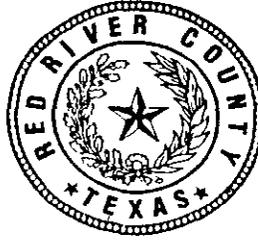


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RQ-504

Opinion Committee

JACK HERRINGTON
District and County Attorney
Red River County, Texas

INVESTIGATOR
Michael R. Hill

VICTIM ASSISTANCE COORDINATOR
Shawn Sargent

P.O. Box 364
Red River County Courthouse
Clarksville, Texas 75426-0364
(903) 427-2009 • FAX (903) 427-5510

February 10, 1993

MBJ
RQ-504-DM
FILE # ~~MC-18889-98~~

The Honorable Dan Morales
Attorney General
State of Texas
P. O. Box 12548
Austin, TX 78711-2548

I.D.# 18996

General Morales,

Re: 18889

On behalf of Red River County and any and all other involved and interested parties, I am asking for an Attorney General's Opinion regarding two (2) specific questions concerning the statutory authority of the Texas Department of Criminal Justice.

Question #1:

Can the Texas Department of Criminal Justice own and/or operate a work program facility that pays program participants/inmates the prevailing/minimum wage and produces goods and services to be marketed for profit or qualify for exemption under Title 18, U.S.C. Section 1761(c) (Private Industry Enhancement Program)?

1. Section 497.022(4) of the Texas Government Code "would eliminate the possibility of profit from distribution of those articles and products".

The incentive for private business to employ inmates and train them would be the possibility of producing a profit.

2. Section 497.035 of the Government Code provides for a fine and/or a jail sentence for anyone that intentionally sells or offers to sell on the open market goods or products utilizing prison labor.

This statute Section would absolutely prohibit any exemption certification based on Title 18, U.S.C. Section 1761(c).

3. Section 497.004(b) of the Government Code does not mandate that the prevailing wage (Federal minimum as entry level) will be paid to the participating inmate. This law only says "may develop and administer an incentive pay scale for inmates confined in the Institutional Division who participate in Prison Industries Program".

To qualify for any possible exemption under Title 18 USC Section 1761(c), prevailing wage must be mandated and initiated. The TDCJ has never paid a wage of any amount.

4. Section 497.004(a) states that the Director of the Institutional Division of TDCJ, "shall pursue arrangements with business for the use of inmate labor". There is no evidence that the Institutional Division has any arrangements with Private Industry for the employment of inmates. Other Sections of the Government Code 497 would impede and/or prohibit any mutually beneficial agreements. A prior Attorney General's opinion prohibits the TDCJ and private industry from entering into any partnership arrangement.

5. The rules of Title 18 Section 1761(c) require statutory authority for the applicant for exemption to "collect and provide financial contributions to crime victims compensation programs". The Division of the Attorney General's Office that administers the Crime Victims Compensation Fund adopted rules concerning the Administration of the fund. Rule 61.34 says that only, "a government entity permitted by law to engage in any Prison Industry Program work program or any of the type of work programs pursuant to the Government Code, Chapter 497 or an operator/manager of a work program facility has the authority to collect and provide financial contributions to crime victims assistance or crime victims compensation funds. Representatives of the TDCJ appeared before a review panel of the Attorney General's Office asking that the Rule read "TDCJ has the Authority to collect and provide these victims payments". According to testimony presented it appeared that TDCJ did not have the authority to request Rule language "that would allow TDCJ to "collect and provide" should they ever become eligible to do so". Thus the rule was adopted as is, should the Agency ever seek from the legislature the necessary changes in Chapter 497 of the Government Code to allow them to QUALIFY under the Administrative Rule #61.34. The legislature has never made those changes and the TDCJ has never sought them.

6. The Rules of Title 18 Section 1761(c) require that inmate participation in the prison industries programs be voluntary. If an inmate refuses to work in the Institutional Division he is deprived of "good time" and in most cases is reassigned to administrative segregation.

7. The Rules of Title 18, Section 1761(c) require provision for compensation to injured workers. There is no such provision in Chapter 497 of the Texas Government Code for inmates in the prison system.

The legislative and administrative criteria for participating in the Private Industries Enhancement Program mandates:

A. Contributions to victims compensation or victims assistance programs.

- B. The statutory authority to administer Prison Industry Programs AS IN PLACE.
 - C. Prevailing wages ARE PAID, (not less than Federal minimum).
 - D. Inmate participation is voluntary.
 - E. Provisions have been made for the compensation of injured workers.
 - F. There is some involvement of the private section (purchasing, managing, planning, etc.).
- None of the required rules can statutorily be met by the TDCJ according to Chapter 497 of the Government Code.

Question#2.

Does Chapter 497, Subchapter C of the Government Code, permit and/or provide for TDCJ to own and operate a work program facility as part of its system?

1. Section 497.055(b) states that a work facility must be OWNED AND OPERATED UNDER A CONTRACT with the Pardons Division and the municipality or county in which the facility is located. If the TDCJ claims ownership by title or lease of this facility then it appears that the facility no longer has the statutory authority as a "work program facility" and is ineligible for funding from that budget line item. According to a letter (Attached copy) dated October 19, 1989, the former Speaker of the House of Representatives stated emphatically that the intent of HB2335 (work program section codified in Chapter 497, Subchapter C, Government Code) was to give the cities and counties the responsibility AND authority for Administrative decision. He continued by saying that TDCJ's involvement was to be by monitoring and auditing. Former Speaker Lewis said, "for the first time communities can be in charge of their own criminal justice destiny". It seems that any claim by the TDCJ to own and/or lease a "work program facility" would be in violation of the enabling statute. Mr. Lewis' further comment contemplates only input and overseeing by TDCJ.
2. Section 497.055(b)(8) provides that the only possibility for the TDCJ to own and assume operation of the facility is "in the event of the failure of the contracting party to perform its duties under the contract". Now as state owned and operated, the facility would appear to no longer be a work program facility as intended, but could be converted to a regular prison facility without the work program.
3. Section 497.005(b)(1) mandates the provisions of the work program contract to include an agreement by the Resident to "contribute to the owner, operator or manager of the work program facility from the funds received by the resident for the residents participation in on-site industries training and employment not more than 80% of the funds TO BE USED OR DISTRIBUTED BY THE OWNER, OPERATOR OR MANAGER OF THE WORK PROGRAM FACILITY, to pay all or part of the designated supervision, family, and victims' costs.

These deductions can only be collected and distributed by the municipality or county. The TDCJ has no authority in this area which is key to certification permitting interstate transportation of inmate produced goods and services. There are several more provisions of the enabling statute that would reinforce the conclusion that the "work program facility" is not authorized as a part, division, or section of the TDCJ but can only be utilized by contract with monitoring and oversight capacity.

Red River county has been granted certification by the United State Bureau of Justice Assistance under the Private Industries Enhancement Program, pursuant to Title 18, USC 1716(c) for the sale of goods and services produced under the terms of the contract.

Red River county is ready to proceed with the financing, construction, and operation of this innovative program designed to reduce recidivism, restore families, compensate victims and return the offender to society as a productive contributing tax paying citizen.

The confusion of the present situation as to responsibility AND authority has greatly impeded Red River county's ability to proceed with this most worthwhile project.

Red River county would humbly seek an expeditious response to this request for the Attorney General's Opinion, I am certain that a letter Opinion would eliminate the confusion.

We would be most grateful for your assistance in this matter.

Sincerely,


Jack Herrington

JH:kc