

MEMO



TO: HIDALGO COUNTY COMMISSIONERS COURT
FROM: RENE GUERRA, HIDALGO COUNTY CRIMINAL DISTRICT ATTORNEY
SUBJECT: BOND FORFEITURE COMMISSIONS
DATE: January 17, 2013

On or about March 14, 2012, the Hidalgo County Auditor advised my office that the total amount of Bond Forfeiture Commissions collected on behalf of the District Attorney was \$216,415.09, as of December 31, 2011. *(See attached correspondence)* These monies were collected pursuant to Section 41.005 of the Texas Government Code and placed in the County Treasury in the general fund and reserved on behalf of the District Attorney. The total commissions collected on behalf of the District Attorney represent revenues from both the District and County Clerk Offices dating back to 2000.

On or about October 18, 2012, the Hidalgo County Auditor advised both the Hidalgo County District Clerk and the Hidalgo County Clerk ("Clerks") that the commissions should not have been collected on behalf of the District Attorney. The Auditor further instructed the Clerks to deactivate the commission fee code through the IT department so that the entirety of the commissions collected could be credited to the Road and Bridge fund. *(See correspondence attached)*. It is my understanding that the Auditor then made a journal entry on October 26, 2012, through journal entry JE-24853, transferring the funds from the reserve fund account for the District Attorney to the Road and Bridge fund. This was done without any discussion or consideration by my office and without any action by you, the governing body of the County.

I have reviewed the Auditor's correspondence to the Clerks and the basis identified for the deactivation of the commissions collected on behalf of the District Attorney. I have outlined below the Constitutional and Statutory requirements with regard to the collection of such commissions and

therefore, believe the actions of the Auditor were in error. Therefore, I am requesting that the Commissioners Court, by action, reinstate the collections of the commissions on behalf of the District Attorney as allowed under the law and as discussed more fully below.

Title 2 Judiciary, Subtitle C Prosecuting Attorneys, Chapter 41 of the Texas Government Code sets out the general provisions and statutory requirements relating to the Office of District Attorney. Section 41.005 entitled “COLLECTION OF MONEY” specifically outlines the District Attorney’s statutory right to set aside a commission for money collected by the District Attorney. *See Tex. Govt. Code §41.005*. Subsection (a) of the provision states that the District Attorney shall pay any money collected into the treasury of the county, after deducting a commission. *See Tex. Govt. Code §41.005(a)*. Subsection (b) of the provision states that the district or county attorney may retain a commission from money collected for the state or a county. *See Tex. Govt. Code §41.005(b)*.

The amount of the commission in any one case is 10 percent of the first \$1,000 collected, and five percent of the amount collected over \$1,000. *See id.* Furthermore, subsection (d) states that not later than the last day of August of each year, each district and county attorney shall file in the office of the comptroller or of the county treasurer, as the case may be, a sworn account of all money received by him by virtue of his office during the preceding year and payable into the state or county treasury. *See Tex. Govt. Code §41.005(d)*.

The Auditor, however, has taken the position that since the District Attorney is paid on a salary basis, as allowed under the Constitution, he is not entitled to collect fees or commissions. In support of his position he has cited a footnote in the *Texas Practice: County and Special District Law Journal* suggesting that, by virtue of the District Attorney being paid on a salary basis, Government Code Section 41.005 should be ignored, and thus, the District Attorney has no authority to retain such a commission. A citation to a journal is not conclusive or controlling legal authority to support such a position, nor does it confirm that the District Attorney cannot set aside a commission on any fees collected.

Article XVI Section 61 of the Texas Constitution, directs the County Commissioners Court in Texas to set the compensation for District, County, and Precinct Officers on a salary basis in Counties having a population of 20,000 or more. *See Tex. Const. Art. XVI, Sec. 61*. This Section also directs that “all fees. . . collected by district, county or precinct officers shall be paid to the

county treasury.” *See id.* Moreover, it does not preclude the setting aside of commissions on the fees collected by the district, county, or precinct officer. Instead, it specifically recognizes that such commissions are to be collected and paid into the county treasury.

It is important to note that Government Code Section 41.005 authorizes the District Attorney’s right to set aside such commissions, irrespective of being paid on a salary basis. *See Tex. Govt. Code §41.005.* In addition, Section 154.003 of the Texas Local Government Code further directs district and county precinct officers (paid on a salary basis) to collect in a manner authorized by law all fees, commissions, and other compensation permitted for official services performed by the officer. *See Tex. Local Govt. Code §154.003.* This provision goes on to direct the officer to dispose of the collected money as provided by Chapter 113 of the Local Government Code. *See id.* Section 113.021(b) of the Texas Local Government Code requires that the county treasurer deposit the money in the county depository in the proper fund to the credit of the person or department collecting the money. *See Tex. Local Govt. Code §113.021(b).*

In this instance, the bond commission fees were collected lawfully in compliance with both Government Code Section 41.005 and Texas Local Government Code Section 154.003. The monies collected were paid into the county treasury and reserved in a separate fund on behalf of the District Attorney, as noted above. There was no basis in law or fact for the Auditor to deactivate the collection of the commissions, transfer the funds that had been collected since 2000 from the reserve fund, and to instruct the Clerks to cease the collection. These actions taken by the Auditor were outside the scope of his authority and at the very least, should have required Commissioners Court action. *See Tex. Const. Art. VIII, Sec. 9; see also Atty. Gen. Op. H-950 (1977).*

The purpose and effect of Article XVI §61, of the Texas Constitution was to abolish a fee basis form of compensation for officers, for counties having a population of 20,000 or more, and to direct the disposition of fees collected. In requiring the disposition of fees to be paid into the county treasury, Article XVI §61 recognizes that *fees may be collected*, but effectively prohibits such fees from being used in the supplementing of the District Attorney’s (or any elected or appointed district, county, and precinct officer) compensation if paid on a salary basis. *See Tex. Const. Art. XVI, §61.* There has never been any attempt by me or my office to direct that the commission funds collected be used to supplement my own salary.

Thus, neither the Texas Constitution nor Texas statutes prohibit the County of Hidalgo, including the County Clerk and District Clerk from collecting a commission on bond forfeitures on behalf of the District Attorney. The commissions collected may be paid to the county treasury and credited to the reserve fund account on behalf of the District Attorney, as maintained by the County Treasurer, for the purposes of complying with the requirements of the Texas Government Code, the Texas Local Government Code and the Texas Constitution. For these reasons, I am asking the court to reinstate the collection of the commissions as allowed under the law, and requesting that the funds transferred through journal entry JE-24853 be returned to the reserve fund account on behalf of the District Attorney. Commissioners Court is authorized under the law to take the action requested. *See Tex. Const. Art. VIII, Sec. 9; see also Atty. Gen. Op. H-950 (1977).*