# Laws Governing County Finance and Financial Management

## **Introduction**

This document is basic in nature and designed, along with the accompanying appendices, only to introduce the major areas of state law affecting county finances. There is no comprehensive compilation of state laws affecting county finances. Statutes related to finances may be found throughout the codes and statutes of Texas and in the State Constitution. This document also does not address state agency regulations (found in the Texas Administrative Code), attorney general opinions, or federal laws and regulations. County auditors have a legal responsibility for the “strict enforcement of the law governing county finances.” Before an auditor can enforce the law concerning county finances, he or she must know what those laws are. This will require the auditor to use professional judgment and may require some training in legal research. The most useful approach, however, is to develop contacts with knowledgeable persons in the areas of interest. For county property taxes, that would include the property tax division of the state comptroller’s office. For case law and other questions, the auditor may want to contact the county affairs division of the Texas attorney general office. Statewide associations of county officials are also good contacts, as well as the Texas Association of Counties and the local government section of the state comptroller’s public policy division. In all instances, the auditor should confer with the local county or district attorney.

## **Research Tools**

### *Hard Copy Resources*

The auditor should have access to a current set of Vernon’s Texas Codes Annotated, Vernon’s Texas Statutes, and Vernon’s Texas Constitution. These can be found in the county law library, the county attorney’s office, a local library, a college library, or they may be purchased. The auditor should always verify that he or she is reviewing the most recent version of any statute or code provision.

Please note that the Vernon’s Statutes and code books are supplemented by pocket parts and pamphlets to reflect the latest changes. If the copy available to you does not show changes through the last biennial session of the Legislature held in odd-numbered years, it probably lacks the proper supplementing pocket parts or pamphlets. You can verify whether you have the latest supplementary materials by examining the date on the cover of the pocket part or pamphlet. These volumes not only display the law, but they also list relevant court cases, attorney general opinions, and the history of the statute.

### *Online Resources*

You may also view the statutes and constitution online via the internet at the Legislature’s website, [www.statutes.legis.state.tx.us](http://www.statutes.legis.state.tx.us). This site may not be updated for changes made by the most recent legislative session until January of the following year. If you don’t have access to proprietary software that has the latest changes, you may look up the index of statutes that were affected last session by going to the Legislative Reference Library’s website at [www.lrl.state.tx.us](http://www.lrl.state.tx.us) and clicking on “Index to Sections Affected.” You can then look up any statute to see the number of the bill that amended, deleted, or added it.

You can find the Texas Administrative Code on the secretary of state’s website at [www.sos.state.tx.us](http://www.sos.state.tx.us). Attorney general opinions may be found at [www.oag.state.tx.us](http://www.oag.state.tx.us). Some of these online facilities allow you to search for key words. The Legislatures website allows you to search by code or by the entire database. You should practice and learn how to narrow your search.

If you want additional online information on court cases, historical notes, and cross-references, you may want to subscribe to the online service of a publisher. These services can be tailored to meet your needs and budget. The publisher will send you software that will allow you to view a CD at your computer. One CD contains all of the statutes and the Constitution. You can also get all of the attorney general opinions. If you want more information, the software will help you to connect to the publisher’s server (at additional cost). This software, though a little more difficult to use, has a more powerful search tool than the websites mentioned above.

### **Listing of Statutes by Office**

The following list of statutes should be used by the auditor as a quick reference. In most cases, the statutes have been displayed under the heading of the officer that has the primary responsibility. The auditor should be careful to read each statute and identify any other county officials whose responsibilities are affected by the same statute.

The following abbreviations are used below:

|          |  |
|----------|--|
| LGC      | V.T.C.A., Local Government Code                |
| BC       | V.T.C.A., Business and Commerce Code           |
| FC       | V.T.C.A., Family Code                          |
| GC       | V.T.C.A., Government Code                      |
| CCP      | Vernon’s Annotated Code of Criminal Procedures |
| HRC      | V.T.C.A., Human Resources Code                 |
| HSC      | V.T.C.A., Health and Safety Code               |
| EC       | V.T.C.A., Election Code                        |
| TC       | V.T.C.A., Tax Code                             |
| TRC      | V.T.C.A., Transportation Code                  |
| PWC      | V.T.C.A., Parks & Wildlife Code                |
| PC       | V.T.C.A., Penal Code                           |
| ABC      | V.T.C.A., Alcoholic Beverage Code              |
| CONST.   | Texas Constitution                             |
| V.A.C.S. | Vernon’s Annotated Civil Statutes              |

#### *County Commissioners Court*

- Duties and powers [LGC Chapter 81](#)
- Fees of county judge [LGC Chapter 118](#)

#### *Sheriff and Constables*

- Miscellaneous powers and duties – Sheriff [LGC Chapter 85](#)



- Miscellaneous powers and duties – Constable [LGC Chapter 86](#)
- Sheriff’s petty cash fund [LGC Chapter 130.904](#)
- Sheriff’s authority to regulate alarm systems [LGC Chapter 233 \(d\)](#)
- Sheriff’s duties and authority for county jail [LGC Chapter 351](#)
- Collection and Recording [CCP Article 103](#)
- Fees of Sheriff and Constable [LGC Chapter 118](#)
- Bail Bonds [CCP Article 17](#)

*Justice of the Peace*

- Collection of county funds [LGC Chapter 113](#)
- Fees of office [LGC Chapter 118](#)
- Change funds [LGC Chapter 130.902](#)
- Justice Bond [GC Chapter 27](#)
- Funds held in trust [GC Chapter 28.055](#)
- Fees of notaries [GC Chapter 406.024](#)
- Justice court dockets, procedures, etc. [CCP Article 45](#)
- Collection and record keeping [CCP Article 103](#)
- Collections for Parks & Wildlife offenses [PWC Chapter 12.107](#)
- Hot check restitution [PC Chapter 32.41](#)

*Tax Assessor Collector*

- Bonds for state and county property taxes [TC Chapter 6.28](#)
- Tax accounts and records [LGC Chapter 112](#)
- Bonds of deputies for property taxes [LGC Chapter 292.028](#)
- Property taxes – assessment [TC Chapter 26](#)
- Property taxes – collections [TC Chapter 31](#)
- Property taxes – liens [TC Chapter 32](#)
- Property taxes – delinquency [TC Chapter 33](#)
- Property taxes – tax sales [TC Chapter 34](#)
- Motor vehicle – title [TRC Chapter 501](#)
- Motor vehicle – registrations [TRC Chapter 502](#)
- Motor vehicle – sales & use tax [TC Chapter 152](#)
- Motor vehicle – inventory tax [TC Chapter 23.12, 1-3](#)
- Fees of office [LGC Chapter 118](#)
- Occupation taxes [LGC Chapter 112.035](#)
- Beer permits [ABC Chapter 11.38](#)
- Liquor Licenses [ABC Chapter 61.36, 48-49](#)
- Boats - titles and numbers [PWC Chapter 31](#)
- Boat - sales & use tax [TC Chapter 160](#)
- Voter registration [EC Chapters 12,19](#)

### *County Auditor*

- Miscellaneous powers and duties [LGC Chapter 84](#)
- Accounting [LGC Chapter 112](#)
- Financial reports [LGC Chapter 114](#)
- Audits [LGC Chapter 115](#)
- County finances [V.A.C.S. Title 34](#)
- Budgets [LGC Chapter 111](#)
- Payment by credit card and internet [LGC Chapter 132](#)
- Investments (“public funds investment act”) [GC Chapter 2256](#)

### *County Treasurer*

- Miscellaneous powers and duties [LGC Chapter 83](#)
- Custodian of county treasury [LGC Chapter 113](#)
- Should receive and disburse all county funds [LGC Chapter 113](#)
- Reports to Commissioners Court [LGC Chapter 114](#)
- Depositories of public funds [LGC Chapter 116](#)
- Prompt payment for goods and services [GC Chapter 2251](#)
- Collateral for public funds [GC Chapter 2257](#)
- Fees of office [LGC Chapter 118](#)

### *Juvenile and Adult Probation, County Attorney, and District Attorney*

- Probation fees [CCP Article 42](#)
- Localized special entity budgets [LGC Chapter 140](#)
- Forfeitures (DA & Sheriff) [CCP Article 59.06](#)
- Hot checks [CCP Article 102.007](#)
- Hot checks [BC 3.506](#)
- Collection and record keeping [CCP Article 103](#)

### *County Clerk*

- Continuing education and combined district clerk [GC Chapter 51](#)
- Clerk of Commissioners Court [LGC Chapter 81.003](#)
- Miscellaneous powers and duties [LGC Chapter 82](#)
- Duties in counties with no county auditor [LGC Chapter 112](#)
- Depositories of trust and registry funds [LGC Chapter 117](#)
- Fees of office, other than court fees [LGC Chapter 118](#)
- Collecting the law library fee [LGC Chapter 323](#)
- Collection and record keeping [CCP Article 103](#)
- Bail bonds [CCP Article 17](#)
- Voter registration [EC Chapters 12,19](#)

### *District Clerk*

- Continuing education and combined county clerk [GC Chapter 51](#)
- Bonds and insurance [GC Chapter 51](#)
- Fees of office, other than court fees [GC Chapter 51](#)
- Payment of jurors [GC Chapter 61-62](#)
- Depositories of trust and registry funds [LGC Chapter 117](#)
- Collecting law library fee [LGC Chapter 323](#)
- Collecting and distributing tax sale proceeds [TC Chapter 34](#)
- Bail bonds [CCP Article 17](#)
- Collection and record keeping [CCP Article 103](#)
- Payment of jurors & other costs – change of venue [CCP Article 104.001](#)

### *Fixed Assets*

- Purchasing agent must prepare listing [LGC Chapter 262.011](#)
- Proceeds from salvage [LGC Chapter 263](#)

### *Purchasing and Bidding*

- Disposition of abandoned or unclaimed property [CCP Article 18](#)
- Disposition of forfeited property [CCP Article 59](#)
- Specialized local entity (DA, Probation, etc.) [LGC Chapter 140](#)
- Regulation of conflicts of interest [LGC Chapter 171](#)
- Purchasing agents; competitive bidding in general [LGC Chapter 262](#)
- Sale or lease of properties by counties [LGC Chapter 263](#)
- Public property finance act; competitive bidding on certain public works contracts; state cooperation in local purchasing programs; certificate of obligation act [LGC Chapter 271](#)
- Miscellaneous provisions [LGC Chapter 280](#)
- Purchases from blind & severely disabled persons [HRC Chapter 122](#)
- Duty to purchase from Texas Correctional Industries [GC Chapter 497.024](#)
- Degrees of relationships; nepotism prohibitions [GC Chapter 573](#)
- Interlocal cooperation act [GC Chapter 791](#)
- Contracts with governmental entity [GC Chapter 2252](#)
- Public works performance & payment bonds [GC Chapter 2253](#)
- Professional and consulting services [GC Chapter 2254](#)
- Prevailing wage rates [GC Chapter 2258](#)
- Awarding certain highway contracts [TRC Chapter 223.047](#)
- Court/Engineer – bidding for roads & bridges [TRC Chapter 252.3, 12-3](#)

### *Payroll and Personnel*

- County employment authority [LGC Chapter 151](#)
- Compensation, expenses, and allowances [LGC Chapter 152](#)
- Compensation of officers on fee basis [LGC Chapter 153](#)
- Compensation of officers on salary basis [LGC Chapter 154](#)
- Deductions from compensation [LGC Chapter 155](#)
- Electronic funds transfer of compensation [LGC Chapter 156](#)
- Assistance, benefits, and working conditions [LGC Chapter 157](#)
- County civil service [LGC Chapter 158](#)
- Financial disclosure by officers & employees [LGC Chapter 159](#)
- Grievance procedure for employees [LGC Chapter 160](#)
- Miscellaneous employment matters [LGC Chapter 171-180](#)

### *Health Care*

- Indigent health care [HSC Chapter 61](#)
- County health authorities; Depts. & districts [HSC Chapter 121](#)
- Funding for public health and sanitation [HSC Chapter 122.001](#)
- County hospitals and hospital districts [HSC Chapter 263-286](#)

### *Court Costs – State*

- Failure to appear [TRC Chapter 706.006](#)
- Juvenile probation diversion fee [FC Chapter 54](#)
- Time payment fee (50/50 state/local) [GC Chapter 51](#)
- Judicial and court personnel training fund [GC Chapter 56](#)
- Compensation to victims of crime fund [CCP Article 56](#)
- DNA testing Fee [CCP Article 102.020](#)
- Consolidated court costs [LGC Chapter 133](#)
- Juvenile crime and delinquency [CCP Article 102.0171](#)

### *Court Costs – Local*

- Traffic [TRC Chapter 542.403-4](#)
- Failure to appear (\$20 state/\$10 local) [TRC Chapter 706.006](#)
- Time payment fee (50/50 state/local) [GC Chapter 51](#)
- Witness fees [CCP Article 102.002](#)
- Jury fee [CCP Article 102.004](#)
- Fees to clerks [CCP Article 102.005](#)
- Fees for services of prosecutors [CCP Article 102.008](#)
- Fees for services of peace officers (arrest) [CCP Article 102.011](#)
- Child safety [CCP Article 102.014](#)

- Courthouse security fee and fund [CCP Article 102.017](#)
- Justice court technology fee and fund [CCP Article 102.0173](#)
- Graffiti eradication [CCP Article 102.0171](#)
- Visual recording [CCP Article 102.018](#)
- Collection services contracts [CCP Article 103.0031](#)

*Adapted and expanded from a presentation by the Office of the State Comptroller.*

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VI. What is the Role of the TACA?

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## What is the Role of the TACA?

The Texas Association of County Auditors (TACA) is a volunteer organization comprised of county auditors from across the state. The TACA mission is as follows:

**“The mission of the Texas Association of County Auditors is to support the membership by providing education and resources to assist in the performance of their official duties in an independent, professional and innovative manner; therefore enhancing efficient and effective government.”**

The stated goals of TACA are as follows:

1. To develop structured professional education programs;
2. To be more responsive to the membership through enhanced communications;
3. Actively participate in the Legislative process; and
4. Promote public awareness of the County Auditor.

The by-laws of the TACA are found in an appendix to the TACA membership directory.

As stated in the mission statement, the TACA Board of Directors exists to support you, the membership. You are encouraged to become active in the organization. The names and phone numbers of the current Board of Directors are presented on the following page. Please do not hesitate to contact any of the Board members for assistance.

**TEXAS ASSOCIATION OF COUNTY AUDITORS  
OFFICERS AND BOARD OF DIRECTORS 2009-2010**

**OFFICERS**

|   |   |  |  |
|---|---|--|--|
| <b><u>PRESIDENT</u></b><br>EDWARD DION, CPA, CIO<br>El Paso County Auditor<br>County Administrative Offices<br>800 E. Overland, Rm 406<br>El Paso, TX 79901<br>Tel 915/546-2040<br>Fax 915/546-8172<br><a href="mailto:edion@co.el-paso.tx.us">edion@co.el-paso.tx.us</a> | <b><u>PRESIDENT-ELECT</u></b><br>JACKIE LATHAM<br>Lubbock County Auditor<br><br>PO Box 10536<br>Lubbock, TX 79408<br>Tel 806/775-1097<br>Fax 806/775-1117<br><a href="mailto:jlatham@co.lubbock.tx.us">jlatham@co.lubbock.tx.us</a>                                   | <b><u>VICE PRESIDENT</u></b><br>KIRK KIRKPATRICK<br>Johnson County Auditor<br><br>1 North Main St.<br>Cleburne, TX 76031<br>Tel 817/556-6305<br>Fax 817/556-6075<br><a href="mailto:kirk@johnsoncountytexas.org">kirk@johnsoncountytexas.org</a> | <b><u>TREASURER</u></b><br>ELLEN FRIAR<br>Ward County Auditor<br><br>400 S. Allen, Suite 300<br>Monahans, TX 79756<br>Tel 432/943-2921<br>Fax 432-943-8517<br><a href="mailto:ellen.friar@co.ward.tx.us">ellen.friar@co.ward.tx.us</a> |
|   | Education Chair   | Law Study Chair  | Annual Meeting Site  |
| <b><u>SECRETARY</u></b><br>DAVID RENKEN<br>Comal County Auditor<br>210 N. Seguin, Suite 201<br>New Braunfels, TX 78130<br>Tel 830/ 620-5555<br>Fax 830/ 620-5592<br><a href="mailto:audder@co.comal.tx.us">audder@co.comal.tx.us</a>                                      | <b><u>IMMEDIATE PAST PRESIDENT</u></b><br>RICK DOLLAHAN<br>Gaines & Dawson County Auditor<br>PO Box 847<br>Seminole, TX 79360<br>Tel 432/758-4002<br>Fax 432/758-4012<br><a href="mailto:rick.dollahan@co.gaines.tx.us">rick.dollahan@co.gaines.tx.us</a><br>Advisory |  |  |

**DIRECTORS**  
**COUNTY REPRESENTATIVES**

| <b><u>LARGE COUNTIES</u></b>   | <b><u>MEDIUM COUNTIES</u></b>   | <b><u>SMALL COUNTIES</u></b>  | <b><u>AT LARGE</u></b>   |
|--|---|---|--|
| <b>KATIE CONNER (11)</b><br>Brazos County Auditor<br>300 E. 26th St., Suite 314<br>Bryan, TX 77803<br>Tel 979/361-4350<br>Fax 979/361-4347<br><a href="mailto:kconner@co.brazos.tx.us">kconner@co.brazos.tx.us</a>                                   | <b>L. H. CROCKETT (10)</b><br>Cherokee County Auditor<br>Address: 502 N. Main St.<br>Rusk, TX 75785<br>Tel 903/ 683-1124<br>Fax<br><a href="mailto:coauditor@cocherokee.org">coauditor@cocherokee.org</a>                     | <b>JENNIFER TAYLOR-ESSARY (10)</b><br>Montague County Auditor<br>P.O. Box 56<br>Mantague, Tx<br>Tel 940/894-2131<br>Fax 940/ 894-3110<br><a href="mailto:mca123@windstream.net">mca123@windstream.net</a>             | <b>NATHAN CRADDUCK (10)</b><br>Tom Green County Auditor<br>112 West Beauregard<br>San Angelo, TX 76903<br>Tel 325/ 659-6521<br>Fax 325/ 658-6703<br><a href="mailto:nathan.craddock@co.tom-green.tx.us">nathan.craddock@co.tom-green.tx.us</a> |
| Institute  | By-Laws/GASB Review   | Mentoring   | Audit Guide/Handbook   |
| <b>Cliff Billingsley (10)</b><br>Galveston County Auditor<br>601 Tremont, Suite 350<br>Galveston, TX 77550<br>Tel 409 770-5301<br>Fax 409 770-5397<br><a href="mailto:cliff.billingsley@co.galveston.tx.us">cliff.billingsley@co.galveston.tx.us</a> | <b>LARRY CRUMP (11)</b><br>Gillespie County Auditor<br>101 W. Main, Unit #4<br>Fredericksburg, TX 78624<br>Tel 830/997-6777<br>Fax 830/997-9958<br><a href="mailto:lcrump@gillespiecounty.org">lcrump@gillespiecounty.org</a> | <b>TRAGINA SMITH (11)</b><br>Live Oak County Auditor<br>P.O. Box 699<br>George West, TX 78022<br>Tel 361/ 449-2733<br>Fax 361/ 449-3626<br><a href="mailto:cauditor@co.live-oak.tx.us">cauditor@co.live-oak.tx.us</a> | <b>PAULA "JEANNIE" HARGIS (11)</b><br>Kerr County Auditor<br>700 Main, Room 103<br>Kerville, TX 78028<br>Tel 830/ 792-2235<br>Fax 830/ 792-2238<br><a href="mailto:jhargis@co.kerr.tx.us">jhargis@co.kerr.tx.us</a>                            |
| Membership   | Audit   | Website   | Entertainment/Sponsorship  |

**HONORARY DIRECTORS**  
**ASSISTANT COUNTY AUDITOR**

|  |  |  |  |
|--|--|--|--|
| <b>DAWN HAND (10)</b><br>McLennan Co 1st Assistant<br>214 N. 4th Street, Suite 100<br>Waco, TX 76701<br>Phone: (254) 757-5156<br>Fax: (254) 757-5157<br><a href="mailto:dawn.hand@co.mclennan.tx.us">dawn.hand@co.mclennan.tx.us</a> | <b>JULIE KILEY (11)</b><br>Williamson Co 1st Asst.<br>Georgetown, TX 78626<br>710 S. Main St., Suite 301<br>Phone: (512) 943-1500<br>Fax: (512) 943-1567<br><a href="mailto:jkiley@wilco.org">jkiley@wilco.org</a> |  |  |
| Technology   | Comments   |  |  |

## VII. Education Available to Texas County Auditors

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# Education Available to Texas County Auditors

## **Mentor Program**

The TACA Board provides a mentor program designed for newly appointed County Auditors.

You should expect a call from your mentor, and you should feel perfectly comfortable in contacting this individual with any question or concern you may have. All Texas county auditors have been new to their duties and responsibilities during their career and will be more than happy to help one of their colleagues.

We all find the need from time to time to pick up the phone and yell:

# Help!

## **Auditors' Listserv**

Another alternative resource available to county auditors is the Texas County Auditors' Listserv. The web-based listserv is managed by the Texas Association of Counties (TAC) and membership to this listserv is open to all Texas county auditors.

The listserv enables you to post any job related questions to your fellow auditors across the state. You will generally find numerous auditors responding to your question or concern, attempting to assist you.

To be included, you must complete the listserv application and forward to the TACA representative noted on the application. The application can be found on the Texas Association of County Auditors website at [www.texascountyauditors.org](http://www.texascountyauditors.org).

## **Listserv Guidelines**

TACA hosts its listserv as a service to members in order to facilitate the sharing of ideas, advice, and experiences, and to foster a community among its members around the State. To ensure that the listserv remains user-friendly, professional, and informative, and uphold the standards of professionalism of the County Auditor's Office, we have adopted this Protocol to guide listserv users of its proper use. TACA offers one listserv option to the membership, to which members may subscribe by completing an application and complying with Listserv Protocol Guidelines. From time to time this Protocol will be updated and is available to members on the TACA website at [www.texascountyauditors.org](http://www.texascountyauditors.org). All members must comply with Listserv User Protocol, which can also be found on the website.

Membership to the auditors' listserv must be obtained by the requesting individual completing the Texas Association of County Auditors listserv application and approval must be granted by the TACA moderator.

The listserv is provided as a service of the Texas Association of Counties (TAC). TAC accepts no responsibility for the opinions and information posted on this site by others. TAC disclaims all warranties with regard to

information posted on this site, whether posted by TAC or any third party; this disclaimer includes all implied warranties of merchantability and fitness. In no event shall TAC be liable for any special, indirect or consequential damages or any damages whatsoever resulting from loss of use, data or profits arising out of or in connection with the use or performance of any information posted on this site.

Do not post any defamatory, abusive, profane, threatening, offensive or illegal materials. Do not post any jokes or tricks. Do not post any information or other material protected by copyright without the permission of the copyright owner. By posting material, the posting party warrants and represents that it owns the copyright with respect to such material or has received permission from the copyright owner. In addition, the posting party grants TAC and users of this list the non-exclusive right and license to display, copy, publish, distribute, transmit, print and use such information or other material.

Participants should be aware that even though membership access is limited to those with a TACA membership such as county auditors, assistant auditors, and others approved by the TACA Boards, a listserv by its nature is not a secure medium of communication. Care should be taken in posting any information or comments that a participant may find embarrassing or improper at a later time.

Also, be aware that the open records act applies to all email, including those posted on this Listserv. Participants are advised to not discuss any pending or potential litigation.

TAC does not actively monitor the site for inappropriate postings, and does not on its own undertake editorial control of postings. However, in the event that any inappropriate posting is brought to TAC's attention, TAC will take appropriate action.

TAC and the Texas Association of County Auditors reserve the right to terminate access to any user who does not abide by these guidelines.

### **Core Curriculum**

The Texas Association of County Auditors Board of Directors encourages all county auditors to take advantage of educational programs offered which will enhance our level of competence in executing our statutory duties and responsibilities. Section 84.0085 of the Texas Local Government Code requires the following: "During each full term of office, a county auditor must successfully complete at least 40 classroom hours of instructional courses relating to the duties of the county auditor and accredited by the Texas State Board of Public Accountancy as continuing professional education credits for certified public accountants. On the completion of the courses and the accumulation of the continuing professional education credits, the county auditor must certify that fact to the district judges."

In order to assist the county auditors in meeting their educational requirements, TACA and the University of Texas LBJ School of Public Affairs sponsor a "County Auditor Institute" each spring in Austin. The annual institute offers a variety of sessions beneficial to you as a county auditor. In addition to the annual institute, a TACA conference is held each fall (usually in October) in different locations across the state. The annual conference program also consists of a variety of educational sessions for county auditors. The Texas State Board of Public Accountancy accredits the sessions presented at the Annual Institute and the annual conference.

In addition to the annual Institute and conference, TACA holds various "regional" meetings during the year known as "On the road area trainings."

The TACA has developed a core training curriculum program which we strongly recommend all Texas county auditors complete. The core curriculum contains six separate courses which cover the basic areas of responsibility for most county auditors. These courses will be offered throughout the year at the Institute, the annual conference, and at area meetings, and will be noted on the Institute and conference agendas as “core curriculum.” The courses contained in the core curriculum are as follows:

1. Financial accounting and reporting;
2. Auditing;
3. Law;
4. Purchasing, accounts payable, and budget; and
5. Payroll, personnel, risk management, and insurance; and
6. Investments, cash management, and debt management.

Although many Texas county auditors are not responsible for purchasing, budget, or investments, you as a county auditor should possess a basic knowledge of these areas in order to properly conduct your statutory audit duties and responsibilities.

Upon the successful completion of each course, a certificate of educational achievement will be presented.

Although the core curriculum program is not mandatory, every auditor is encouraged to participate and maintain a reasonably current certificate for each of the core courses.

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## VIII. Suggested Code of Ethics

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## Suggested Code of Ethics

The following suggested code of ethics is provided as an option for use by county auditors. Some county auditors insert the name of their county (instead of Texas Association of County Auditors), then adopt this code of ethics for themselves and display a signed copy in their office. There are some county auditors who require all of their employees to sign the code of ethics as a condition of employment.

Again, this is only a suggested code of ethics. It is NOT mandatory. Its use is strictly at the discretion of each individual county auditor.

Texas Association of County Auditors

**Code of Ethics and Rules of Conduct**

1. PERSONAL STANDARDS

Texas Association of County Auditors shall demonstrate and be dedicated to the highest ideals of honor, objectivity and integrity in all public and personal relationships to merit the respect, trust and confidence of governing officials, other officials, employees and the public. They shall give their time, skills and energies to their office, both individually and in cooperation with other professionals. They shall abide by approved professional practices and standards.

2. RESPONSIBILITY AS PUBLIC EMPLOYEES

Texas Association of County Auditors shall recognize and be accountable for their responsibilities as public employees.

- a. They shall be sensitive to and responsible for the rights of the public and their changing needs.
- b. They shall strive to provide the highest quality performance and advice.
- c. They shall uphold both the letter and the spirit of the Constitution, laws, and regulations governing their actions and report any known violations of the law to the appropriate authorities.

3. PROFESSIONAL DEVELOPMENT

Texas Association of County Auditors shall continually strive for improvement in their own proficiency and that of their colleagues. They shall provide encouragement to those seeking to enter the field of government finance. They shall promote excellence in the public sector and are encouraged to seek and maintain professional certifications and licenses that will evidence their skills.

4. INDEPENDENCE

Texas Association of County Auditors shall be independent of the activities they audit and/or provide service for in order to maintain objectivity in the performance of their work. "Objectivity is an independent mental attitude which internal auditors should maintain in performing audits."

- a. They shall refrain from entering into any activity which may be in conflict with the interest of their respective county or which would prejudice their ability to objectively carry out their duties and responsibilities.
- b. They shall not accept anything with a value greater than \$50 from another county employee, business associate, or supplier of their respective county.
- c. The County Auditor or personnel in the Auditor's office shall not be assigned to audit engagements with county departments, districts or agencies which employ any relatives.
- d. The County Auditor or personnel in the Auditor's office shall not be assigned to audit engagements with county departments, districts, or agencies for which they were employed within the last 24 months or violate other rules concerning relative independence.

5. CLIENT SERVICE

Texas Association of County Auditors shall manage the business relationships with their clients (departments, districts or agencies) so that clients receive the maximum benefits and the full range of professional services offered by the Auditor’s office.

6. PROFESSIONAL INTEGRITY - INFORMATION

Texas Association of County Auditors shall demonstrate professional integrity in the management and issuance of information.

- a. They shall not knowingly sign, subscribe to, or permit the issuance of any statement or report which contains misstatements or which omits any material fact.
- b. They shall prepare and present statements and financial information pursuant to accepted practices and guidelines.
- c. They shall respect and protect privileged information to which they have access by virtue of their office. They shall not use confidential information for personal gain nor in any manner which would be contrary to law or detrimental to the welfare of the county.
- d. They shall report all material facts known to them which, if not revealed, could either distort their report on client operations or conceal unlawful practices.

7. PROFESSIONAL INTEGRITY - RELATIONSHIPS

In all relationships, Texas Association of County Auditors shall act with honor, integrity and virtue.

- a. They shall exhibit loyalty and trust and in the affairs and interest of the county.
- b. They shall not knowingly be a party to any illegal or improper activity.
- c. They shall not knowingly be a part to or condone activities which are discreditable to their profession or to the county.
- d. They shall respect the rights, responsibilities and integrity of their colleagues and the public officials and county employees with whom they work and associate.
- e. They shall be dedicated to creating an environment which provides opportunities for individual growth and development, and which rewards outstanding performance and encourages responsibility for obtaining positive results.
- f. They shall promote equal employment opportunities and, in doing so, actively oppose any discrimination, harassment or other unfair practices.

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\*\*Source: The Institute of Internal Auditors – Standards for the Professional Practice of Internal Auditing.

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## Appendix A

### Selected Court Cases Involving the County Auditor's Office

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## Selected Court Cases Involving the County Auditor's Office

- Commissioners' Court of Harris County vs. S. Grady Fullerton, County Auditor of Harris County (1980)
- The Commissioners' Court of Titus County, Texas and Carl Johnson, County Auditor vs. Cynthia Agan, County Treasurer of Titus County, Texas (1996)
- Ernest Guerrero vs. Refugio County, Texas, Charles Stone, Marion M. Lewis, Whayland K. Kilgore, and Joseph P. Kelly (1997)
- Crider vs. Cox (Anderson County) (1997)
- Bettye Warnock vs. Pecos County, Texas (1997)

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Commissioners' Court vs. S. Grady Fullerton, County Auditor of Harris  
County

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later by a timely motion under Rule 21c for extension of time until October 26 for filing the statement of facts. The motion was granted by this court on November 1, at which time the statement of facts (which had already been received) was marked filed. Therefore, if the motion for new trial was indeed overruled by operation of law, then the record was timely filed.

Appellees call to our attention an order signed by the trial judge in which he purported to have overruled the motion for new trial on July 26. This written order does not pretend to overrule the motion but rather, in connection with another matter, simply indicates that the motion had already been overruled on July 26. The record before this court contains no other evidence indicating that the motion was overruled before August 10.

We hold that in the absence of a written draft of the purported July 26 order, the appellants' motion for new trial was overruled by operation of law on August 10 and that the record on appeal was timely filed. The written order mentioned above was a nullity insofar as it purported to affect either the motion for new trial or the timetable for filing papers on appeal. See *Flowers v. Muse*, 427 S.W.2d 727 (Tex.Civ.App.1968, writ ref.); *Washington v. Golden State Mutual Life Insurance Company*, 405 S.W.2d 856 (Tex.Civ.App.1966, writ ref., 408 S.W.2d 227); *Hernandez v. Baucum*, 338 S.W.2d 481 (Tex.Civ.App.1960, no writ).

The appellers' cross-points are overruled.

The judgment of the trial court is affirmed.

EVANS and WARREN, JJ., participated.



COMMISSIONERS COURT OF HARRIS COUNTY et al., Appellants,

v.

S. Grady FULLERTON, County Auditor of Harris County, Appellees.

No. 17520.

Court of Civil Appeals of Texas, Houston (1st Dist.).

Jan. 31, 1980.

Rehearing Granted Jan. 31, 1980 (Written Opinion).

Rehearing Denied Feb. 28, 1980.

County auditor brought suit for mandamus, injunction and declaratory relief against commissioners court and individual commissioners challenging certain orders and actions of commissioners court. The District Court, Harris County, Bert H. Tunks, J., directed verdict in county auditor's favor and entered judgment ordering issuance of writs of mandamus and injunction as prayed for, and defendants appealed. The Court of Civil Appeals, Doyle, J., held that: (1) where county auditor presents his budget to commissioners court enumerating equipment which he deems necessary for operation of his office, commissioners court has power and authority to review or reject his budget only to extent that specific cost of enumerated item is excessive or unreasonable in its monetary demands upon county funds, available or to become available subject to any abuse of discretion; (2) commissioners court abused its discretion by refusing to approve certain specified property, equipment, office supplies, rentals, fees and services requested and deemed necessary by county auditor for operation of his office when funds were available for such items in budget; (3) commissioners court exceeded its authority over county auditor's operations by ordering county auditor's computer sold, his computer operations transferred to department created by commissioners court, and computer rental agreements and related maintenance agreements discontinued; (4) trial

5. Counties - 159

Approval of county auditor's budget by district judges is not required. Vernon's Ann.Civ.St. art. 1650.

Fulbright & Jaworski, James C. Slaughter, Houston, for appellants.

Sears & Burns, Will Sears, Houston, for appellees.

DOYLE, Justice.

This is an action for mandamus, injunction and declaratory relief brought by appellee, the County Auditor of Harris County, S. Grady Fullerton (county auditor) against appellants, individually and as the Commissioners Court of Harris County, composed of Jon Lindsay, County Judge of Harris County, and Commissioners Tom Bass, Bob Eckels, Jim Fonteno, and E. A. Lyons, Jr. (commissioners court), involving a computer assigned to the county auditor's office, equipment and services necessary for the computer and the legal principles governing the rights and powers of the county auditor, the district judges and the commissioners court regarding purchasing of equipment for the county auditor's office. The commissioners court argues that it has the discretionary power and authority to limit the general budget of the county as set forth in Tex.Rev.Civ.Stat. Ann. art. 1666a (Vernon 1962). The county auditor contends that he alone is statutorily authorized to prescribe the system of accounting and provide himself with the necessary supplies and equipment to perform his duties within the limits of his budget and, absent an abuse of discretion, the commissioners court's approval of such supplies and equipment requests is purely ministerial. The trial court rendered judgment for the county auditor. We affirm.

While the facts upon which this controversy is based are virtually undisputed, we deem it important to review how the matter reached this court.

In 1977 the county auditor sent several letters to commissioners court requesting

court did not err in finding that county auditor was entitled to injunctive relief; and (5) approval of county auditor's budget by district judges is not required.

Affirmed as modified.

1. Counties - 159

When county auditor presents his budget to commissioners court enumerating equipment which he deems necessary for operation of his office, commissioners court has power and authority to review or reject his budget only to extent that specific cost of enumerated item is excessive or unreasonable in its monetary demands upon county funds, available or to become available, subject to any abuse of discretion. Vernon's Ann.Civ.St. arts. 1650, 1656, 1656a, 1666a.

2. Counties - 159

Commissioners court abused its discretion by refusing to approve certain specified property, equipment, office supplies, rentals, fees and services requested and deemed necessary by county auditor for operation of his office when funds were available for such items in budget. Vernon's Ann.Civ.St. art. 1650, 1656, 1656a, 1666a.

3. Counties - 47

Commissioners court exceeded its authority over county auditor's operations by ordering county auditor's computer sold, his computer operations transferred to department created by commissioners court, and computer rental agreements and related maintenance agreements discontinued. Vernon's Ann.Civ.St. arts. 1650, 1656a.

4. Injunction - 76

Even though commissioners court rescinded several of its orders which, if imposed, would have seriously curtailed and interfered with operation of county auditor's office, trial court did not err in finding that county auditor was entitled to injunctive relief, considering ample evidence that act complained of might recur.

computer the auditor was currently using. In accordance with state law, the county auditor was required to submit these equipment requests to commissioners court which then solicits and approves bids for these purchases.

The auditor's request for equipment was tabled and never granted. In 1978, the county auditor sent a new request for equipment bids to commissioners court which was also tabled and never granted. During 1978, a new Harris County Administration building was completed and the county auditor moved to new offices in this building. His specially designed offices included space for his computer and associated equipment, supplies and records. As part of this move, the county auditor sent requests to the commissioners court to solicit bids for the transfer of the computer and for the enhancement and replacement of items needed for the computer, which the court refused. The commissioners court then ordered the county auditor to send his computer operations to the Harris County Data Processing System of Computers (HCDPS) and further ordered that the county auditor's present computer be sold. HCDPS is a separate department of Harris County created by commissioners court and under its sole control to the exclusion of any control by the county auditor. To date, the county auditor's computer is still located in his old offices at the Harris County Criminal Court building and each day the county auditor's employees must travel between the administration building and the old office to perform the tasks necessary to operate the county auditor's business.

In November 1978, the county auditor submitted his proposed 1979 budget including salaries for personnel and expenditures, equipment and various office supplies necessary for the proper functioning of his office and duties, to the district judges, who approved same in the amount of \$3,973,374.00. The approved budget was then included in the Auditor's General Budget which was submitted to commissioners court.

deleted certain equipment and supplies from the county auditor's budget and reduced it by an amount of \$380,324.00. The deleted equipment, the basis for this suit, includes computer enhancement items, maintenance and transfer service of the computer, temporary key punch operator help, and lease of software programs and disk packs. On January 29, 1979, the county auditor presented six orders to commissioners court again requesting the disputed services and equipment, to which the commissioners court responded by adopting an order that such contracts and services would be continued only through March 31, 1979, and that all vendors be notified of this termination date. The commissioners court subsequently extended this termination date until July 31, 1979. On February 22, 1979, the county auditor brought suit on this order alleging that these acts by the commissioners court were illegal and praying for the following relief: (1) that commissioners court be restrained from attempting to enforce its order of January 31, 1979; (2) that a writ of mandamus issue compelling commissioners court to procure the equipment necessary for the proper functioning of the county auditor's office as requested in his budget and approved by the district judges; (3) that commissioners court be prohibited from selling the county auditor's computer and forcing the county auditor to use the HCDPS computers; (4) that the court issue a writ of mandamus compelling the commissioners court to not terminate the contracts for services and equipment presently in force, and (5) that the commissioners court be restrained from interfering with the extension of the county auditor's contracts through 1979. Additionally, the county auditor sought a declaratory judgment to determine the autonomy of the county auditor's office versus the scope of control, if any, which the commissioners court may exercise over the county auditor's office, particularly involving purchases of equipment and transference of the county auditor's records to any other department or agency in Harris County.

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... evidence followed the county auditor's pleadings. He complains that the commissioners court acted illegally by refusing to approve his budget, ordering his computer sold and attempting to force him to turn his records over to the HCDPS.

After both sides had rested, each requested that the case be withdrawn from the jury and each moved for a directed verdict. The trial court granted the county auditor's motion, directed a verdict in his favor and entered a judgment ordering the issuance of the writs of mandamus and injunction as prayed for by the county auditor. The judgment declared that when the county auditor, acting within the scope of his equipment budget approved by the district judges, determines that an item or items of equipment or of associated services is necessary for the proper functioning of the county auditor's office, the commissioners court has a ministerial duty to follow the lawful procedures to acquire such item or items at county expense, absent an abuse of discretion by the county auditor. It further provided that the commissioners court has no authority to order the county auditor to transfer any official financial records or equipment of his office to any other officer, agency or department of the government of Harris County.

In appealing from this judgment, commissioners court brings 42 points of error. Although the county auditor challenges these points as being multifarious, we think the points as submitted sufficiently acquaint the court with the nature of commissioners court's contention and find substantial compliance with Rule 418(b), T.R.C.P.: *Miller Management Co. Inc. v. State*, 159 S.W.2d 218 (Tex.Civ.App.-Galveston), aff'd 140 Tex. 370, 167 S.W.2d 728 (Tex.1943); Rule 422, T.R.C.P.

By its first 12 points of error commissioners court asserts that the trial court erred in finding that commissioners court did not have the authority to issue the orders contained in the judgment and that the commissioners court abused its discretion in so ordering.

Contrary to the contentions of both parties, we think the question before this court is whether the county auditor submitted a budget to commissioners court which was within the statutory guidelines prescribed by the Legislature, and whether the commissioners court abused its discretion in failing to approve such budget and in ordering other procedures by which the county auditor was to operate his office.

Commissioners court claims its authority to review, alter or reject the county auditor's budget for equipment and supplies is derived generally from art. V, § 18, Texas Constitution and specifically from art. 1666a, the relevant parts of which state:

*Art. V, § 18*

The Commissioners Court so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

*Art. 1666a*

... the budget as prepared by the County Auditor shall be acted upon by the Commissioners Court. The Court shall have authority to make such changes in the budget as in its judgment the facts and the law warrant and the interest of the taxpayers demand . . .

The foregoing provisions standing alone would seem to give commissioners court a basis for its contention that it had the clear legal authority in its judgment or discretion to enter the orders and take the actions of which the county auditor complains. After a careful reading of Tex.Rev.Civ.Stat. Ann. articles 1645 through 1676 (Vernon 1962) and the amendments thereto, all of which pertain to commissioners court and the office of the county auditor, and particularly articles 1650, 1656 and 1656a, we have reached the conclusion that the Legislature, through statutory enactment, vested the commissioners court with the power to determine the reasonableness of the county auditor's budget. Especially is this true



with regards to the monetary outlay necessary to foster the budget's approval. Conceivably the county auditor's budget could call for the acquisition of a luxury model automobile when clearly a compact model would serve the declared purpose as well. Under such a situation, we think commissioners court would clearly have the authority to "make such changes in the budget as in its judgment the facts and the law warrant . . . ." This is true because commissioners court has general budgetary control over all budgets as prepared by the county auditor.

However, an entirely different situation arises when the county auditor, acting within the scope of his equipment budget (we do not reach the question of whether such budget requires the approval of the district judges) determines that an item or items of equipment or of associated services is necessary for the proper functioning of his office. Once such a determination is made by the county auditor, the commissioners court must ministerially take the proper legal steps to procure such item or items unless it finds that the county auditor abused his discretion. This mandate arises by virtue of the 1905 enactment of the Legislature of the State of Texas in S.B. No. 258, which became art. 1650, creating the office of county auditor and prescribing the duties and compensation of said office. The purpose for the county auditor's office was to oversee the books and records of all officers of the county and to provide a uniform system of accounting for all county finances. Included in this law was section 5 stating:

The auditor shall at the expense of the county provide himself with all necessary ledgers, books, records, blanks and stationery, and shall also have the power to appoint additional clerical help when needed, with the consent of the county judge or of the commissioners court. Tex. Laws 1905, ch. 161.

In 1935, art. 1650 was amended and the old section 5 was incorporated and rewritten stating:

The County Auditor shall be authorized to provide himself with all necessary ledgers, books, records, blanks, stationery, equipment, telephone and postage at the county's expense, but all purchases thereof shall be made in the manner provided for by law.

Today in article 1650, the exact wording of the 1935 amendment is repeated. In articles 1656 and 1656a, the legislature further provides that the county auditor shall prescribe the accounting methods for the county and the forms and rules to be used by all county personnel regarding all county moneys.

We think it significant to note that prior to the 1935 amendment, art. 1650 made no mention of "equipment" in itemizing the supplies with which the county auditor should provide himself and his power to appoint additional clerical help when needed was conditioned upon "the consent of the county judge or of the commissioners court." After the 1935 amendment of art. 1650, the Legislature withdrew the consent provision as to the appointment of deputies from the "county judge or of the commissioners court" and vested this authority in the "District Judge or District Judges." For the first time the article included "equipment" along with "all necessary ledgers, books . . . at the county's expense."

From the foregoing statutory background has evolved the present office of county auditor, clothed with an impressive array of independent administrative duties and discretionary powers long recognized by our courts.

In *Southern Surety Co. v. Hidalgo County*, 125 Tex. 390, 83 S.W.2d 313 (1935), the Supreme Court of this state discussed the county auditor and his office:

The office of county auditor is highly important under our scheme of local self-government. His selection is removed as far as possible from direct political influence by requiring his appointment at the hands of the district judges of the county. The statutory qualifications and oath prescribed for the incumbent of this office

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tionable good moral character and intelli- gence, thoroughly competent in business details. He is required to take the usual official oath of office, and also an addi- tional oath, in writing, stating he is in every way qualified under the provisions and requirements of the law relating to his office, the positions of public trust or private trust he has theretofore held, and the length of service under each. He is also required to include in his additional oath that he will not be personally inter- ested in any contract with the county.

The foregoing resumé of the nature and duties of the office of county auditor is made for the purpose of showing not only what the statutory duties incumbent upon him are, but also as reflecting the power conferred upon him by the Legisla- ture, and his obligations in consequence thereof, in the matter of safeguarding county funds.

In its brief, commissioners court argues that art. 1666a grants it the authority, without limitation, to make any changes in the items of equipment in the county audi- tor's budget that it deems necessary, unless this authority is withdrawn or limited by some other statute. Our disagreement with this conclusion is based on our interpreta- tion of articles 1650, 1656 and 1656a, which we observe to give specific authority to the county auditor in matters relating to his determination and acquisition of items of equipment deemed necessary by him for the operation of his office. The general author- ity of commissioners court is set forth in art. 1666a. Therefore, we hold that these statutes are in pari materia. We see no conflict between the articles under discus- sion.

[1] In the case of *Culver v. Miers*, 220 S.W.2d 200 (Tex.Civ.App.—Eastland 1949, error ref'd), the court stated:

Under the rules of statutory construction, statutes in pari materia should be con- strued together and where one statute deals with a subject in general terms and another deals with a part of the same

subject in a more detailed way, the two should be harmonized, if possible. How- ever, if there is any conflict the latter will prevail, regardless of whether it was passed prior or subsequent to the general statute, unless it appears that the Legis- lature intended to make the general act controlling.

We think that articles 1650 and 1656a detail clearly that the county auditor is not only authorized to "prescribe the system of accounting for the county", but also "The County Auditor shall be authorized to provide himself with all necessary ledgers . . . equipment . . ." If these statutory provisions mean anything other than what they plainly state, then who is to "prescribe the system of accounting" and who is to determine what equipment is necessary? It is difficult to envision that the Legislature would grant to the county auditor the au- thority to decide upon the system of keep- ing the county accounts and to provide him- self with all necessary items including equipment, if it meant for commissioners court or some other branch of county government to exercise such authority. Such precise authority as is granted to the county auditor by these statutes does not deny commissioners court its right to exer- cise the general budgetary authority grant- ed by art. 1666a. We think it is clear that when the county auditor presents his budg- et to commissioners court enumerating equipment which he deems necessary for the operation of his office, the commis- sioners court can review and reject his budget only to the extent that the specific cost of an enumerated item is excessive or unrea- sonable in its monetary demands upon coun- ty funds, available or to become available, subject to any abuse of discretion. Com- missioners court cannot prescribe the sys- tem of accounting nor what equipment the county auditor must use in the operation of his office. Thus, the specific authority granted the county auditor by art. 1650 and 1656a prevails over the general authority conferred by 1666a to the extent herein explained. *Culver v. Miers*, supra. Com- missioners court's first 12 points of error are overruled.

Points of error 13 through 25 are based on the assumption that the trial court's rulings and orders were predicated upon commissioners court's abuse of discretion in refusing the requests of the county auditor and in taking other actions at issue in this case. We are not at liberty to speculate on the exact basis of the trial court's judgment, except that in determining that a proper judgment was entered, we must find sufficient evidence to support the judgment. We shall now examine the acts and orders of commissioners court which the county auditor alleged, and the trial court found, constituted an abuse of discretion.

[2, 3] The facts are undisputed that in December, 1977, commissioners court refused to approve certain specified property, equipment, office supplies, rentals, fees and services requested and deemed necessary by the county auditor for the operation of his office, notwithstanding that funds were available for such items in the 1977 budget. From the record, there appears to be no evidence that this request was found to be excessive or unreasonable. The request was simply tabled and never granted. We think this act on the part of commissioners court was a clear abuse of discretion. Again on January 31, 1979, the county auditor's budget for 1979 containing substantially the same items of equipment and supplies necessary for the upgrading and maintaining of the county auditor's computer as previously requested, was in effect denied by commissioners court when it reduced that portion of the budget by \$380,324. Again there seems to have been no consideration of the county auditor's budget as to its necessity or reasonableness. Since the commissioners court had ordered the county auditor's computer sold, his computer operations transferred to HCDPS, and the computer rental agreements and related maintenance agreements discontinued, it is apparent that commissioners court intended to substitute its judgment as to how the county auditor's records would be kept in the future, what equipment would be necessary to effect this purpose and who would process the county auditor's various accounting requirements. We find that the

above actions were rescinded a few days before trial proceedings began, but such rescissions would be effective only until July 31, 1979. It is undisputed that HDCPS is a separate department of Harris County created by commissioners court. The county auditor has no control over its director nor personnel. These employees are answerable only to commissioners court. Here again we find the commissioners court has exceeded its authority over the county auditor's operations as outlined and prescribed by art. 1650 and particularly as set forth in art. 1656a and abused its discretion in making the subject orders. The county auditor, being a public officer, cannot delegate his official duties to another, other than his duly appointed deputies. Nor may he be compelled to turn over the custody of his records to any other person, persons or department, as commissioners court here seeks to have him do. This issue was squarely before the court in *Navarro County v. Tullos*, 237 S.W. 982 (Tex.Civ.App.—Dallas 1922, writ ref'd). In denying the commissioners court's writ to compel the county auditor to deliver the books, papers, accounts and warrants of his office to a firm of private auditors employed by the Dallas County commissioners court, the court held:

That he (the county auditor) is an officer is beyond dispute. That he has official duties and powers prescribed by law will not be questioned. Among the lawful duties and powers possessed by him is to exercise control and custody of the records, papers, etc., of his office, and to supply the commissioners' court such information concerning the affairs of the county as to enable that body properly and efficiently to discharge its duties. These functions he cannot be required by mandamus or otherwise to delegate to some person, or set of persons, arbitrarily selected by the commissioners' court. In other words, the commissioners court may not deprive the duly constituted auditor of a county of the authority, right, and duties which inhere in his office and dele-

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gate them to some other person, or set of persons, merely for the purpose of investigating acts and transactions of different county officials who have gone before and whose official careers have expired. The court further discussed the limits of commissioners court's power and authority as granted by the constitution and legislative enactments pertaining to the county auditor:

The law providing for auditors and prescribing their duties, and necessarily corresponding rights, while it potentially affects the commissioners' court in the exercise of its authority over county affairs, still leave that authority in the commissioners' court to be exercised by it, but to be exercised in its relation to the auditor only along the course of procedure prescribed by the Legislature. This is true notwithstanding that commissioners' courts are constitutional courts endowed with prescribed jurisdiction. The commissioners' court, therefore, does not possess the inherent, constitutional or statutory right to disregard the duly appointed auditor and employ other auditors at the county's expense to explore the records of his office for the purpose of obtaining information it is the duty of the county auditor to supply.

In its effort to meet its burden of showing that it did not abuse its discretion in making the orders of which the county auditor complained, the commissioners court has cited many authorities under the substantial evidence rule which it alleges would support its position under the evidence adduced in the case before us. This evidence consisted mainly of a detailed analysis of the central computer systems used in Texas by the county auditors of Dallas and Tarrant Counties and how the Harris County auditor's office could save the taxpayers money by using HCDPS and certain available security measures. However, we do not consider the main issue here involved to be that of savings and security of records, but whether the actions of commissioners court in its orders constituted an illegal intrusion upon the statutory powers and authority of the county auditor to the extent that he

could not carry out the duties of his office. Points of error 13 through 29 are overruled.

[4] Commissioners court argues in points of error 30 through 41 that the trial court erred in finding that the county auditor was entitled to injunctive relief. The record shows that prior to the trial, commissioners court rescinded several of its orders which, if imposed, would have seriously curtailed and interfered with the operation of the county auditor's office. That these orders were voluntarily withdrawn did not mean that in the absence of an injunction they could not have been reinstated at the will of commissioners court. Considering the entire record before it, there was ample evidence before the court that the acts complained of might recur. None of these points of error are meritorious and all are accordingly overruled.

Commissioners court's remaining point of error 42 complains that the trial court erred in entering a declaratory judgment which is "vague and ambiguous". We have read the injunctive clauses and the declaratory provisions of the trial court's judgment and conclude that they are clear. This remaining point of error is overruled.

Our review of the cases and statutory authorities outlined in both briefs leads us to the conclusion that the powers and authority granted to commissioners court and the county auditor by the constitution and Legislature may be exercised without disturbing the "delicate system of checks and balances" existing between commissioners court and the county auditor as discussed by the court in *Smith v. McCoy*, 533 S.W.2d 457, 459 (Tex.Civ.App.—Dallas 1976, writ dismissed). In the case before us, however, the undisputed evidence shows that the commissioners court exceeded its authority and hence abused its discretion in seeking to impose upon the county auditor the orders made the basis of this suit.

The judgment of the trial court is affirmed.

COLEMAN, C. J., and WALLACE, J., also sitting.

On appellants' motion for rehearing it has been pointed out that the opinion of this court is at variance with certain portions of the trial court's judgment and that we failed to determine whether the county auditor's budget required the approval of the district judges.

A portion of the trial court's judgment granting declaratory relief, states at Section (a):

" . . . and that the Commissioners Court has no power or authority . . . to revise or to veto the District Judges' approval of such equipment budget absent an abuse of discretion by the County Auditor; AND IT IS SO DECLARED;"

Section (b) states:

"That when the County Auditor, acting within the scope of his equipment budget approved by the District Judges, determines that an item or items of equipment or of associated services is necessary for the proper functioning of the County Auditor's office, the Commissioners Court has a ministerial duty to follow the lawful procedures to acquire such item or items at county expense absent an abuse of discretion by the County Auditor; AND IT IS SO DECLARED;"

It is undisputed that the controversial budget made the basis of this lawsuit was in fact approved by the Board of District Judges. The testimony of the county auditor shows that he annually submits his budget to the district judges for their inspection and approval as an established administrative practice. Since the county auditor and his assistants and their salaries are subject to the approval of the district judges, it is inescapable that the district judges must carefully review the county auditor's budget before they are able to intelligently exercise their duties imposed by article 1650.

[5] However, we find no statutory authority requiring the district judges' approval of the county auditor's budget or granting the district judges any authority over his equipment budget. The county auditor does not claim this authorization by article 1650.

the County Auditor's budget, judges is not required.

To the extent that the trial court's judgment holds that commissioners court has no power or authority to revise or veto the district judges' approval of such equipment budget absent an abuse of discretion by the county auditor, as set out in Section (a) above, such judgment is modified to declare that when the county auditor presents his budget to commissioners court enumerating equipment which he deems necessary for the operation of his office, the commissioners court has the power and authority to review and reject his budget only to the extent that the specific cost of an enumerated item is excessive or unreasonable in its monetary demands upon county funds, available or to become available, subject to any abuse of discretion. The judgment is also modified to the extent that neither Section (b) quoted above, nor any other provisions of the judgment shall require the county auditor's budget to be approved by the district judges.

With these modifications, the judgment in all other particulars is affirmed.

COLEMAN, C. J., and WALLACE, J., also sitting.



LEE TOWING CO., INC., Appellant,

v.

INDUSTRIAL CASTING COMPANY,  
INC., Appellee.

No. 8387.

Court of Civil Appeals of Texas,  
Beaumont.

Jan. 31, 1980.

Rehearing Denied Feb. 28, 1980.

Suit was instituted under the Deceptive Trade Practices—Consumer Protection Act.

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The Commissioners' Court of Titus County, Texas and Carl Johnson,  
County Auditor vs. Cynthia Agan, County Treasurer of Titus County,  
Texas

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# IN THE SUPREME COURT OF TEXAS

NO. 96-0683

THE COMMISSIONERS COURT OF TITUS COUNTY, TEXAS AND CARL JOHNSON,  
COUNTY AUDITOR, PETITIONERS

v.

CYNTHIA AGAN, COUNTY TREASURER OF TITUS COUNTY, TEXAS, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued on November 21, 1996

JUSTICE BAKER delivered the opinion for a unanimous Court.

The issue in this case is whether the Commissioners Court of Titus County may divest the County Treasurer of payroll preparation responsibilities and transfer these responsibilities to the County Auditor. The County Treasurer filed a declaratory judgment action challenging the Commissioners Court's action. Both parties moved for summary judgment. In addition to their summary judgment evidence, the parties filed a joint stipulation of uncontested facts. The trial court denied the County Treasurer, Cynthia Agan's (Agan), summary judgment and granted the Commissioners Court's summary judgment. The trial court denied the Commissioners Court recovery of attorneys' fees. The court of appeals reversed the trial court's judgment and rendered judgment for the County Treasurer. That court also ordered the Commissioners Court to return

the payroll preparation responsibilities to the treasurer's office and to adequately fund the treasurer's office. The court of appeals affirmed the trial court's denial of attorneys' fees for the Commissioners Court.

We conclude the Commissioners Court did not abuse its discretion when it transferred the payroll preparation duties from the County Treasurer's office to the County Auditor's office. However, we find that the Commissioners Court exceeded its authority by transferring certain other functions from the County Treasurer to the County Auditor's office. These functions belong to the County Treasurer's office. We affirm the court of appeals' denial of attorneys' fees to the Commissioners Court. Accordingly, we affirm in part and otherwise reverse the court of appeals' judgment and render judgment accordingly.

## I. FACTS

The summary judgment evidence and the stipulated uncontested facts show that Agan is the elected County Treasurer in Titus County. In 1987, Titus County hired a part-time assistant County Treasurer, or payroll clerk, whose primary duty was preparing the county payroll. From 1987 until 1994, Agan and her assistant prepared the county payroll. In 1994, the Titus County Commissioners Court amended the county budget to combine administrative duties involving county payroll, the insurance program, personnel, and receiving purchase orders and their payment into one full-time position assigned to the County Auditor's office. These responsibilities had previously been divided between the payroll clerk in the County Treasurer's office and a part-time employee in the County Auditor's office, who had recently resigned. The County Treasurer's payroll clerk transferred to the County Auditor's office to fill this new

position. The effect of these changes is to remove payroll preparation responsibilities from Agan and transfer them to the County Auditor's office.

As a County Auditor employee, the payroll clerk performs the same functions as she did in the County Treasurer's office. Her duties include: (1) collecting timesheets from all county departments, entering timesheet data into the county computer system to generate payroll deductions for FIT, FICA, Medicare, insurance, retirement, and child support payments; (2) making FIT deposits with bank; (3) making child support deposits with appropriate offices; (4) depositing payroll funds; (5) paying insurance premiums; (6) preparing insurance claims; (7) wiring payments to third party administrators; (8) answering questions about insurance claims or payments; (9) preparing and transmitting W-2's and 1099's; and (10) preparing payroll checks.

After the payroll clerk completes these functions, she delivers the payroll checks with the timesheets to the County Treasurer, Agan, for verification, signature, and disbursement. As a result, Agan's payroll preparation responsibilities are diminished and she is the only person in her office.

## II. PROCEDURAL HISTORY

In response to the Commissioners Court's actions, Agan sued the Commissioners Court seeking to declare the decision illegal and to order the payroll function back to her office. The trial court granted the Commissioners Court's motion for summary judgment and denied Agan's motion for summary judgment. The trial court held that the Commissioners Court could legally give the auditor's office the payroll responsibilities. However, the trial court refused to award the Commissioners Court attorney's fees. Agan appealed.

The court of appeals reversed the trial court and rendered judgment for Agan. The court of appeals rested its decision on two Attorney General decisions, Op. Tex. Att'y Gen. No. JM-911 (1988) and Op. Tex. Att'y Gen. No. JM-986 (1988). These opinions reason that the County Treasurer must prepare the county payroll because the payroll functions are so intimately linked that the payroll functions cannot be divorced from preparing the checks. Following this logic, the court of appeals decided that payroll preparation responsibilities must rest with the County Treasurer. The court of appeals affirmed the trial court's decision to deny the Commissioners Court its attorney's fees. The Commissioners Court appealed.

### III. STANDARD OF REVIEW

Our Constitution establishes the Commissioners Court as the county's principal governing body. TEX. CONST. art. V, § 18. The powers and duties of the Commissioners Courts include aspects of legislative, executive, administrative, and judicial functions. *Avery v. Midland County*, 390 U.S. 474, 482 (1968); *Ector County v. Stringer*, 843 S.W.2d 477, 478 (Tex. 1992).

Our Constitution vests appellate jurisdiction and general supervisory control over a County Commissioners Court with the district court subject to such exceptions and under such regulations as the law may prescribe. TEX. CONST. art. V, § 8. With a few narrow exceptions, the Legislature has not prescribed procedures for the district court's exercise of this appellate jurisdiction or supervisory control. *Ector County*, 843 S.W.2d at 479. The enabling legislation empowering the district court repeats the Constitution's terms. TEX. GOV'T CODE § 24.020; *see also* 35 DAVID BROOKS, COUNTY & SPECIAL DISTRICT LAW § 5.11 (Tex. Practice 1989).

Case law defines the scope of the district court's jurisdiction. A party can invoke the

district court's constitutional supervisory control over a Commissioners Court judgment only when the Commissioners Court acts beyond its jurisdiction or clearly abuses the discretion conferred upon the Commissioners Court by law. *Ector County*, 843 S.W.2d at 479 (citing *Tarrant County v. Shannon*, 104 S.W.2d 4, 9 (Tex. 1937)).

If the Commissioners Court acts illegally, unreasonably, or arbitrarily, a district court may so adjudge. *Ector County*, 843 S.W.2d at 479 (citing *Lewis v. City of Fort Worth*, 89 S.W.2d 975, 978 (Tex. 1936)). However, in reviewing a Commissioners Court judgment for abuse of discretion, the district court has no right to substitute its judgment and discretion for that of the Commissioners Court. *Ector County*, 843 S.W.2d at 479 (citing *Lewis*, 89 S.W.2d at 978). The district court may order the Commissioners Court to exercise its discretion, but cannot tell the Commissioners what decision to make. *Ector County*, 843 S.W.2d at 479. Once the Commissioners Court exercises its discretion, the district court may review the order for abuse of discretion. *Ector County*, 843 S.W.2d at 479.

#### IV. APPLICABLE LAW

Our Constitution creates the County Treasurer's office:

Except as otherwise provided by this section, the Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this State, of a County Treasurer and a County Surveyor, who shall have an office at the county seat, and hold their office for four years, and until their successors are qualified; and shall have such compensation as may be provided by law.

TEX. CONST. art. XVI, § 44(a). This section establishes the County Treasurer's office, but gives

the Legislature the responsibility to prescribe the treasurer's duties.

The Legislature established the County Treasurer's duties in § 113 of the Local Government Code. The County Treasurer's enumerated functions include:

The county treasurer, as chief custodian of county funds, shall keep in a designated depository and shall account for all money belonging to the county.

TEX. LOC. GOV'T CODE § 113.001.

The county treasurer shall keep an account of the receipts and expenditures of all money that the treasurer receives by virtue of the office and of all debts due and owed by the county. The treasurer shall keep accurate, detailed accounts of all the transactions of the treasurer's office.

TEX. LOC. GOV'T CODE § 113.002.

The county treasurer shall receive all money belonging to the county from whatever source it may be derived.

TEX. LOC. GOV'T CODE § 113.003.

The county treasurer shall disburse the money belonging to the county and shall pay and apply the money as required by law and as the commissioners court may require or direct, not inconsistent with law.

TEX. LOC. GOV'T CODE § 113.041(a). Enumerated or core functions are fundamental to the County Treasurer's office and the Commissioners Court cannot take core functions from the County Treasurer. The Commissioners Court may provide funds for adequate personnel and supplies, if necessary, to permit the County Treasurer to perform the functions of the office.

TEX. LOC. GOV'T CODE § 83.006.

Several other statutes apply to the County Treasurer, but do not grant the County Treasurer exclusive power to perform specific functions. For example, § 155.021 considers deductions. That section states, “[t]he County Treasurer or, if another officer is specified by law, that other officer shall make deductions from, or take other similar actions with regard to, the compensation of county employees. . . .” TEX. LOC. GOV'T CODE § 155.021 (emphasis added). If the statutory language is clear and unambiguous we give the statute its common everyday meaning. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). This statute’s ordinary meaning allows the County Treasurer or another county official to conduct the described function. Consequently, the Commissioners Court does not abuse its discretion when it delegates a function the Legislature has not exclusively delegated to the County Treasurer to another appropriate county official.

The Texas Uniform Declaratory Judgments Act allows the trial court to award reasonable and necessary attorney’s fees and costs as are equitable and just. See TEX. CIV. PRAC. & REM. CODE § 37.009. The decision to grant or deny attorney’s fees and costs is within the trial court’s sound discretion. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). We do not reverse the trial court’s denial of attorney’s fees unless the complaining party shows a clear abuse of discretion. *Oake*, 692 S.W.2d at 455.

## V. APPLICATION OF LAW TO FACTS

When, as here, both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence

presented by both sides and determine all questions presented. *See Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). The reviewing court should render such judgment as the trial court should have rendered. *Jones*, 745 S.W.2d at 900. If a party brings the case to this Court and we reverse the court of appeals, we should render the judgment that the court of appeals should have rendered. *Tobin v. Garcia*, 316 S.W.2d 396, 400-01 (Tex. 1958).

Our Constitution does not specifically designate the county office which must prepare the payroll. Instead, it leaves this task to the Legislature. The Legislature has not assigned payroll preparation responsibilities to any county official. Though the Legislature has enumerated several functions that cannot be taken away from the County Treasurer, preparing the payroll is not one of them.

The budgetary decision to transfer the payroll preparation responsibilities to the County Auditor's office is a legislative function for which the Commissioners Court receives broad discretion. *See generally* TEX. CONST. art. II, § 1 (discussing separation of powers). Because the Legislature has not assigned payroll preparation responsibilities, the Commissioners Court acting in its legislative capacity may delegate the responsibilities to an appropriate county official. The County Auditor is an appropriate county official. This is so because the County Auditor has the authority to perform the clerical functions associated with payroll preparation. *See* TEX. LOC. GOV'T CODE § 152.051 (stating that county payroll officer means County Auditor within this subchapter); TEX. LOC. GOV'T CODE § 155.002(a)(2) (requiring payroll deductions to be submitted to the County Auditor).

Another statute suggests that anyone the Commissioners Court authorizes has the authority



to administer payroll. TEX. LOC. GOV'T CODE § 155.062(a)(2) (requiring insurance deduction requests to be submitted to county officer authorized by Commissioners Court to administer payroll deductions). Thus, the Commissioners Court did not exceed its authority in transferring the payroll preparation responsibilities to the County Auditor.

In reaching its contrary conclusion, the court of appeals relied on two Attorney General opinions, Op. Tex. Att'y Gen. No. JM-911 (1988), and Op. Tex. Att'y Gen. No. JM-986 (1988). JM-911 held that the County Treasurer is the only officer to whom the payroll function may be delegated because the County Treasurer is the official authorized to pay and apply county money under TEX. LOC. GOV'T CODE § 113.041(a). Op. Tex. Att'y Gen. JM-911 at 4144 (1988). The Attorney General decided that this responsibility is not constitutionally or legislatively mandated but falls within the penumbra of the treasurer's ministerial core functions. Op. Tex. Att'y Gen. JM-911 at 4143 (1988). JM-986 applied this rationale to counties with populations less than 190,000, holding: (1) the County Treasurer is the proper county officer to conduct county payroll deductions; (2) the Commissioners Court must approve the county payroll and issue warrants in payments of salaries; and (3) the Commissioners Court can delegate the ministerial task of preparing salary warrants to the County Treasurer. Op. Tex. Att'y Gen. JM-986 at 3781 (1988).

While Attorney General's opinions are persuasive they are not controlling on the courts. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996). We disagree with the Attorney General's conclusion that the payroll preparation functions fall within the County Treasurer's core functions because the Legislature has not mandated those functions to another county official. It is clear that the Legislature has mandated that the County Treasurer must receive all money belonging

to the county from whatever source derived and the County Treasurer must disburse and apply county funds. See TEX. LOC. GOV'T CODE §§ 113.003 and 113.041(a). Conversely, we conclude the Commissioners Court may transfer any payroll responsibility to the County Auditor that the Legislature has not specifically delegated to the County Treasurer.

Several of the transferred payroll responsibilities involve disbursing county funds. Specifically, the County Treasurer must: (1) make FIT deposits with the bank; (2) make child support deposits with appropriate offices; (3) wire insurance payments to third party administrators; (4) deposit payroll funds; and (5) pay insurance premiums. Because the Legislature has given the treasurer the exclusive power to disburse funds, the Commissioners Court acted beyond its authority in transferring these functions to the County Auditor. The Commissioners Court may properly assign the remaining payroll responsibilities to the County Auditor because they do not involve disbursement, payment, or application of county funds. However, the Commissioners Court must allow the County Treasurer to perform those functions legislatively delegated to her. There is no indication in the record before us that the County Treasurer will require additional personnel or funding to perform these functions.

The trial court rendered judgment for the Commissioners Court but refused to grant the Commissioners Court attorney's fees. The trial court has the discretion to deny attorney's fees in declaratory judgment actions. See *Oake*, 692 S.W.2d at 455. The record does not show that the trial court abused its discretion.

## VI. CONCLUSION

The Legislature has assigned the County Treasurer certain core functions. The

Commissioners Court cannot allocate the County Treasurer's core functions to any other officer, including the County Auditor. If the Legislature does not specifically assign a duty to the County Treasurer, that duty is not one of the County Treasurer's core functions. The Commissioners Court may, within its discretion, assign those non-core functions to other county officials the Legislature authorizes to perform those functions.

Because payroll preparation responsibilities are non core functions of the County Treasurer's office, the Commissioners Court can assign the payroll preparation responsibilities to the County Auditor's office. However, the Commissioners Court cannot delegate to the County Auditor any payroll responsibility which requires actual disbursement, payment, or application of county funds. These duties are core functions of the County Treasurer's office.

Therefore, we hold the Commissioners Court properly transferred the payroll preparation responsibilities to the County Auditor. We hold the Commissioners Court exceeded its authority and improperly transferred to the County Auditor the functions of: (1) making FIT deposits with the bank; (2) making child support deposits with appropriate offices; (3) wiring insurance payment to third party administrators; (4) depositing payroll funds; and (5) paying insurance premiums because they involve actual disbursement, payment, or application of county funds. However, this does not preclude the County Auditor's office from preparing the documents necessary to deposit, disburse, pay, or apply county funds, subject to the County Treasurer's approval, just as the County Auditor prepares payroll checks subject to the County Treasurer's approval.

We reverse the court of appeals' judgment for Agan, and render judgment that the

Commissioners Court properly transferred payroll preparation responsibilities to the County Auditor's office. We further render judgment that the Commissioners Court improperly transferred functions that require disbursement, payment, or application of county funds. These responsibilities must remain in the County Treasurer's office. We affirm the court of appeals' judgment denying attorney's fees to the Commissioners Court.

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James A. Baker  
Justice

OPINION DELIVERED: February 21, 1997.

Ernest Guerrero vs. Refugio County, Texas, Charles Stone, Marion M.  
Lewis, Whayland K. Kilgore, and Joseph P. Kelly

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Ernest GUERRERO, Appellant,

v.

REFUGIO COUNTY, Texas, Charles Stone, Marion M. Lewis, Whayland K. Kilgore,  
and

Joseph P. Kelly, Appellees.

No. 13-95-368-CV.

Court of Appeals of Texas,  
Corpus Christi.

May 15, 1997.

Former county auditor sued county, county judge, and district court judges, alleging age, national origin, and politically motivated discrimination in failure to reappoint him as auditor. The 267th District Court, Refugio County, Henry Schuble, III, Retired Judge, specially appointed, entered summary judgment for defendants. Former auditor appealed. The Court of Appeals, Frederico G. Hinojosa, Jr., J., held that: (1) auditor was not county's "employee" under Texas Commission on Human Rights Act (TCHRA), nor could county be held liable under TCHRA on agency theory; (2) district court judges were not auditor's employer under TCHRA, thus precluding their liability on auditor's age and national origin discrimination claims; (3) auditor was public official who did not have property interest in his position beyond end of his term, and thus he was not entitled to procedural due process when district judges decided to open auditor appointment process to other applicants; (4) county judge did not act under color of state law with respect to appointment process and thus could not be held liable under s 1983 for alleged political discrimination; (5) district judges were not acting in judicial capacity in auditor appointment process, and thus they could not assert affirmative defense of absolute judicial immunity against auditor's § 1983 claim for political discrimination; and (6) district judges failed to establish affirmative defense of quasi-judicial immunity from political discrimination claim.

Affirmed in part and reversed and remanded in part.

[1] APPEAL AND ERROR ¶863

30k863

When defendant moves for summary judgment on several theories and trial court enters summary judgment without specifying ground relied upon, appeal court will affirm summary judgment if any one of theories advanced is meritorious.

[2] APPEAL AND ERROR ¶863

30k863

Proper inquiry on appeal from summary judgment is whether defendant, in seeking summary judgment, fulfilled his initial burden to: (1) establish as matter of law that there remains no genuine issue of material fact as to one or more essential elements of plaintiff's cause of action, or (2) establish his affirmative defense to plaintiff's cause of action as matter of law.

[3] APPEAL AND ERROR ¶856(1)

30k856(1)

Summary judgments may not be affirmed or reversed on grounds not expressly set forth in motions presented to trial court. Vernon's Ann. Texas Rules Civ. Proc., Rule 166a(c)

[4] JUDGMENT ¶183

228k183

Motion for summary judgment must stand or fall on grounds expressly presented in motion, and court may not rely on briefs or summary judgment evidence in determining whether grounds are expressly presented. Vernon's Ann. Texas Rules

[5] JUDGMENT ☞185(2)

228k185(2)

For trial court to properly enter summary judgment for defendant disposing of entire case, defendant must present summary judgment evidence on all theories pleaded by plaintiff. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

[6] CIVIL RIGHTS ☞146

78k146

County auditor was not county "employee" under Texas Commission on Human Rights Act (TCHRA), since county did not have requisite right of control over auditor, and economic realities did not support finding of employment relationship; among other things, statutory authority to appoint or remove county auditor was vested in district court judges, and county lacked full control over auditor's salary and expenses. V.T.C.A., Local Government Code § 152.031; V.T.C.A., Local Government Code §§ 84.002(b), 84.009(b), 84.021(a), 84.901 (1988); V.T.C.A., Labor Code § 21.002(7, 8).

See publication Words and Phrases for other judicial constructions and definitions.

[7] COURTS ☞97(1)

106k97(1)

When Texas case law fails to address questions raised under Texas Commission on Human Rights Act (TCHRA), courts look to federal case law for guidance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; V.T.C.A., Labor Code § 21.001 et seq.

[8] CIVIL RIGHTS ☞143

78k143

Before defendant can be considered "employer" for purposes of employment discrimination laws, defendant must fall within statutory definition of employer, and employment relationship must exist between parties. V.T.C.A., Labor Code § 21.002(8).

See publication Words and Phrases for other judicial constructions and definitions.

[9] MASTER AND SERVANT ☞1

255k1

In determining whether employment relationship exists, federal courts use hybrid economic realities/common law control test, of which most important part is right to control employee's conduct, which focuses on whether alleged employer has right to hire and fire employee, right to determine employee's schedule, and right to supervise employee's work. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[10] MASTER AND SERVANT ☞1

255k1

In applying hybrid economic realities/common law control test to determine whether employment relationship exists, economic realities component focuses on (1) kind of occupation, with reference to whether work usually is done under supervisor's direction; (2) skill required in particular occupation; (3) who furnishes equipment used and place of work; (4) length of time individual has worked; (5) method of payment; (6) manner in which work relationship is terminated; (7) whether annual leave is afforded; (8) whether work is integral



part of purported employer's business; (9) whether worker accumulates retirement benefits; (10) whether "employer" pays social security taxes; and (11) parties' intention. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[11] COUNTIES 84

104k84

County auditor is not appointed by any elected body or officer who administers or determines county policy, and auditor is to be left entirely free from control of these officers. V.T.C.A., Local Government Code § 84.002.

[12] CIVIL RIGHTS 371

78k371

Because district court judges were acting pursuant to state policy, not county policy, in county auditor appointment process, they were not agents of county when they appointed new county auditor, and county could not be held liable, on agency theory, on former auditor's age, national origin, and political discrimination claims. V.T.C.A., Government Code § 84.002 (1988); 42 U.S.C.A. § 1983; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[12] CIVIL RIGHTS 451

78k451

Because district court judges were acting pursuant to state policy, not county policy, in county auditor appointment process, they were not agents of county when they appointed new county auditor, and county could not be held liable, on agency theory, on former auditor's age, national origin, and political discrimination claims. V.T.C.A., Government Code § 84.002 (1988); 42 U.S.C.A. § 1983; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[13] STATES 74

360k74

Official pursues his duties as state agent when he is enforcing state law or state policy.

[14] COUNTIES 93

104k93

Official is county agent when he enforces county policy or law.

[15] CIVIL RIGHTS 146

78k146

Although district court judges fell within definition of "employer" found in Texas Commission on Human Rights Act (TCHRA), they were not county auditor's employer, thus precluding their liability on auditor's age and national origin discrimination claims under TCHRA when auditor was not reappointed, since district judges had only limited right to control county auditor, and economic realities disfavored employment relationship, to extent that many economic realities of their relationship were controlled by state law. V.T.C.A., Labor Code § 21.002; V.T.C.A., Local Government Code §§ 84.002, 111.001- 115.001 (1988).

[15] CIVIL RIGHTS 171

78k171

Although district court judges fell within definition of "employer" found in Texas Commission on Human Rights Act (TCHRA), they were not county auditor's employer, thus precluding their liability on auditor's age and national origin discrimination claims under TCHRA when auditor was not reappointed, since district judges had only limited right to control county auditor, and economic realities disfavored employment relationship, to extent that many economic realities of their relationship were controlled by state law. V.T.C.A., Labor Code § 21.002; V.T.C.A., Local Government Code §§ 84.002, 111.001- 115.001 (1988).

[16] CONSTITUTIONAL LAW ↪277(2)  
92k277(2)

County auditor was public official who did not have property interest in his position beyond end of last two-year term to which he was appointed, and thus he was not entitled to procedural due process when district court judges decided to open auditor appointment process to other applicants. V.T.C.A., Local Government Code §§ 84.002, 84.004, 84.009, 111.001-115.001 (1988).

[16] CONSTITUTIONAL LAW ↪278.4(5)  
92k278.4(5)

County auditor was public official who did not have property interest in his position beyond end of last two-year term to which he was appointed, and thus he was not entitled to procedural due process when district court judges decided to open auditor appointment process to other applicants. V.T.C.A., Local Government Code §§ 84.002, 84.004, 84.009, 111.001-115.001 (1988).

[16] COUNTIES ↪65  
104k65

County auditor was public official who did not have property interest in his position beyond end of last two-year term to which he was appointed, and thus he was not entitled to procedural due process when district court judges decided to open auditor appointment process to other applicants. V.T.C.A., Local Government Code §§ 84.002, 84.004, 84.009, 111.001-115.001 (1988).

[17] OFFICERS AND PUBLIC EMPLOYEES ↪1  
283k1

Public office is right, authority, and duty created and conferred by law which, for given period either fixed by law or enduring at pleasure of creating power, an individual is invested with some portion of sovereign function of government to be exercised by him for benefit of public.

[18] OFFICERS AND PUBLIC EMPLOYEES ↪1  
283k1

Public office can be properly described in terms of trust, duty, and public benefit, rather than contract, employment, ownership, or possession.

[19] OFFICERS AND PUBLIC EMPLOYEES ↪1  
283k1

Public office should be viewed not as right, but a responsibility, and every public officeholder remains in his position at sufferance and for benefit of public, subject to removal from office by any constitutionally prescribed method.

[19] OFFICERS AND PUBLIC EMPLOYEES ↪60  
283k60

Public office should be viewed not as right, but a responsibility, and every public officeholder remains in his position at sufferance and for benefit of

subject to removal from office by any constitutionally prescribed method.

[20] OFFICERS AND PUBLIC EMPLOYEES ↪4

283k4

Public officer has no vested right in office held by him, and thus cannot complain of abolishment of such office or of his removal or suspension, according to law.

[20] OFFICERS AND PUBLIC EMPLOYEES ↪7

283k7

Public officer has no vested right in office held by him, and thus cannot complain of abolishment of such office or of his removal or suspension, according to law.

[21] OFFICERS AND PUBLIC EMPLOYEES ↪1

283k1

Determining factor which distinguishes public officer from employee is whether any sovereign function of government is conferred upon individual to be exercised by him for benefit of public largely independent of control of others, and other factors to consider include fixed term of office, removal provisions, and qualifications for holding position, all of which are prescribed by statute, and fact that officer will be required by law to take oath of office and to give bond.

[22] COUNTIES ↪91

104k91

County auditor could not delegate statutory official duties to another, other than to duly appointed assistants, nor could he be compelled to delegate those duties. V.T.C.A., Local Government Code §§ 112.001, 112.005, 112.006(b), 113.043, 113.064, 113.065, 114.002, 114.003 (1988).

[23] COUNTIES ↪84

104k84

County auditor, when acting as such, is not subject to orders of commissioners court. V.T.C.A., Local Government Code §§ 111.001-115.001 (1988).

[23] COUNTIES ↪91

104k91

County auditor, when acting as such, is not subject to orders of commissioners court. V.T.C.A., Local Government Code §§ 111.001-115.001 (1988).

[24] CONSTITUTIONAL LAW ↪278(1)

92k278(1)

Requirements of procedural due process apply only to threatened deprivation of property interests requiring protection of federal and state constitutions. U.S.C.A. Const.Amend. 14.

[25] CIVIL RIGHTS ↪198(2)

78k198(2)

County judge had no legal control over or duty to be involved in process of appointing county auditor, which fell within discretionary duties of district court judges, and thus, even if county judge's letter to district judges, informing them of unfavorable audit of auditor's accounting practices and suggesting that they consider other auditor candidates, was interpreted as politically motivated, county judge was not acting under state law and could not be liable to auditor under §1983. U.S.C.A. Const.Amend. 1, 14; 42 U.S.C.A. § 1983; Vernon's Ann.Texas Const. Art. 5, § 18; V.T.C.A., Local

[26] CIVIL RIGHTS ☞196.1

78k196.1

To state claim under § 1983, plaintiff must allege that he was deprived of right or interest secured by Constitution and laws of United States, and that deprivation occurred under color of state law. 42 U.S.C.A. § 1983.

[27] CIVIL RIGHTS ☞196.1

78k196.1

Person does not act under color of state law for § 1983 purposes solely by virtue of relationship to state, but depending on person's function. 42 U.S.C.A. § 1983.

[28] CIVIL RIGHTS ☞196.1

78k196.1

Regardless of one's affiliation with state, person acts under color of state law for § 1983 purposes only when exercising power possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law. 42 U.S.C.A. § 1983.

[29] CIVIL RIGHTS ☞196.1

78k196.1

If state law has imposed duty to report, investigate, monitor, or regulate without granting duty to exercise state-conferred legal control over underlying persons or events, there is no conduit through which exercise of state power can be said to have caused constitutional injury for § 1983 purposes. 42 U.S.C.A. § 1983.

[30] CIVIL RIGHTS ☞214(8)

78k214(8)

District court judges were not acting in judicial capacity in county auditor appointment process, and thus they could not assert affirmative defense of absolute judicial immunity against former auditor's § 1983 claim for political discrimination. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983; V.T.C.A., Local Government Code, § 84.002 (1988).

[31] JUDGES ☞36

227k36

Judges enjoy absolute immunity from damage claims arising out of acts performed in exercise of their judicial functions, even if acting in bad faith or with malice.

[32] OFFICERS AND PUBLIC EMPLOYEES ☞114

283k114

Government officers have common law immunity from personal liability in performing discretionary duties performed in good faith within scope of their authority; this is known as qualified, official, quasi-judicial, or good faith immunity. 42 U.S.C.A. § 1983.

[33] JUDGMENT ☞185(2)

228k185(2)

Quasi-judicial immunity is affirmative defense, and movant for summary judgment has burden to come forward with evidence to establish each element of defense.

[34] CIVIL RIGHTS ☞214(8)

78k214(8)

To prevail on affirmative defense of quasi-judicial immunity to former county auditor's claim that district court judges engaged in political discrimination in failing to reappoint him, district judges had to establish: that their positions had quasi-judicial status, that they were acting within their authority, and that they were acting in good faith. U.S.C.A. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; V.T.C.A., Local Government Code § 84.002 (1988).

[35] CIVIL RIGHTS C-214(8)

78k214(8)

District court judges failed to establish affirmative defense of quasi-judicial immunity from former county auditor's claim alleging that district judges engaged in political discrimination in failing to reappoint him, since judges, although stating that age, race, gender, and disability were not considered, did not address whether they acted in good faith with respect to auditor's claim of political discrimination, and they offered no evidence that reasonably prudent judges would believe their actions were appropriate. U.S.C.A. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; V.T.C.A., Local Government Code § 84.002 (1988).

[36] CIVIL RIGHTS C-214(8)

78k214(8)

In considering claim of quasi-judicial or qualified immunity, test for good faith is one of objective legal reasonableness, without regard to whether government official involved acted with subjective good faith. 42 U.S.C.A. § 1983.

[37] CIVIL RIGHTS C-214(8)

78k214(8)

To be entitled to summary judgment on claim of quasi-judicial or qualified immunity, government official must prove that reasonably prudent official might have believed that action taken was appropriate, but official need not prove that it would have been unreasonable to take different action, nor must official prove that all reasonably prudent officials would have acted as he did. 42 U.S.C.A. § 1983.

\*562 Jose Garza, Gray & Becker, Tracey Whitley, Austin, for appellants.

Michael A. Johnson, Richard D. Cullen, Cullen, Carsner, Seerden & Cullen, Bob Bass, Allison & Associates, for appellee.

Before FREDERICO G. HINOJOSA, Jr., YANEZ and RODRIGUEZ, JJ.

OPINION

FREDERICO G. HINOJOSA, Jr., Justice.

Appellant, Ernest Guerrero, sued appellees, Refugio County, Refugio County Judge Charles Stone, 135th District Court Judge Marion M. Lewis, 267th District Court Judge Whayland K. Kilgore, and 24th District Court Judge Joseph P. Kelly because he was not reappointed County Auditor of Refugio County. Guerrero alleged age, national origin, and politically motivated discrimination. Retired Judge Henry Schuble, III was specially appointed to hear the case.

All of the appellees filed motions for summary judgment. On July 29, 1995, Judge Schuble granted the motions filed by Judge Lewis, Judge Kilgore, and Judge Kelly. On August 12, 1995, Judge Schuble granted the motions filed by Judge Stone and Refugio County. Appellant challenges these summary judgments by eleven points of error. We reverse the trial court's summary judgments for Judge Lewis, Judge Kilgore, and Judge Kelly against Guerrero's 42 U.S.C. § 1983 claim for political discrimination and remand that cause of action to the

trial court for further proceedings. We affirm the trial court's summary judgments for Judge Lewis, Judge Kilgore, and Judge Kelly against the remainder of Guerrero's causes of action. We affirm the trial court's summary judgments for Refugio County and Judge Stone.

Guerrero was appointed County Auditor of Refugio County by a majority of the district judges in Refugio County. See Tex. Loc. Gov't Code Ann. §§ 84.001(a), 84.002 [FN1] (Vernon 1988). A county auditor serves a two-year term. Tex. Loc. Gov't Code Ann. § 84.004 (Vernon 1988). Guerrero was appointed county auditor eleven times and served for twenty-two years. He was last appointed in 1991, and his term of office ended in 1993.

FN1. At the time of the alleged discrimination, Refugio County had a population of less than 10,000 and was, therefore, governed by subsection (b) of this section. See Tex. Loc. Gov't Code Ann. § 84.002(b) (Vernon 1988).

Before 1993, the district judges did not seek other applicants, and Guerrero was reappointed based on his application for the position. In 1993, Judge Lewis received a letter from Judge Stone, dated July 15, 1993, suggesting that the district judges open the appointment process to other applicants because independent auditors had criticized Guerrero's auditing practices. [FN2] The district \*563 judges subsequently notified Guerrero that public notice was being given to open the appointment process to all applicants, and he was asked to reapply. The district judges received seventeen applications. Guerrero was one of the seventeen applicants. Guerrero and seven others were selected for an interview. After the interviews, Guerrero received a letter from Judge Lewis, dated December 10, 1993, informing him that another person had been appointed county auditor. [FN3]

FN2. Judge Stone's letter of July 15, 1993, states, in relevant part, as follows:

I am enclosing one copy each of the 1991 and 1992 management letters as per your request. The 1992 letter was formally presented to the Commissioners' Court on Monday July 12, 1993.

I am sure you will notice that most of the offices that were given recommendations for needed change in 1991 had made those corrections and were not included in the 1992 letter. The three exceptions were: The J.P. Offices, Elderly Services (Nutrition) and the County Auditor's Office.

\* \* \* \* \*

The final office that has been written up two years in a row is the Auditor's Office. I have serious concerns that no response or attempt has been made by the auditor to follow the recommendations of the outside auditor. I am reluctant to instruct the auditor to comply with these findings since action on my part could possibly be perceived as undermining the "independence" of his office. Since the auditor's office is supposed to be free of all outside influence from the public including County Government, appropriate corrective measures should come from your office while in consultation with the other District Judges. This Commissioner's Court wants an auditor that will be impartial, independent, capable and willing to perform the statutory duties and fulfill requirements of the position. It is my perception that the Commissioner's Court wants the position of auditor to be filled again at the next re-appointment date which should be October 11, 1993.

I hope that you and the other judges will consider opening the position up to other applicants that may be interested in applying while considering

Mr. Guerrero's reappointment. In any case and no matter who is appointed, serious consideration should be given to incorporating the recommendations from the management letters and all applicable statutory requirements into the order appointing the next auditor for Refugio County.

FN3. Judge Lewis' letter of December 10, 1993, states as follows: On Friday, December 3, 1993, Judge Kilgore, Judge Kelly, and I personally interviewed the persons we considered to be the most qualified eight persons out of the seventeen applicants that asked to be considered for the position of County Auditor of Refugio County. We have now made a most difficult decision. All persons interviewed had the basic qualifications. However, we were looking for a person who was not only qualified, but had additional attributes of independence, cooperativeness, dedication, and understanding of the political process in a rural county setting. While the three judges could agree on the three or four individuals, we believed to be the most suitable, we had to reach a consensus by some give and take among us to select the final appointee.

We have decided to appoint Russel W. (Rusty) Friedrichs, who presently resides in Goliad, Texas, as County Auditor with his two-year term to begin on January 3, 1994.

Ernest, we want to take this occasion to express our sincere thanks to you for your long and dedicated service. However, because of a number of different circumstances, some of which were beyond your control, we believe now is an appropriate time for you to step aside in favor of a younger and more aggressive person, with no ties to any particular political group or affiliation. We do appreciate the many courtesies you have extended us in the past, and your help in making Refugio County an efficiently run organization.

I am sure Mr. Friedrichs will be contacting you in the next few days. Please do whatever you can to make the transition of the duties of the office as smooth as possible.

Thank you for your cooperation in this regard.

Appellant then filed a complaint with the Texas Commission on Human Rights, charging Refugio County with age discrimination in the appointment process. Appellant later amended the complaint to include discrimination because of national origin. Appellant is Mexican-American and was fifty-nine years old. The new appointee is not Hispanic and was thirty-eight years old.

After receiving a right to sue letter from the Texas Commission On Human Rights, Guerrero sued the County and the district judges. Guerrero alleged that appellees had violated the Texas Commission on Human Rights Act (TCHRA) [FN4] because they had discriminated against him on the basis of age and national origin. Guerrero alleged violations of 29 U.S.C. 621, et seq., and 42 U.S.C. 2000e, et seq. He also alleged that the district judges and the county judge, acting under the color of state law, deprived him of \*564 property without due process as required by the U.S. Constitution and without due course of law as required by the Texas Constitution. Guerrero further alleged that, acting under the color of state law, the district judges and the county judge discriminated against him for political reasons, thereby depriving him of his free speech and associational rights in violation of the First and Fourteenth Amendments to the U.S. Constitution. He based these last

FN4. Tex. Lab.Code Ann. § 21.001, et seq. (Vernon 1996).

All appellees moved for summary judgment on the ground that there was no employer/employee relationship between (1) Guerrero and the district judges or (2) Guerrero and the County. In addition, they alleged that Guerrero had no property interest in his position because he was appointed at the discretion of the district judges or, in the alternative, that he received due process when he was informed of the application process and was interviewed.

The district judges asserted that they had not discriminated against Guerrero, and that they had not violated section 21.051 of the TCHRA. They also claimed the affirmative defense of "failure to exhaust administrative remedies" because they were not identified as respondents in Guerrero's charge to the Texas Commission on Human Rights. The district judges contended that this failure deprived the trial court of jurisdiction because they had not received notice of the discrimination allegations prior to the commencement of the lawsuit. The district judges also asserted the affirmative defenses of "absolute judicial immunity" and "qualified immunity."

Judge Stone contended that his letter of July 15, 1993, was absolutely privileged, and that he was entitled to "qualified immunity." The County and the county judge asserted that the district judges had non-discriminatory reasons for not reappointing Guerrero and that the district judges were exercising their discretion as state actors. Thus, any harm to Guerrero as a result of exercising that discretion could not be attributed to the County or Judge Stone.

Without specifying the grounds, the trial court granted all of appellees' motions for summary judgment. Guerrero contends that the trial court erred in granting the motions for summary judgment.

#### I. Standard of Review

[1][2] When a defendant moves for summary judgment on several theories and the trial court enters summary judgment without specifying the ground relied upon, we affirm the summary judgment if any one of the theories advanced is meritorious. *Martinez v. Corpus Christi Area Teachers Credit Union*, 758 S.W.2d 946, 950 (Tex.App.--Corpus Christi 1988, writ denied). The proper inquiry on appeal is whether the defendant, in seeking summary judgment, fulfilled his initial burden to: 1) establish as a matter of law that there remains no genuine issue of material fact as to one or more essential elements of the plaintiff's cause of action, or 2) establish his affirmative defense to the plaintiff's cause of action as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex.1989); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972).

In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant must be taken as true. *Nixon*, 690 S.W.2d at 549. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor. *Id.*

[3][4][5] A movant for summary judgment must expressly state the grounds upon which it is made. Tex.R. Civ. P. 166a(c); *McConnell v. Southside Sch. Dist.*, 858 S.W.2d 337, 339 (Tex.1993); Summary judgments may not be affirmed or reversed on grounds not expressly set forth in the motions presented to the trial court. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex.1979); *Wofford v. Blomquist*, 865 S.W.2d 612, 614 (Tex.App.--Corpus Christi 1993, writ denied). A motion for summary judgment must stand or fall on the grounds expressly presented in the motion, and a court may not rely on briefs or summary judgment evidence in determining whether grounds are expressly presented. *McConnell*, 858 S.W.2d at 339. For a trial court to properly enter a summary judgment for a defendant disposing of \*565 the



entire case, the defendant must present summary judgment evidence on all theories pleaded by the plaintiff. *Havens v. Tomball Community Hosp.*, 793 S.W.2d 690, 691 (Tex.App.--Houston [1st Dist.] 1990, writ denied).

By eleven points of error, Guerrero contends that the trial court erred as follows:

1. In granting appellees' motions for summary judgment.
2. In determining that appellees are not "employers" as defined by the Texas Labor Code.
3. In determining that appellant was not an "employee" as defined by the Texas Labor Code.
4. In determining that the act of appointing a county auditor cannot constitute a discriminatory act as defined by the Texas Labor Code.
5. In determining that appellant was not entitled to a due process hearing.
6. In granting the district judges' motions for summary judgment when they presented no evidence disputing the allegations of non-renewal for political reasons.
7. In granting the district judges' motions for summary judgment when the evidence demonstrated that they received sufficient notice of appellant's claims.
8. In granting the district judges' motions for summary judgment because they are not entitled to absolute judicial immunity for administrative functions such as employment decisions.
9. In granting the district judges' motions for summary judgment because the elements of the affirmative defense of qualified immunity were not proven.
10. In granting the County's motion for summary judgment because the district judges were the County's agents when the district judges acted to employ a county auditor.
11. In granting the County's motion for summary judgment because the County failed to provide credible evidence regarding non-discriminatory justifications for appellant's non-renewal.

#### II. Refugio County

[6] Refugio County moved for summary judgment on the ground that appellant was not a County "employee" as defined by section 21.002 of the Texas Labor Code. Section 21.002 defines "employee" as "an individual employed by an employer, including an individual subject to the civil service laws of this state or a political subdivision of this state, except that the term [employee] does not include an individual elected to public office in this state or a political subdivision of this state." Tex. Lab.Code Ann. § 21.002(7) (Vernon 1996). [FN5] Section 21.002 defines "employer" as "a county..." Tex. Lab.Code \*566 Ann. § 21.002(8)(D) (Vernon 1996). Although the County can be an "employer" and appellant is not excluded from the definition of "employee" found in the Labor Code, we must first determine if the county auditor is a County employee. The Labor Code and Texas case law offer us little assistance in this determination.

FN5 In 1993, the Legislature repealed article 5221k of the Texas Civil Statutes (Texas Commission on Human Rights Act) and codified it as chapter 21 of the Labor Code. Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 990 (current version at TEX. LAB.CODE ANN. (Vernon 1996)). As codified, a person selected as an appointee by an elected official was excluded from the definition of "employee." *Id.* at 996. However, during the same legislative session, the Legislature amended the definition of "employee" found in art. 5221k without reference to the repeal and codification of the article. See Act of May 14, 1993, 73rd Leg., R.S., ch. 276, § 2, 1993 Tex. Gen. Laws 1287, 1287-88. The amendment of article 5221k does not exclude appointed persons from the definition of "employee." *Id.*

Section 311.031 of the Texas Government Code provides that the repeal of a statute by a code does not affect an amendment of the statute during the same legislative session as the statute was codified and that the amendment is to be given effect as part of the code. Tex. Gov't Code Ann. § 311.031(c) (Vernon 1988). The codification and amendment were effective September 1, 1993. Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 8, 1993 Tex. Gen. Laws 1275. The alleged discrimination occurred in December 1993. Thus, the codification and the amendment are applicable to appellant, and we must give the amendment full effect. During the 1995 regular session, the Legislature amended the definition of "employee" in § 21.001 of the Labor Code to conform with Chapter 276 of the 73rd Legislative Session. Act of April 25, 1995, 74th Leg., R.S., ch. 76, § 902, 1995 Tex. Sess. Law Serv. 458, 621-22 (Vernon) (current version at Tex. Lab.Code Ann. § 21.002(7) (Vernon 1996)). Because the 1995 amendment made no substantive changes to the definition of "employee" found in Chapter 276, or to the other pertinent provisions of § 21.002, all references will be to the current version of that section.

[7] The Legislature modeled the TCHRA on federal law with the purpose of (1) executing the policies embodied in Title VII of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000e, et seq. and (2) identifying and creating an authority meeting the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633. Tex. Lab.Code Ann. § 21.001 (Vernon 1996); *Benavides v. Moore*, 848 S.W.2d 190, 193 (Tex.App.--Corpus Christi 1992, writ denied). Consequently, when Texas case law fails to address questions raised under the TCHRA, we look to federal case law for guidance. *Benavides*, 848 S.W.2d at 193; cf. *Syndex Corp. v. Dean*, 820 S.W.2d 869, 871 (Tex.App.--Austin 1991, writ denied).

[8] Before a defendant can be considered an employer for purposes of employment discrimination laws, it must pass the following two-prong test:

- 1) the defendant must fall within the statutory definition of employer, and
- 2) an employment relationship must exist between the parties.

*Deal v. State Farm County Mut. Ins. Co. of Tex.*, 5 F.3d 117, 118 n. 2 (5th Cir.1993). The TCHRA provides that the County can be an employer. See Tex. Lab.Code Ann. § 21.002(8)(C) (Vernon 1996). Therefore, we must determine if the second prong of the test has been met.

[9][10] In determining whether an employment relationship exists, federal courts use a hybrid economic realities/common law control test. *Deal*, 5 F.3d at 118-19; *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019 (5th Cir.1990), cert. denied, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991); *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C.Cir.1979); *Benavides*, 848 S.W.2d at 193. The most important part of this test is the right to control an employee's conduct. *Deal*, 5 F.3d at 119; *Fields*, 906 F.2d at 1019; see generally *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51, 109 S.Ct. 2166, 2178, 104 L.Ed.2d 811 (1989) (setting forth test to be used in determining if hired person is employee). Under this component of the test, the focus is on whether the alleged employer has the right to hire and fire the employee, the right to determine the employee's schedule, and the right to supervise the employee's work. *Deal*, 5 F.3d at 119; *Fields*, 906 F.2d at 1020. The economic realities component of the test focuses on the following factors:

- 1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor;
- 2) the skill required in the particular occupation;
- 3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;

- 4) the length of time during which the individual has worked;
- 5) the method of payment, whether by time or by the job;
- 6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation;
- 7) whether annual leave is afforded;
- 8) whether the work is an integral part of the business of the "employer";
- 9) whether the worker accumulates retirement benefits;
- 10) whether the "employer" pays social security taxes; and
- 11) the intention of the parties.

Fields, 906 F.2d at 1020 n. 4; Spirides, 613 F.2d at 832; see also Deal, 5 F.3d at 119; see generally Reid, 490 U.S. at 750-53, 109 S.Ct. at 2178-79; Benavides, 848 S.W.2d at 193 (using these factors to determine whether individual was employee or independent contractor).

[11] We begin our analysis by reviewing the history of the creation of county government and of the county auditor's office. When county government was first created by the Texas Constitution of 1876, the judicial, executive, and legislative powers of the \*567 county were vested in a single body called the commissioners court. See Burke Holman & James R. Gough, A Study of County Government in Texas: With Particular Reference to Harris County, 2 S. TEX. L.J. 197, 201 (1956). Before 1891, no judicial court had authority to review any acts of the commissioners court unless the acts were clearly outside its jurisdiction and thus void. See id. at 202. In 1891, however, the people approved a constitutional amendment granting district courts supervisory powers of review over the commissioners courts within their jurisdictions. See id. In the early 1900's, the office of the county auditor was created by statute to maintain the accounts of the various county offices and to oversee the county finances. See Act of April 22, 1905, 29th Leg., R.S., ch. 161, § 2, 1905 Tex. Gen. Laws 381, 381 (current version at Tex. Local Gov't Code Ann. § 84.002). Initially, the auditor was appointed by the county and district judges having jurisdiction in the county. Id. The Legislature subsequently amended the statute to provide for the appointment of the county auditor by only the district judges. Act of March 29, 1917, 35th Leg., R.S., ch. 134, §§ 2, 3, 1917 Tex. Gen. Laws 337, 338 (current version at Tex. Local Gov't Code Ann. § 84.002). The auditor is not appointed by any elected body or officer who administers or determines county policy and is to be left entirely free from the control of these officers. See Weaver v. Commissioners' Court of Nacogdoches County, 135 Tex. 611, 146 S.W.2d 170, 174 (1941); see also Burke Holman & James R. Gough, A Study of County Government in Texas--Evaluation of the Office of County Auditor, 3 S. Tex. L.J. 1, 1 (1957).

After reviewing the record, we conclude that the County's relationship with the county auditor does not satisfy the common law control component of the economic realities/common law control test. Statutory authority to appoint or remove the county auditor is vested in the district judges. Even the decision whether to have a county auditor in Refugio County rests with the district judges and not the County. Tex. Local Gov't Code Ann. §§ 84.002(b), 84.009(b) (Vernon 1988). Although the County, through Judge Stone, suggested to the district judges that they open the appointment process to other applicants because independent auditors had criticized Guerrero's auditing practices, we find nothing in the statutes or the record indicating that any county official or agent controlled, or had the right to control, the decision of the district judges to not reappoint Guerrero. In addition, we find uncontroverted evidence in the record showing that the County did not control Guerrero's work schedule or supervise his work and that Guerrero had the power to determine and control the County's accounting procedures. In fact, as county auditor, Guerrero had to examine and approve all claims, bills, and accounts before the County could pay them. Tex. Local Gov't Code Ann. § 113.064(a) (Vernon 1988).

Several of the economic realities factors also do not weigh in Guerrero's favor. Although the County was responsible for paying the salary and social security taxes of Guerrero and his assistants, it was the district judges who set the salary and determined if appellant needed assistants. Tex. Local Gov't Code Ann. §§ 84.021(a) (Vernon 1988), 152.031(a) (Vernon Supp.1997). The fact that the County provided Guerrero with an office, equipment, and supplies is not dispositive concerning whether there was an employment relationship. As the county auditor, Guerrero had the statutory authority to equip and supply his office, at county expense, as long as he complied with the law. Tex. Local Gov't Code Ann. § 84.901 (Vernon 1988). The County could only disapprove of Guerrero's purchases if they were excessive or an unreasonable demand on the county's funds. See Commissioners Court of Harris County v. Fullerton, 596 S.W.2d 572, 577 (Tex.Civ.App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). County disapproval, however, is subject to review under an abuse of discretion standard. See id. The record also shows that Guerrero could go to the district judges to override any unfavorable County decision concerning his expenses. To qualify for the position of auditor, Guerrero had to have experience in accounting and auditing and be thoroughly competent in public business details. See Tex. Local Gov't Code Ann. § 84.006(a) (Vernon Supp.\*568 1997). The evidence shows that these skills are important because the auditor maintains accounting procedures without supervision from the County. Finally, the County asserts, and we agree, that it would indeed be strange to have an "employee" exercise such control over an employer's finances as a county auditor does over a county's fiscal matters.

Because the County does not have the requisite right of control over the county auditor and because the economic realities of the case do not support a finding that an employment relationship existed, we hold that Guerrero was not a County employee. We overrule appellant's first, second, third and fourth points of error as they apply to Refugio County.

[12] By his tenth point of error, Guerrero contends that summary judgment for Refugio County was not proper because the district judges were agents of the County when they appointed the county auditor.

[13][14] An official pursues his duties as a state agent when he is enforcing state law or state policy. Echols v. Parker, 909 F.2d 795, 801 (5th Cir.1990). He is a county agent when he enforces county policy or law. Id. When the district judges appointed the county auditor, the judges were fulfilling a duty that was imposed on them by the state legislature. See Tex. Local Gov't Code Ann. § 84.002; Weaver, 146 S.W.2d at 174. When the appointment process was amended in 1917 to exclude the involvement of county judges, see Act of March 29, 1917, 35th Leg., R.S., ch. 134, §§ 2, 3, 1917 Tex. Gen. Laws 337, 338, the legislature clearly intended that counties have no voice in the selection of county auditors. This is evidenced by the fact that county judges do share appointment powers with district judges for other positions, such as the appointment of county purchasing agents. See Tex. Local Gov't Code Ann. § 262.011(a) (Vernon Supp.1997). In addition, the State, and not the County, has determined the qualifications a person must have to become a county auditor. Tex. Local Gov't Code Ann. § 84.006.

Because the district judges were acting pursuant to state policy, and not county policy, we hold that they were not agents of the County when they appointed the county auditor. We overrule appellant's tenth point of error.

Because we have held that Refugio County was not Guerrero's employer and that the district judges were not agents of Refugio County when they appointed the county auditor, we overrule appellant's eleventh point of error. Therefore, we hold that the trial court did not err in granting Refugio County's motion for summary judgment.

### III. The District Judges

[15] District Court Judges Lewis, Kilgore, and Kelly moved for summary

judgment on the ground that they were not Guerrero's employers as defined in section 21.002 of the TCHRA. Appellant contends that summary judgment should not have been granted on this ground because section 21.002 specifically states that elected officials, such as district judges, are employers.

Guerrero is correct that the district judges fall within the statutory definition of "employer." However, that alone is not enough. See Deal, 5 F.3d at 118 n. 2. An employment relationship must exist between appellant and the judges. See id. We, therefore, look again to the hybrid economic realities/common law control test for guidance in determining whether such a relationship exists. See id; Benavides, 848 S.W.2d at 193.

As we previously stated, the most important part of the economic realities/common law control test is the right to control an employee's conduct. Deal, 5 F.3d at 119; Fields, 906 F.2d at 1019. Pursuant to state law, district judges must appoint a county auditor when the need for such a function arises. See Tex. Local Gov't Code Ann. § 84.002. The judges also decide whether the county auditor is entitled to assistant auditors and approve the persons appointed to those positions. Tex. Local Gov't Code Ann. § 84.021. In addition, the judges have the authority to remove a county auditor from office when an investigation shows that he has committed official misconduct or is incompetent to discharge the requisite duties. See Tex. Local Gov't Code Ann. § 84.009. Other than these statutorily imposed duties, \*569 the district judges have little control over the office of county auditor.

The duties of the county auditor are prescribed in the Local Government Code. See TEX. LOCAL GOV'T CODE ANN. ch. 111-115 (Vernon 1988 & Supp.1997). The district judges have no authority to determine who or what is audited, how the auditing functions are to be handled, or when the audits are to be conducted. Only when a county auditor fails to properly discharge these requisite duties, may the district judges determine whether to remove him from office. Thus, as a matter of law, district judges have a limited right to control the county auditor by their appointment and removal powers only.

The economic realities component of the test looks at the economic realities of the relationship. In this case, many of the economic realities are controlled by state law. For instance, state law provides that the county auditor's salary must be set by the district judges and paid by the county. See Tex. Local Gov't Code Ann. § 152.031. The auditor's supplies are provided at the county's expense. See Tex. Local Gov't Code Ann. § 84.901. By law, the county auditor adopts and enforces the regulations necessary for a proper accounting system in the county. See Tex. Local Gov't Code Ann. §§ 112.001, 114.002 (Vernon 1988). Once appointed to the position, the county auditor is entitled to serve for two years, unless the office is discontinued or the auditor is removed for cause. See Tex. Local Gov't Code Ann. §§ 84.004, 84.009. Moreover, a review of the auditor's duties, as specified by statute, shows that the auditor's work is not an integral part of the business of the district judges. We, therefore, conclude that the economic realities in this instance do not favor a finding of an employment relationship between the district judges and the county auditor.

Having found that the district judges have limited right to control the county auditor and that the economic realities disfavor an employment relationship, we hold that the district judges were not Guerrero's employers under the TCHRA. Therefore, the trial court did not err in granting the district judges' motions for summary judgment on Guerrero's age and national origin discrimination claims. We overrule Guerrero's second, third, fourth, and seventh points of error as they relate to the district judges.

#### IV. Property Interest

[16] Appellant alleged that the district judges and the county judge, acting under the color of law, deprived him of a property interest in the position of county auditor without due process. All four judges moved for summary

judgment claiming that as a public officer, interest in the position and was not entitled to due process.

[17][18][19][20] Public office is a "right, authority, and duty created and conferred by law which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign function of the government to be exercised by him for the benefit of the public." *Tarrant County v. Ashmore*, 635 S.W.2d 417, 420 (Tex.) (quoting *Kimrough v. Barnett*, 93 Tex. 301, 310, 55 S.W. 120, 122 (1900)), cert. denied, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 606 (1982); *Ruiz v. State*, 540 S.W.2d 809, 812 (Tex.Civ.App.--Corpus Christi 1976, no writ). Public office can be properly described in terms of trust, duty, and public benefit, rather than contract, employment, ownership, or possession. *Ashmore*, 635 S.W.2d at 420. Stated briefly, public office should be viewed not as a right, but a responsibility. *Id.* Every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by any constitutionally prescribed method. *Id.* at 421. "An officer has no vested right in the office held by him, and thus cannot complain of an abolishment of such office or of his removal or suspension, according to law[.]" *Id.* at 422 (quoting *Sutton v. Adams*, 180 Ga. 48, 178 S.E. 365, 375 (1934)).

[21] "The determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the \*570 public largely independent of the control of others." *Aldine Indep. Sch. Dist. v. Standley*, 154 Tex. 547, 280 S.W.2d 578, 583 (1955) (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex.Civ.App.--Galveston 1949, writ ref'd n.r.e.)); *Ruiz*, 540 S.W.2d at 811. Other factors to consider include a fixed term of office, removal provisions, and qualifications for holding the position, all of which are prescribed by statute. See *Standley*, 280 S.W.2d at 581. In addition, an officer will be required by law to take an oath of office and to give a bond. See *id.*

In the instant case, Guerrero held an appointed position with a statutorily prescribed term of two years. See *Tex. Local Gov't Code Ann.* § 84.004. The Refugio County Auditor is appointed at the discretion of the district judges who may abolish the office one year after an appointment, or remove the auditor from office for cause. See *Tex. Local Gov't Code Ann.* §§ 84.002, 84.009. Statutory qualifications exist for the position, and the person appointed must take an oath of office as well as give a bond. See *Tex. Local Gov't Code Ann.* §§ 84.006 84.007 (Vernon 1988).

[22] Most significant, however, are the sovereign functions conferred upon the county auditor. The auditor:

- 1) may adopt and enforce regulations, consistent with the law, necessary for the proper and speedy collecting, checking, and accounting of the revenues, funds, and fees of the county. *Tex. Local Gov't Code Ann.* § 112.001;
- 2) shall maintain an account for each county, district, or state officer authorized or required by law to receive or collect money or other property intended for use by or that belongs to the county. *Tex. Local Gov't Code Ann.* § 112.005 (Vernon 1988);
- 3) must countersign a check or warrant to validate it as a proper and budgeted item of expenditure. *Tex. Local Gov't Code Ann.* § 113.043 (Vernon 1988);
- 4) must examine and approve each claim, bill, and account against the county before they can be allowed or paid, and such approval may not be given unless the claim was incurred as provided by law. *Tex. Local Gov't Code Ann.* §§ 113.064, 113.065 (Vernon 1988);
- 5) shall determine the time and manner for making reports to the auditor, and any person required to make such a report, who intentionally refuses to

Code Ann. §§ 114.002, 114.003 (Vernon 1988); and  
6) shall see to the strict enforcement of the law governing county finances.  
Tex. Local Gov't Code Ann. § 112.006(b) (Vernon 1988).

As county auditor, Guerrero could not delegate these official duties to another, other than to duly appointed assistants. Fullerton, 596 S.W.2d at 578. Nor could he be compelled to delegate these duties. See *id.* (quoting *Navarro County v. Tullos*, 237 S.W. 982, 986 (Tex.Civ.App.--Dallas 1922, writ ref'd n.r.e.)).

[23] When acting as county auditor, Guerrero was not subject to the orders of the commissioners court. See *Op. Tex. Att'y Gen. No. JM-911* (1988) (citing *Op. Tex. Att'y Gen. No. O-5049* (1943)). As county auditor, Guerrero had broad powers to oversee county finances and prescribe systems for the accountability of county funds. See *id.* The independent nature of Guerrero's position was assured by placing the power of appointment and dismissal in the hands of the district judges. See *id.*

[24] For these reasons, we hold that Guerrero was a public official who did not have a property interest in his position beyond the end of the last two-year term to which he was appointed. See *Tarrant County*, 635 S.W.2d at 422 (public official has property interest that may be protected from unlawful interference with possession and conduct of such office during official's incumbency). The record reflects that Guerrero completed his eleventh two-year term before the new auditor assumed office. Lacking a complaint about unlawful interference during his incumbency, Guerrero had no property interest in his position. See *id.* The requirements of procedural due process apply only to the threatened deprivation of property \*571 interests requiring protection of the federal and state constitutions. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Tarrant County*, 635 S.W.2d at 422.

Because we have held that Guerrero did not have a property interest in his position beyond the end of his eleventh two-year term, Guerrero was not entitled to procedural due process when the district judges decided to open the appointment process to other applicants. We hold that the trial court did not err in granting all four judges' motions for summary judgment on this issue. We overrule Guerrero's fifth point of error.

#### V. Political Discrimination

##### A. The County Judge

[25] Relying on 42 U.S.C. § 1983, Guerrero alleged that the county judge, for political reasons, had urged that he not be reappointed, thereby acting under color of law to deprive him of his First and Fourteenth Amendment rights. Guerrero contended that the county judge's letter of July 15, 1993 to the district judges prevented his reappointment. Specifically, appellant complained of the following sentence:

This Commissioners Court wants an auditor that will be impartial, independent, capable and willing to perform the statutory duties and fulfill requirements of the position.

Guerrero claimed that this sentence showed that Judge Stone was biased against him for political reasons. Guerrero's § 1983 claim was made even though, by law, Judge Stone had no role in the appointment process.

[26][27][28][29] To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the following two elements: 1) that he was deprived of a right or interest secured by the Constitution and laws of the United States, and 2) that the deprivation occurred under color of state law. *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir.1995); see *West v. Atkins*, 487 U.S. 42, 46-48, 108 S.Ct. 2250, 2254, 101 L.Ed.2d 40 (1988). A person does not act under color of state law solely by virtue of a relationship to the state; but depending on the person's function. *Rains County I.S.D.*, 66 F.3d

at 1411, see Polk County v. Dodson, 454 U.S. 312, 318-20, 102 S.Ct. 441, 445, 70 L.Ed.2d 509 (1981). Regardless of one's affiliation with the state, "a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Rains County I.S.D., 66 F.3d at 1411 (quoting Polk County, 454 U.S. at 317-18, 102 S.Ct. at 449). If state law has imposed a duty to report, investigate, monitor, or regulate without granting a duty to exercise state-conferred legal control over the underlying persons or events, there is no conduit through which an exercise of state power can be said to have caused the constitutional injury. Id. at 1416.

The county commissioners court, with the county judge as presiding officer, exercises power and jurisdiction over all county business, as prescribed by state law. Tex. Const. art. 5, § 18. Maintaining finance records and examining accounting records of the county are among the functions of the commissioners court. Tex. Local Gov't Code Ann. §§ 112.008, 115.022 (Vernon 1988). In order to fulfill these functions, the commissioners court may authorize an independent audit of the accounts and officials if the audit would best serve the public interest. See Tex. Local Gov't Code Ann. § 115.031 (Vernon 1988). This audit can include the office of the county auditor. Id.

In the instant case, the county judge and commissioners of Refugio County determined at the end of 1991 and again at the end of 1992 that an independent audit of all county officials was necessary. At the time of each audit, the accountants also performed an investigation and evaluation of the county's system of internal accounting control. Neil Snedeker, the certified public accountant who conducted the audits, submitted the results of these studies in the form of management letters. These management letters were presented to the commissioners court, and appellant received a copy. According to the 1991 letter, many county offices, most notably that of the county auditor, were deficient in accounting procedures.

\*572 In July 1993, the county judge sent copies of the management letters to the district judges for their review. In addition, Judge Stone sent his July 15, 1993 letter, expressing concern with Guerrero's accounting practices. Judge Stone noted that the management letters indicated that Guerrero was not performing his statutory duties and not following accepted accounting procedures. Judge Stone pointed out that the 1992 management letter indicated that Guerrero had apparently not attempted to correct the shortcomings noted in the 1991 management letter. Judge Stone then explained his reluctance to address the issue with the county auditor because the position was supposed to be free of all outside influence and because Judge Stone felt corrective measures were better left to the district judges. Judge Stone informed the district judges that the county commissioners court wanted to continue the auditor's position, and asked the district judges to consider opening the position to other applicants when Guerrero's term expired.

In authorizing the audit, the commissioners court was investigating facts concerning county financial procedures, and Judge Stone's letter informed the district judges of that investigation. However, once the letter was written, Judge Stone had no state-conferred legal control over how the district judges addressed the issues raised by the letter. The summary judgment evidence established that, as a matter of law, Judge Stone had no legal control over or duty to be involved in the process of appointing the county auditor. Instead, appointing a county auditor falls within the discretionary duties of the district court judges of that county. As such, those judges could decide who to appoint as auditor, to remove a person from that office, or to eliminate the position entirely, whether this met with the approval of county officials or not. Even if Judge Stone's letter was interpreted as politically motivated, without state-conferred legal control, Judge Stone could not be



liable under § 1983. Thus, Guerrero has failed to establish an element of his cause of action, namely that the judge was acting under color of state law. Accordingly, we hold that the trial court did not err in granting Judge Stone's motion for summary judgment on Guerrero's § 1983 claim. We overrule Guerrero's first and ninth points of error as they relate to Judge Stone.

B. The District Judges

[30] Guerrero also asserted a § 1983 claim for political discrimination against the district judges.

It is well-settled that a motion for summary judgment must expressly state the grounds upon which it is made. *McConnell*, 858 S.W.2d at 339; *Tex.R. Civ. P. 166a(c)*. Summary judgments may not be affirmed or reversed on grounds not expressly set forth in the motions presented to the trial court. *Clear Creek Basin Auth.*, 589 S.W.2d at 677; *Wofford*, 865 S.W.2d at 614. A motion for summary judgment must stand or fall on the grounds expressly presented in the motion, and a court may not rely on briefs or summary judgment evidence in determining whether grounds are expressly presented. *McConnell*, 858 S.W.2d at 339.

After reviewing the record, we find that the district judges did not address Guerrero's § 1983 claim for political discrimination in their motions for summary judgment. We find, however, that the district judges asserted the affirmative defenses of "absolute judicial immunity" and "qualified immunity" in their motions for summary judgment.

[31] Judges enjoy absolute immunity from damage claims arising out of acts performed in the exercise of their judicial functions even if acting in bad faith or with malice. *Garza v. Morales*, 923 S.W.2d 800, 802 (Tex.App.--Corpus Christi 1996, n.w.h.); *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957-58 (Tex.App.--Dallas 1985, no writ); *Morris v. Nowotny*, 323 S.W.2d 301, 304 (Tex.Civ.App.--Austin, writ ref'd n.r.e.), cert. denied, 361 U.S. 889, 80 S.Ct. 164, 4 L.Ed.2d 124 (1959).

However, the U.S. Supreme Court has held that in civil rights cases, absolute judicial immunity applies only when a judge acts in a judicial capacity. *Forrester v. White*, 484 U.S. 219, 228-30, 108 S.Ct. 538, 544-46, 98 L.Ed.2d 555 (1988). In *Forrester*, the \*573 Court held that the termination of a probation officer by a judge was an administrative act, and not a judicial act. *Id.* Because Judges Lewis, Kilgore, and Kelly were not acting in a judicial capacity, we conclude that they cannot assert the affirmative defense of absolute judicial immunity against Guerrero's § 1983 claim for political discrimination.

[32][33][34] Government officers also have a common law immunity from personal liability in performing discretionary duties performed in good faith within the scope of their authority. *Garza v. Smith*, 860 S.W.2d 631, 633 (Tex.App.--Corpus Christi 1993, no writ); *Eakle v. Texas Dep't of Human Serv.*, 815 S.W.2d 869, 875 (Tex.App.--Austin 1991, writ denied); *Russell v. Texas Dep't of Human Resources*, 746 S.W.2d 510, 513 (Tex.App.--Texarkana 1988, writ denied). This immunity is known as qualified, official, quasi-judicial, or good faith immunity. *Garza*, 860 S.W.2d at 633; see *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n. 1 (Tex.1993). Quasi-judicial immunity is an affirmative defense, and a movant for summary judgment has the burden to come forward with evidence to establish each element of the defense. *Garza*, 860 S.W.2d at 634. To prevail, the district judges had to establish: 1) that their positions had quasi-judicial status, 2) that they were acting within their authority, and 3) that they were acting in good faith. *Eakle*, 815 S.W.2d at 875.

[35][36] Even if we were to assume that the district judges proved the first two elements, we conclude that they did not establish the good faith element. The only evidence we find in the record on the issue of good faith is contained in the judges sworn affidavits. Although the affidavits state that

the judges sole concern was the appointment of the best possible person and that age, race, gender, and disability were not considered, the affidavits do not address Guerrero's political discrimination claim. Moreover, the test for good faith is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. Gallia v. Schreiber, 907 S.W.2d 864, 869 (Tex.App.--Houston [1st Dist.] 1995, no writ); see City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex.1994).

[37] To be entitled to summary judgment, a government official must prove that a reasonably prudent official might have believed that the action taken was appropriate. Gallia, 907 S.W.2d at 869; see Chambers, 883 S.W.2d at 656-57. The official does not have to prove that it would have been unreasonable to take a different action; nor must the official prove that all reasonably prudent officials would have acted as he did. Gallia, 907 S.W.2d at 869; see Chambers, 883 S.W.2d at 656-57. The district judges offered no evidence that could lead us to conclude that reasonably prudent judges would believe their actions were appropriate.

Because the district judges did not address Guerrero's § 1983 claim for political discrimination and because they did not establish that they are entitled to immunity, we hold that the trial court erred in granting the district judges' motions for summary judgment against Guerrero's § 1983 claim for political discrimination. See Havens, 793 S.W.2d at 691. We sustain Guerrero's first, sixth, eighth, and ninth points of error as they relate to the district judges.

We reverse the trial court's summary judgments for Judge Lewis, Judge Kilgore, and Judge Kelly against Guerrero's § 1983 claim for political discrimination and remand that cause of action to the trial court for further proceedings. We affirm the trial court's summary judgments for Judge Lewis, Judge Kilgore, and Judge Kelly against the remainder of Guerrero's causes of action. We affirm the trial court's summary judgments for Refugio County and Judge Stone.

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Crider vs. Cox (Anderson County)

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all points of error seven and eight, Appellant complains that the trial court erred in making an affirmative finding of a deadly weapon, since the finding was not authorized by the jury verdict and Appellant was not given fair notice of the State's intent to seek such a finding. In reviewing the verdict, it is apparent that there was no affirmative finding that Appellant used a deadly weapon in the commission of the offense; therefore, we sustain point of error seven. The judgment in cause number 22,203-E from the 124th District Court of Gregg County is reformed to delete the finding of deadly weapon. Because of our holding on point of error seven, it is unnecessary to address Appellant's last point of error. The judgment of the trial court is affirmed, as reformed.



Robert L. CRIDER, Appellant,

v.

Mary COX, Auditor of Anderson  
County, et al, Appellees.

No. 12-95-00281-CV.

Court of Appeals of Texas,  
Tyler.

April 30, 1997.

Rehearing Overruled June 30, 1997.

Attorney who represented judge on misdemeanor charges of attempting to secure dismissal of traffic tickets in cases pending in his court filed petition for writ of mandamus requiring county auditor to audit, approve, issue, and sign county check paying him for his legal services. The Third Judicial District Court of Anderson County, Joe Clayton, J., denied relief, and attorney appealed. The Court of Appeals, Ramey, C.J., held that: (1) auditor's prior approval was requisite to commissioners court's consideration of attorney's bill, and absence of such action by auditor

rendered approval of bill by commissioners court void, and (2) auditor's decision as to her approval of attorney's bill presented complex issues requiring exercise of her discretion and was not ministerial act for which remedy of mandamus was available.

Affirmed.

1. Judgment  $\Leftrightarrow$  525

Court's recitals preceding decretal portions of judgment do not determine rights and interests of parties.

2. Judgment  $\Leftrightarrow$  525

Despite court's stated intention to grant summary judgment motion for defendant, such judgment was not granted where decretal rulings only addressed and denied plaintiff's petition for writ of mandamus.

3. Appeal and Error  $\Leftrightarrow$  758.3(3)

Single point of error asserting various subpoints could be disregarded as multifarious.

4. Mandamus  $\Leftrightarrow$  11

Existence of disputed facts precludes mandamus.

5. Counties  $\Leftrightarrow$  204(2)

County auditor's prior approval was requisite to commissioners court's consideration of attorney's bill, and absence of such action by auditor rendered approval of bill by commissioners court void. V.T.C.A., Local Government Code §§ 112.006, 113.064, 113.065.

6. Counties  $\Leftrightarrow$  204(2)

County auditor is not authorized to delegate to another legal entity or office her responsibility to examine and approve, if appropriate, a claim; auditor must make independent examination of each claim and approve it before commissioners court may consider it. V.T.C.A., Local Government Code §§ 112.006, 113.064, 113.065.

7. Mandamus  $\Leftrightarrow$  101

County auditor's decision as to her approval of attorney's bill for services rendered in representing judge presented complex issues requiring exercise of her discretion and

... ministerial act for which remedy of mandamus was available.

8. Mandamus ⇐1

Mandamus is extraordinary remedy and is available only in limited circumstances: mandamus will issue only to correct clear abuse of discretion when there is no adequate remedy by ordinary appeal.

9. Mandamus ⇐4(1), 72

Rule that mandamus will issue only to correct clear abuse of discretion when there is no adequate remedy by ordinary appeal applies to public officials.

10. Mandamus ⇐71, 72

Mandamus will issue to compel public official to perform "ministerial act," not discretionary act; act is said to be ministerial when law clearly describes duty to be performed by official with sufficient certainty that nothing is left to exercise of discretion.

See publication Words and Phrases for other judicial constructions and definitions.

Robert Crider, Austin, for appellant.

Robert Wayne Gage, Fairfield, for appellees.

Before RAMEY, C.J., and HOLCOMB and HADDEN, JJ.

RAMEY, Chief Justice.

Austin attorney Robert L. Crider ("Crider"), Plaintiff below, appeals from a trial court's denial of his petition for mandamus to require Anderson County Auditor, Mary Cox, and her successor, Melissa Woodard (together "Auditor"), Defendants below, to audit, approve, issue and sign a county check paying him for his legal services in representing Anderson County Judge, John Ballard McDonald ("McDonald").<sup>1</sup> McDonald had previously been indicted on six misdemeanor counts of attempting to secure the dismissal of two persons' traffic tickets: the cases were pending in his court. Crider also

1. This suit is not the more customary mandamus original proceeding in this court but rather is an appeal by the Relator of the denial of a mandamus filed in the district court.

complains that the trial court erroneously denied his Motion for Summary Judgment for mandamus relief. We will affirm the trial court's judgment.

McDonald retained Crider, his uncle, to represent him in the defense of these charges.<sup>2</sup> Upon a trial of the criminal charges against McDonald, the Anderson County Court at Law decided in Crider's client's favor by quashing the indictment, ruling that Sec. 36.04 of the Penal Code was unconstitutionally vague and overbroad and that the indictment did not confer adequate notice for McDonald to prepare his defense.

Crider presented a bill for his legal services to McDonald six months later. The bill was then submitted to the Auditor for her approval. She did not approve it. Without the Auditor's approval, the claim was placed on the September 27, 1994 Commissioners Court agenda whereupon that Court unanimously voted to pay the bill, McDonald abstaining. Cox and Woodard have continued to refuse to approve Crider's bill on the grounds that the charges did not arise out of an act by McDonald performed in his capacity as Anderson County Judge or in which Anderson County had an interest and also because a contract for services between Crider and Anderson County would violate the nepotism statute, TEX. GOV'T CODE ANN. § 573.041 (Vernon 1988). Crider filed this mandamus proceeding on October 20, 1994 in the district court against the Auditor to compel her to audit and approve the bill and issue and sign a county check in payment of his claim. On January 13, 1996, the Commissioners Court voted to rescind the order that had approved payment of Crider's claim.

[1, 2] Counter Motions for Summary Judgment were filed by Crider and the Auditor. After the summary judgment issues were joined, the court by letter apprised the parties of his ruling; he expressed the intention to rule in favor of the Auditor and

2. Anderson County had no District Attorney nor County Attorney; the Anderson County Criminal District Attorney, being a witness to the transactions, could not represent McDonald.

ing, as recited in the Judgment itself, stated:

The Court after examining the pleadings, briefs, and summary judgment evidence determines that Movants, Melissa Woodard and Mary Cox, are entitled to summary judgment and the motion by Robert L. Crider for summary judgment should be denied. (Emphasis added.)

The decretal rulings in the Judgment, however, only declared the following:

IT IS WHEREFORE (sic) ORDERED that Relator, Robert L. Crider's, application for writ of mandamus against Melissa Woodard or Mary Cox, Auditor is denied. All relief requested and not expressly granted is denied.

No specific order is expressed in the Judgment as to the parties' motions for summary judgment, apart from the residual denial provision. The court's recitals preceding the decretal portions of the judgment do not determine the rights and interests of the parties. *Rausheck v. Empire Life Insurance Co. of Amer.*, 507 S.W.2d 237, 239 (Tex.Civ. App.—Texarkana 1974, writ *ref'd n.r.e.*). Despite the court's stated intention to grant the Auditor's summary judgment motion, we conclude that it was not granted. *Id.*<sup>3</sup> Decretal provisions control. 5 R. McDONALD, TEXAS CIVIL PRACTICE § 27.24(a) (rev.1992). Thus, the trial court's apparent intention to grant the Auditor's motion for summary judgment is not borne out by the trial court's judgment. The only rulings presented for our review are the trial court's specific denial of Crider's petition for mandamus and the denial of his summary judgment, there being no assignment that the trial court erred in failing to grant the Auditor's summary judgment.

In the Judgment, the trial court makes the following recitations:

It is the finding of this Court that the approval of the County Auditor of the relator's bill is jurisdictional and that any action taken by the Commissioner's Court without the Auditor's approval makes any ruling by the Commissioner's Court void.

3. The judgment was entitled "Final Summary

All other matters discussed in both motions and briefs become moot with the non-jurisdictional finding.

Relator's remedy is to sue the County for the payment of his bill.

Subsequently, the trial court filed the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. Mary Cox, Auditor of Anderson County, Texas did not approve the claim of Relator for Attorney's fees incurred in behalf of John Ballarú McDonald prior to the claim being submitted to the Anderson County Court or at any other time, and further Mary Cox and her successor in office, Melissa Woodard, at no time approved said claim.

2. There are numerous, complicated, unresolved issues concerning the legality of the payment of the claim as submitted by Relator.

#### CONCLUSION OF LAW

1. The approval of Relator's claim by the Commissioner's Court, since it was not first approved by the County Auditor prior to submission is void.

2. The acts of Commissioner's Court in rescinding the approval of Relator's claim was valid.

3. The approval or disapproval of Relator's claim was a ministerial rather than a discretionary act on behalf of the Anderson County Auditor and her successor in office. The failure of the Anderson County Auditor and her successor in office to approve Relator's claim was not an abuse of discretion.

4. Relator has an adequate remedy at law in that he may bring suit against Anderson County on his claim.

{3.4} Crider assigns but one point of error. He generally asserts that the trial court erred in denying the mandamus and in failing to grant his motion for summary judgment. As subpoints, Crider charges that the court's various fact findings and conclusions of law were erroneous. This point of error is

Judgment"

mandamus and may be disregarded. *Clancy v. Zale Corp.*, 705 S.W.2d 820, 823-24 (Tex.App.Dallas 1986, writ ref'd n.r.e.). We will, however, construe the point as complaining about the lower court's denial of the mandamus and Crider's motion for summary judgment. His exception to the court's findings and conclusions is noted, but there is no complaint that the evidence is insufficient to support the findings. We do observe that the existence of disputed facts precludes mandamus. *Dikeman v. Snell*, 490 S.W.2d 183, 186-87 (Tex.1973).

[5] The expressed rationale for the trial court's ruling is contained in the court's letter to counsel advising them of his decision, the Judgment, and the Findings of Fact and Conclusions of Law: approval of Crider's bill by the Auditor before the Commissioners Court vote considered the bill was a jurisdictional requisite; thus, the Commissioners Court's approval of the claim was void.

Several statutes are relevant. A claim, bill or account against the county may not be paid by the county until it has been examined and approved by the Auditor. TEX.LOC.GOV'T CODE ANN. § 113.064(a) (Vernon 1988). The Auditor must stamp her approval upon the bill. TEX.LOC.GOV'T CODE ANN. § 113.064(b) (Vernon 1988). Responsibility is imposed upon the county Auditor to strictly enforce the law governing county finances. TEX.LOC.GOV'T CODE ANN. § 112.006 (Vernon 1988). A claim against the county may not be approved by the Auditor unless it was incurred in accordance with the law. TEX.LOC.GOV'T CODE ANN. § 113.065 (Vernon 1988).

It is undisputed that the statutorily required approval of the bill was never given by the Auditor. The Auditor's approval is a condition precedent to the Commissioners Court's consideration of the bill. *Smith v. McCoy*, 533 S.W.2d 457, 459 (Tex.Civ.App.—Dallas 1976, writ dismissed). One of the functions of the office of County Auditor is to operate as a part of a delicate system of checks and balances to protect county funds. *Id.* Both the Auditor (Section 113.064(a)) and the Commissioners Court (Section 115.021) are required separately to examine and make a decision as to whether to approve each claim against county funds. *Id.* The legisla-

tive scheme of control of county funds requires specific approval of the claim by the Auditor before consideration by the Commissioners Court. *Id.* Likewise, the Auditor may not direct the expenditure of county funds without the County Commissioner's order. *Id.* The necessity of the Auditor's approval of the claim is acknowledged by Crider by his filing this mandamus action against the Auditor.

[6] Crider argues that when the Auditor was initially presented with the bill in September 1994, she requested that the Commissioners Court make the decision on the approval of the claim. This fact is disputed. A County Auditor, however, is not authorized to delegate to another legal entity or office her responsibility to examine and approve, if appropriate, a claim. *Smith v. Flock*, 728 S.W.2d 784, 790 (Tex.Cr.App.1987). She must make an independent examination of each claim and approve it before the Commissioners Court may consider it. *Id.* For the same reason, we disagree with Crider's contention that the Auditor is bound by a 1990 resolution passed by the Anderson County Commissioners Court approving reimbursement for future legal services without the Auditor's approval. *Id.* We conclude that the trial court did not err in ruling that the Auditor's prior approval was requisite to the Commissioners Court's consideration of Crider's bill and the absence of such action by the Auditor renders the September 1994 approval of the bill by the Commissioners Court void.

[7-10] An additional obstacle to Crider's relief here is that the remedy of a mandamus of the Auditor to approve the bill is not available. Mandamus is an extraordinary remedy: it is available only in limited circumstances. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex.1994). It will issue only to correct a clear abuse of discretion when there is no adequate remedy by ordinary appeal. *Id.*; *Walker v. Parker*, 827 S.W.2d 833, 839 (Tex.1992). This rule is applicable to public officials. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex.1991). Mandamus will issue to compel a public official to perform a ministerial act.



not a ministerial act. *Id.* An act is said to be ministerial when the law clearly describes the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. *Id.* This narrow approach to mandamus relief is required to preserve "orderly trial proceedings" and to avoid "constant interruption of the trial process by appellate courts." *Canadian Helicopters*, 876 S.W.2d at 305. A Relator's demonstration of a clear abuse of discretion as well as the inadequacy of a remedy by appeal is a heavy burden. *Id.*

As stated, the legislature provided a system of checks and balances for the control of county funds. *McCoy*, 533 S.W.2d at 459. The statutory scheme assigns two independent county offices to examine the lawfulness of claims against the county; the intended protection would be circumvented if the Auditor's responsibility is merely ministerial. The legislative intent is manifest that the Auditor should exercise her discretion in examining and approving the claims submitted.

Crider contends that the September 1994 order of the Commissioners Court approving the bill established the validity of his claim. He asserts that the Auditor herself had requested that the Commissioners Court make the determination whether the claim should be paid and that their affirmative vote decided the fact question that Anderson County's interest was involved in the performance of the services provided by Crider. He argues that because of the September 1994 Commissioners Court vote, the approval by the Auditor was merely ministerial, not discretionary, and thus was appropriate for mandamus relief.

In deciding whether to approve Crider's bill, the Auditor was required to resolve several daunting questions: (1) Was McDonald's conduct leading to the criminal charges un-

dertaken in the performance of McDonald's public duties as County Judge? (2) Would approval of the claim violate the state nepotism statute inasmuch as Crider is a relative of the County Judge McDonald within the third degree of consanguinity? TEX.GOV'T CODE ANN. § 573.041 (Vernon 1994). (3) Is the County obligated to pay for legal services when there was no agreement or contact between Anderson County and the claimant before the services were rendered? The trial court also found that there were numerous complicated, unresolved issues concerning the legality of the payment of the claim. At issue is not a correct resolution of these questions by the Auditor but whether she was required to wrestle with them; thus her decision to approve or not approve Crider's claim was not a simple ministerial act.

To aid her in making the determination as to whether to approve Crider's bill, the Auditor sought and received a legal opinion from the Anderson County Criminal District Attorney's office, as per TEX.GOV'T CODE ANN. § 41.007 (Vernon 1988), which, not surprisingly, concluded that county funds may not be expended to pay McDonald's legal fees here. The Auditor likewise sought an attorney general opinion on the issue, but the attorney general declined to respond to the request because the matter was in litigation.<sup>5</sup> We agree with the finding of the trial court that the Auditor's decision as to her approval of Crider's bill presented complex issues requiring the exercise of her discretion and was not a ministerial act. The Auditor did not act in an arbitrary manner by not approving Crider's bill. Writ of mandamus is not available to Crider here. We need not address the question of appeal as an adequate remedy at law for the Relator.

4. No proof or other rationale was offered by Crider to explain Anderson County's interest in the dismissal of the traffic tickets. No explanation of the circumstances of McDonald's various requests for dismissal of the charges was ever presented. Crider's contention is that the Commissioners Court's September 1994 approval of the bill established that McDonald was performing his public duty as County Judge in seeking the dismissals. Assuming that to be the case, there was no explanation by McDonald to the

Auditor of a basis of the county's interest in dismissing the traffic charges to justify her approval of the bill before the September vote was taken, which approval was statutorily required for the County Commissioners' vote to be effective.

5. Crider provided the Auditor with earlier attorney general opinions submitted in response to others' requests.

... single point of error. Crider also generally asserts that the trial court erred in denying his motion for summary judgment for the same mandamus relief. The presumptions and burden of proof imposed upon a movant for summary judgment are much more stringent than for a conventional trial. *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 287 (Tex.App.—Dallas 1989, writ denied), cert. denied, 498 U.S. 1087, 111 S.Ct. 963, 112 L.Ed.2d 1049 (1991); see *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). Here, the reviewing court is limited to the proof presented as summary judgment evidence. The movant, Crider, offered only the notice of the September 27, 1944 meeting, the minutes from that meeting, Crider's affidavit reciting that he had been employed to defend the complaint against McDonald, the submission of his bill for services and its nonpayment; he also included a copy of his demand letter via Fax mail and regular mail to the successor Auditor, Woodard. Thus, Crider's summary judgment evidence is less complete than the proof considered in the conventional trial discussed above.<sup>6</sup> In view of our above holding relating to Crider's Petition for Mandamus and the paucity of Crider's summary judgment evidence, together with the elevated burden of proof in the summary judgment process, we hold that the trial court's denial of the summary judgment was not erroneous. Crider's only point of error is overruled.

The judgment of the trial court is affirmed.



6. The Auditor's summary judgment evidence was more comprehensive and included the affidavits of Assistant Criminal District Attorney Bill Curley who described McDonald's efforts to secure dismissal of the traffic tickets. Mary Cox and

The OHIO CASUALTY GROUP, West American Insurance Company, Dennis Ghram and Jeff McInturf, Appellants,

v.

Joe Dan RISINGER, individually and as next friend for Regina Risinger, Appellee.

No. 12-95-0027-CV.

Court of Appeals of Texas,  
Tyler.

April 30, 1997.

Rehearing Overruled June 4, 1997.

Victim of one-car accident brought action against garage liability insurer to recover default judgment against insured. The 4th Judicial District Court, Rusk County, Donald R. Ross, J., entered judgment in favor of victim. Insurer appealed. The Court of Appeals, Holcomb, J., held that evidence established insurer's actual knowledge of suit against insured despite insured's failure to provide notice.

Affirmed in part, reversed in part, and rendered.

#### 1. Insurance $\text{\textcircled{C}}539.8$

If liability insurer is prejudiced by insured's failure to comply with requirement to immediately forward every demand, notice, summons, or other process of claim or suit brought against insured, recovery against insurer under policy is precluded.

#### 2. Insurance $\text{\textcircled{C}}829(1, 2)$

In suit against insurance company on liability policy, insured's victim was required to plead and prove that valid policy was in effect at time of harm and that victim was judgment creditor of policy as third-party beneficiary.

Melissa Woodard, the County Auditor, Lena Smith, the County Clerk and the opinion from the Anderson County Criminal District Attorney's office to the Auditor.

Bettye Warnock vs. Pecos County, Texas

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Summary Calendar

Bettye WARNOCK, Plaintiff-Appellant.

v.

PECOS COUNTY, TEXAS, et al., Defendants.

Alex Gonzalez, Individually and in his Official Capacity as  
Pecos County District Judge; Brock Jones, Individually and in his Official Capacity as Pecos County District Judge,  
Defendants-Appellees.

July 3, 1997.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

I.

Bettye Warnock, formerly auditor for Pecos County, brought this § 1983 suit to recover damages and obtain prospective relief from Pecos County and its two state district judges, Alex Gonzalez and Brock Jones. She alleges that these judges violated her First Amendment rights when they chose not to appoint her to a second two-year term as county auditor after she brought to light violations of laws and administrative regulations of the State of Texas and of the policies and ordinances of Pecos County, Texas." She sued the judges in both their official and individual capacities.

In an unsuccessful suit filed in Texas state court in May of 1993, she alleged that the county violated the Texas Whistleblower Act, Tex.Rev.Civ. Stat. Ann. art. 6252-16a (West 1993) (currently codified as amended at Tex. Local Gov't Code § 554.001 *et seq.* (West 1994 & Supp.1997)). Although this statute allows a state prosecutor to recover civil penalties from individual officials, it does not permit private suits against officials acting in their individual capacities. Tex.Rev.Civ. Stat. Ann. art. 6252-16a § 5(a); Tex. Local Gov't Code § 554.008. The county won a summary judgment in the trial court, and the Texas Court of Appeals affirmed. Based on the whistleblowing suit, the district court held that Warnock was precluded from recovering against the county. The district court dismissed the county with prejudice, and Warnock did not appeal.

Warnock did, however, appeal the district court's further conclusion that the Eleventh Amendment and qualified immunity principles barred her claims against the two judges. We vacated the judges' dismissals. *Warnock v. Pecos County*, 88 F.3d 341 (5th Cir.1996). We instructed the district court on remand that the Eleventh Amendment does not protect state officials acting in their official capacities from claims for reinstatement and attorneys' fees when they violate federal law. We also asked the court to reconsider the issue of qualified immunity in light of our opinion in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir.1995) (en banc).

On remand, the district court once again dismissed the judges in their official capacities, and Warnock has not appealed those dismissals. With respect to the claims against the judges individually, Warnock followed the Rule 7(a) procedure that we outlined in *Schultea*. The judges filed a response in which they argued that they were entitled to qualified immunity. Although the county noted that it had already been dismissed, it filed a similar pleading urging the court to dismiss the judges on the grounds of qualified immunity.

Instead of deciding the immunity issue, the district court granted summary judgment on the theory that Warnock's state suit against the county precludes the present suit against the judges individually.

II.

cannot sanction this application of the doctrine of *res judicata*. First, under Fed.R.Civ.P. 8(c), *res judicata* is an affirmative defense that courts generally should not raise *sua sponte*. *Carbonell v. Louisiana Dept. of Health & Human Resources*, 772 F.2d 189 (5th Cir.1985). We have recognized two exceptions, but neither applies here. The prior suit was not brought in the

Gonzalez and Jones in her state action. Nor was there privity between the county and the judges in their individual capacities. See *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.) (holding that a prior suit against a municipality does not bar a subsequent suit against officials individually because official-capacity and personal-capacity suits involve different legal theories and defenses), *cert. denied*, 488 U.S. 856, 109 S.Ct. 147, 102 L.Ed.2d 118 (1988); *Headley v. Bacon*, 828 F.2d 1272, 1277-79 (8th Cir.1987) (distinguishing privity between principal and agent from privity between a governmental entity and officials sued in their individual capacities). See also *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990) ("Res judicata does not apply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity." (citing *Clark v. Amoco Production Co.*, 794 F.2d 967, 973 (5th Cir.1986))); *Restatement (Second) of Judgments* § 36(2) (1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.").

### III.

Judges Gonzalez and Jones invite us to affirm the dismissal by reaching the issue of qualified immunity. Because the immunity question would almost certainly arise before the district court, and because we have access to all the relevant pleadings, we will decide it. We conclude, however, that Warnock has defeated the judges' immunity from discovery and thus that the judges' motion to dismiss should be denied. We remand for further proceedings consistent with this opinion.

#### A.

Warnock's Rule 7(a) reply lists dozens of violations of law or fiscal improprieties committed by county officials or compromising county funds. For each violation, Warnock indicates the year in which the incident occurred; in many cases, she indicates the month of the year. She also provides the names and offices of the state and county officials to whom she reported the violations. We have no trouble concluding that Warnock's Rule 7(a) reply is sufficiently detailed to satisfy the heightened pleading requirements that we reinforced in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir.1995) (en banc).

A sample of Warnock's allegations shows that her claim is sufficiently particularized. She asserts that she reported to Judge Gonzalez's chambers in June of 1991 that his wife had improperly used county phone services. The next month, she told Judge Jones that the district attorney was holding forfeiture funds unlawfully. In January of 1992, she brought to both judges' attention alleged violations of Texas bidding statutes. She told the county treasurer on several occasions about matters such as the unauthorized release of pledged securities, incorrect amounts paid to the state, illegal early releases of paychecks, and violations of laws governing rapid deposits. She notified county officials of violations of state statutes on travel reimbursements. She told the commissioners court that its use of tax money for a prison water tank was improper. The list goes on. This detailed Rule 7(a) reply "alleg[es] with particularity all material facts on which [Warnock] contends [she] will establish [her] right to recovery, which ... include[s] detailed facts supporting the contention that the plea of immunity cannot be sustained." *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir.1985). See also *Schultea*, 47 F.3d at 1434 (embracing "the practical core" of *Elliott*).

The judges contend that most of Warnock's detailed allegations are irrelevant because only about a dozen involve reports to the judges themselves. Given the context, however, we will not require Warnock to plead the details of how Judges Gonzalez and Jones learned about each report to various state and county officials. The judges may not have known about every last report, but we can suppose that their duty to decide whether to re-appoint Warnock to the auditor's office led them to inquire into her communications with entities such as the county treasurer's office, the county attorney's office, and the commissioners court. See *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991) (Kennedy, J., concurring) (asserting that the requirement of "specific, nonconclusory factual allegations" does not prevent a plaintiff from relying on circumstantial evidence).

#### B.

In order to survive the judges' motion to dismiss, Warnock's specific allegations must portray an objectively unreasonable violation of clearly established First Amendment law. *Siegert*, 500 U.S. at 231, 111 S.Ct. at 1793; *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2680, 129 L.Ed.2d 814 (1994). We conclude that, as described in Warnock's pleadings, the judges' decision not to re-appoint Warnock violated the First Amendment. We further conclude that the relevant First Amendment law was clearly established when the judges made their decision in 1993 and that firing a Texas county auditor for reporting violations of the law is objectively unreasonable.<sup>(1)</sup>

#### 1.

Because Warnock is a public employee, her allegations must survive a three-part test in order to state a violation of the First Amendment. First, the relevant speech must involve a matter of public concern. Second, her interest in commenting on the matter of public concern must outweigh her employer's interest in promoting efficiency. And third, her protected speech must have motivated her public employer's decision to fire her. *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983) (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1050 (5th Cir.1996); *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir.1990).

and abuses within the county government. Warnock was attempting to improve the quality of government. Her allegations hardly suggest a merely personal concern for her working conditions, job security, and the like. The content, context, and form of Warnock's statements, see *Thompson*, 901 F.2d at 461-67, indicate that they addressed issues necessarily of concern to the public

- The defendants argue that Warnock was speaking as an employee rather than as a citizen and thus that her public employer could terminate her without regard to whether her speech involved matters of public concern. In essence, they contend that they could fire Warnock because it was her job to serve the public by investigating governmental waste and abuse. Citing *Connick*, we have announced that "our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee." *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). But the plaintiff's statements in *Terrell* were tied to a personal employment dispute. *Terrell* does not stand for the proposition that an employee hired to make disinterested criticisms of her employer loses the protection that the First Amendment grants to those who speak out in the public interest. See *Wallace*, 80 F.3d at 1051 (indicating that "speech made in the role as employee" can be of public concern when it "involv[es] the report of corruption or wrongdoing to higher authorities"); *Wilson v. University of Texas Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992) ("[T]he rule proposed by the defendants could ironically facilitate the suppression of speech through a requirement that the speech be made."), cert. denied, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993).

In weighing the value of Warnock's speech against the county's interest in efficiency, we generally focus on three factors: "(1) whether the speech was likely to generate controversy and disruption; (2) whether the speech impeded the general operation of the department; and (3) whether the speech affected the working relationships necessary to the proper functioning of ... County administration." *Davis*, 40 F.3d at 783. These factors help us determine when a worker's interest in protected speech fails to match up to the public employer's interest in having the employee contribute to the smooth operation of the workplace.

Warnock presents an unusual case because the Texas legislature has assigned auditors the task of disrupting the workplace when its smooth operation conflicts with legal requirements or compromises the public's interest in fiscal responsibility. In other words, Texas gives county auditors responsibility for guarding the public purse and using the authority of the auditor's office to ensure that local governments comply with the law. Under Texas Local Government Code § 112.006(b), for example, "[t]he county auditor shall see to the strict enforcement of the law governing county finances." This involves "general oversight of the books and records of a county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county." Tex. Local Gov't Code § 112.006(a) (West 1988). Texas law requires the approval of the county auditor before a county pays any claim, bill, or account. *Id.* § 113.064(a). To make auditors' examinations effective, the legislature has given county auditors access to county records and accounts. *Id.* §§ 115.001-115.021; *id.* § 115.0035 (Supp. 1997). Because the auditor is supposed to patrol county business and check any tendency toward corruption or inefficiency, the auditor's duties are discretionary rather than ministerial. *Smith v. McCoy*, 533 S.W.2d 457, 459

- (Tex. Civ. App.--Dallas 1976, writ dismissed).

In the bulk of First Amendment cases brought by public employees, the governmental employer has a legitimate interest in terminating employees whose criticisms intrude on the workplace harmony that tends to facilitate the efficient operation of government functions. In this case, however, the statutes of the State of Texas articulate an interest in stirring up controversy when county auditors discover misappropriations of county funds. Although Warnock's position was not merely ministerial, she was not a "policymaker" hired to implement the agenda of the county or the judges. As the statutory scheme shows, Warnock was to use her discretion to scrutinize county expenditures, not to enable county officials to spend money as they saw fit. The job of county auditor, then, is not within "that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Gonzalez v. Benavides*, 712 F.2d 142, 150 (5th Cir. 1983).

At this stage, of course, we are not in a position to determine whether any misappropriations or other violations have taken place. But if Warnock's allegations are true, and we say nothing about that, Judges Gonzalez and Jones may not rely on the county's interest in an efficient workplace. When a public employer grants an employee the task of serving as ombudsman within a particular field, it may not fire that employee for accurate and thorough criticisms of the relevant governmental practices.

Finally, Warnock must show that her protected speech caused Judges Gonzalez and Jones to decide not to re-appoint her. As we have noted, the allegations, if believed, could support an inference that the judges knew about the bulk of Warnock's reports. We also conclude that evidence supporting these allegations could sustain Warnock's burden of demonstrating that her effort to air the county's fiscal problems was "a substantial or motivating factor" in the judges' decision. *Harrington v. Harris*, 108 F.3d 598, 603 (5th Cir. 1997) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)). At this stage, it is difficult to know whether Warnock had extensive auditing authority over Judges Gonzalez and Jones and their court staff. On remand, resolution of the causation issue may turn on whether the district judges had reason to prefer a less inquisitive auditor. We decide only that Warnock has raised an inference that the judges preferred a less aggressive advocate for county fiscal responsibility.

An inference is just that. We do not know what discovery may bring. We say only that Warnock's pleadings state a First Amendment violation

liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). See also *Anderson v. Creighton*, 483 U.S. 635, 638-41, 107 S.Ct. 3034, 3038-40, 97 L.Ed.2d 523 (1987). The law in force at the time of the violation must outline the contours of the rights allegedly violated, or else qualified immunity would give public officials little protection. See *Anderson*, 483 U.S. at 638-40, 107 S.Ct. at 3038-39. But "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640, 107 S.Ct. at 3039.

Warnock's term ended on March 5, 1993.<sup>2</sup> Case law prior to that date contained many discussions of what sort of speech implicates public concerns. Most importantly, the judges had the advantage of our opinion in *Wilson v. University of Texas Health Center*, 973 F.2d 1263, 1268-70 (5th Cir.1992), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993), in which we explained that a public employee can make a single statement both as an employee and as a citizen. Like the plaintiff in *Wilson*, a police officer who reported sexual abuse to her superiors, Warnock "had a stake as an individual citizen in having [fiscal irresponsibility] stopped, regardless of whether her reports also coincided with her job responsibilities." *Id.* at 1270. Furthermore, at the time of the judges' decision we had already declared that public officials must "engage in *McBee-Pickering-Connick* balancing before taking disciplinary action." *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir.1992). In light of the purposes of Warnock's office, we conclude that First Amendment law at the beginning of March of 1993 clearly established that county officials may not terminate a county auditor for diligently monitoring county finances and speaking out about genuine fiscal problems.

Clearly established law will not defeat qualified immunity if "an objectively reasonable view of the facts" might lead an official not to realize that he was breaking the law. *Matherne v. Wilson*, 851 F.2d 752, 756 (5th Cir.1988). But our consideration of the judges' motion to dismiss does not present circumstances that suggest a misunderstanding of the facts. According to Warnock's particularized allegations, Judges Gonzalez and Jones had ample information about her surveillance of public funds and based their decision on what they knew about her aggressive enforcement efforts. With discovery, the able district judge will be able to take another look at the defense of qualified immunity and decide if the case should proceed to trial.

#### IV.

The dismissals of Judges Gonzalez and Jones in their individual capacities based on *res judicata* are REVERSED. We instruct the district court to deny the judges' motion to dismiss on grounds of qualified immunity and REMAND the case for further proceedings.

REVERSED and REMANDED with instructions.

<sup>1</sup> For our purposes, there is no difference between firing and declining to re-appoint. See *Branti v. Finkel*, 445 U.S. 507, 512 n. 6, 100 S.Ct. 1287, 1291 n. 6, 63 L.Ed.2d 574 (1980) ("[T]he lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs."); *Elrod v. Burns*, 427 U.S. 347, 359 n. 13, 96 S.Ct. 2673, 2683, 49 L.Ed.2d 547 (1976) (plurality opinion) (rejecting the notion that employees who accept partisan appointments have waived their right to bring a First Amendment suit when their political patrons lose power and a newly elected regime fires them based solely on party affiliation); *Brady v. Fort Bend County*, 58 F.3d 173, 175 (5th Cir.1995) ("Both 'firing' and 'failing to hire' are 'triggering personnel decision[s]';"), *reh'g en banc granted* (5th Cir. Aug. 25, 1995) and *dismissed for lack of jurisdiction* (5th Cir. Nov. 17, 1995); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1015 (5th Cir.1984) (en banc) ("[T]he fact that the deputies were terminated by a 'failure to rehire' rather than a 'dismissal' is irrelevant to the question of whether they were impermissibly terminated for exercising First Amendment rights." (footnote omitted) (citing *Branti*)).

<sup>2</sup> At this stage in the proceedings, it is difficult to know when the judges made the decision that Warnock alleges violated the First Amendment. For the purposes of the motion to dismiss, we assume that March 5, 1993, is the relevant date. This assumption does not bar further factual or legal arguments about when the judges terminated Warnock.



## Appendix B

### Sample Orders, Oaths, and Letters

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**SAMPLE FORM**

THE STATE OF TEXAS  
COUNTY OF \_\_\_\_\_

BE IT REMEMBERED that *(Auditor's Name)* was appointed and elected for a term of two years as Auditor of *(County Name)* county, Texas, beginning *(Term beginning date)*, by an Order of the Board of District Judges having jurisdiction in *(County Name)* County, recorded in volume *(Volume #)*, Page *(Page #)* of the Special Minutes of the District Courts,

BE IT FURTHER REMEMBERED that Section 84.005(b) of the Texas Local Government Code provides that the term of office of the county Auditor begins on *(Term beginning date)*,

BE IT FURTHER REMEMBERED that on *(Judge's Board Meeting Date)* pursuant to notice, the Board of District Judges having jurisdiction in *(County Name)* county assembled at a meeting for the purpose of appointing a County Auditor for *(County Name)* County for the term beginning *(Term beginning date)* and ending *(Term ending date)*.

IT IS HEREBY ORDERED that *(Auditor's Name)* be, and is hereby, appointed and elected as *(County Name)* County Auditor for this period.

IT IS FURTHER ORDERED that the Clerk of the District Courts record this Order and the same shall be spread upon the special Minutes of the District Courts; and that a certified copy thereof be provided to Commissioners Court of *(County Name)* County, Texas, for recording in its Minutes, and to the County Administrative Judge for such further orders as are required by law.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable *(Administrative Judge's Name)*  
*(County Name)* County Administrative Judge

ACKNOWLEDGMENT OF SURETY  
(Corporate Officer)

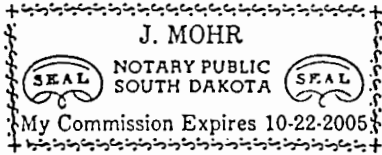
STATE OF SOUTH DAKOTA

County of .

} ss

Before me, a Notary Public, in and for said County and State on this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_ personally appeared \_\_\_\_\_ to me known to be the identical person who subscribed the name of WESTERN SURETY COMPANY, Surety, to the foregoing instrument as the aforesaid officer and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.



J. Mohr  
Notary Public

Western Surety Company

OFFICIAL  
BOND AND OATH

On Behalf of

Principal

Official Title

\_\_\_\_\_, Texas

Filed the \_\_\_\_\_ day of \_\_\_\_\_,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

Clerk

County Court \_\_\_\_\_ County, Texas

# Western Surety Company

## OFFICIAL BOND AND OATH

THE STATE OF TEXAS }  
County of \_\_\_\_\_ } ss

KNOW ALL MEN BY THESE PRESENTS: BOND No. 68847962

That we, \_\_\_\_\_, as Principal, and WESTERN SURETY COMPANY, a corporation duly licensed to do business in the State of Texas, as Surety, are held and bound unto' District Judge(s), his successors in office, in the sum of Five Thousand And 00/100 ---- DOLLARS (\$ 5,000.00 ), for the payment of which we hereby bind ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the above bounden Principal was on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, duly \_\_\_\_\_ to the office of Auditor in and for<sup>3</sup> \_\_\_\_\_ (Elected-Appointed) County, State of Texas, for a term of two year s commencing on the \_\_\_\_\_ day of \_\_\_\_\_

NOW THEREFORE, if the said Principal shall well and faithfully perform and discharge all the duties required of him by law as the aforesaid officer, and shall faithfully perform the duties of county auditor.

then this obligation to be void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, that regardless of the number of years this bond may remain in force and the number of claims which may be made against this bond, the liability of the Surety shall not be cumulative and the aggregate liability of the Surety for any and all claims, suits, or actions under this bond shall not exceed the amount stated above. Any revision of the bond amount shall not be cumulative.

PROVIDED, FURTHER, that this bond may be cancelled by the Surety by sending written notice to the party to whom this bond is payable stating that, not less than thirty (30) days thereafter, the Surety's liability hereunder shall terminate as to subsequent acts of the Principal.

Countersigned \_\_\_\_\_ By \_\_\_\_\_ Resident Agent  
Principal  
WESTERN SURETY COMPANY  
By Stephen T. Pate Stephen T. Pate, President

### ACKNOWLEDGMENT OF PRINCIPAL

THE STATE OF TEXAS }  
County of \_\_\_\_\_ } ss

Before me, \_\_\_\_\_ on this day, personally appeared \_\_\_\_\_, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_.

SEAL \_\_\_\_\_ County, Texas

Form 882A - 3-2000

~~C-6~~

10/01/01

Execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm) that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected; and I furthermore solemnly swear (or affirm) that I will not be, directly or indirectly, interested in any contract with or claim against the County, except such contracts or claims as are expressly authorized by law and except such warrants as may issue to me as fees of office. So help me God.

Signed \_\_\_\_\_

Sworn to and subscribed before me at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_.

SEAL \_\_\_\_\_ County, Texas

OATH OF OFFICE (General)

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm) that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God.

Signed \_\_\_\_\_

Sworn to and subscribed before me at \_\_\_\_\_, Texas, this \_\_\_\_\_ day of \_\_\_\_\_.

SEAL \_\_\_\_\_ County, Texas

THE STATE OF TEXAS } ss  
County of \_\_\_\_\_

The foregoing bond of \_\_\_\_\_ as \_\_\_\_\_ in and for \_\_\_\_\_ County and State of Texas, this day approved in open Commissioner's Court.

ATTEST: \_\_\_\_\_ Date \_\_\_\_\_  
\_\_\_\_\_ Clerk \_\_\_\_\_ County Judge,  
County Court \_\_\_\_\_ County \_\_\_\_\_ County, Texas

THE STATE OF TEXAS } ss  
County of \_\_\_\_\_

I, \_\_\_\_\_, County Clerk, in and for said County, do hereby certify that the foregoing Bond dated the \_\_\_\_\_ day of \_\_\_\_\_, with its certificates of authentication, was filed for record in my office the \_\_\_\_\_ day of \_\_\_\_\_; \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., and duly recorded the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., in the Records of Official Bonds of said County in Volume \_\_\_\_\_, on page \_\_\_\_\_.

WITNESS my hand and the seal of the County Court of said County, at office in \_\_\_\_\_, Texas, the day and year last above written.

\_\_\_\_\_ Clerk  
By \_\_\_\_\_ Deputy County Court \_\_\_\_\_ County



# The State of Texas

## Statement of Appointed Officer

(Please type or print legibly)

I, \_\_\_\_\_, do solemnly swear (or affirm), that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment, as a reward to secure my appointment or confirmation thereof, so help me God.

\_\_\_\_\_  
Affiant's Signature

\_\_\_\_\_  
Office to Which Appointed

\_\_\_\_\_  
City and/or County

SWORN TO and subscribed before me by affiant on this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Signature of Person Administering Oath

(Seal)

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

See Reverse Side  
for Instructions  
Revised August 1992

10/01/01



# The State of Texas

## OATH OF OFFICE

I, \_\_\_\_\_, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

SWORN TO and Subscribed before me by \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
Signature of Person Administering Oath

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

(2-1)

~~C-10~~

10/01/01

# WRITTEN OATH OF COUNTY AUDITOR

I, *(AUDITOR'S NAME)*, do solemnly swear that I have previously held the positions of public or private trust that are listed for the length of time indicated:

| Position | Public/Private | Length of Time<br>Position Held |
|----------|----------------|---------------------------------|
|          |                |                                 |
|          |                |                                 |

I do further swear that I have the qualifications for the office of County Auditor required by Chapter 84 of the Local Government Code; I have in the past and shall continue to comply with the Continuing Education requirements set forth in Chapter 84 of the Local Government Code; and that I am not personally interested in a contract with *(County Name)* County, Texas.

---

*(AUDITOR'S NAME)*

SWORN TO and subscribed before me by *(AUDITOR'S NAME)* on this the *(day)* of *(month)*, *(year)*.

---

(Signature of Person Administering Oath)

---

(Printed Name of Person Administering Oath)

NOTARY PUBLIC

Title