



512/463-4000

LBJ State Office
Building

The Honorable Daniel C. Morales
Attorney General of Texas
Price Daniel, Sr. Building
209 West 14th Street, 8th Floor
Austin, Texas 78701-1614

Dear General Morales:

I wish to ask your opinion on several questions arising under Senate Bill 102 passed by the 74th Session of the Texas Legislature this year.

This legislation deals with the state-paid portion of the social security contribution paid by state employees and judges. The state-paid contribution for new state employees and judges is to be eliminated after August 31, 1995. It will continue for employees and judges who are employed on August 31, 1995, through December 31, 1995. Further, beginning on January 1, 1996, state employees and judges who were employed on August 31, 1995, shall be eligible for "benefit replacement pay." This pay was intended by the Legislature to fully compensate them for the loss of the state-paid portion of their social security contribution. This pay can amount to a maximum of \$965.25 per year for each eligible employee or judge, plus an additional retirement offset. There are a number of issues that are raised by this legislation in connection with state judicial salaries and the salaries of district attorneys who are subject to the Professional Prosecutors Act.

Under Section 2 of Article IV of the state appropriations bill (H.B. 1), the total salaries of state district judges are tied to that of Court of Appeals justices. Specifically, a district judge's salary from all sources must be no more than \$1,000.00 less than that paid to the appellate justices in whose district the district judge resides. This gap is called the "salary differential" and represents a "salary cap" effectively. If a judge's salary exceeds the cap, the Comptroller's Office must reduce the state's contribution to that salary by the amount of the excess. See Article IV-26, - 5 appropriations bill. These judges must file formal salary affidavits with the Comptroller's Office prior to September 1 annually to enable the agency to calculate the required state contribution for all state district judges' salaries. These affidavits list the judge's compensation from all sources, both state and local. My questions arise as a result of the Comptroller's role in this salary process.

My first question is as follows:

1.) Is the "benefit replacement pay" payable to eligible state-paid judges under Section 659.121, Government Code, to be included as part of the judge's salary for the purposes of calculating the salary differential under Article IV of the appropriations bill?

Formerly, the state-paid portion of state employees and judges social security contribution was considered to be a "benefit" and not a part of the individual's salary per se. Although this sum was considered to be taxable for the purpose of the Federal income tax, it was not included as a part of

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the employee's or judge's salary by the Employees Retirement System or the Judicial Retirement System for the purpose of calculating retirement pay or benefits. As a result of S.B. 102, it would appear that "benefit replacement pay" is now part of that salary. Subsection 659.121(1), Government Code, defines "compensation" as "salary or wages subject to tax under the Federal Insurance Contributions Act." This seems to include the "benefit replacement pay."

Assuming that the answer to the first question is "yes", my next question is:

2.) How is the salary differential to be applied to district judges if some appellate justices in their district receive this "benefit replacement pay" and some do not?

As mentioned above, district judges are to be paid \$1,000.00 less than the justices of the court of appeals in their district. After January 1, 1996, some of these appellate justices may receive this "benefit replacement pay" and others may not (those that are newly appointed or elected and were not judges or state employees on August 31, 1995). The results of a salary differential calculation will vary depending on whether it is applied against the "old" or "new" justices of the regional court of appeals. Which is the Comptroller to utilize? Should new district judges' salary differentials be calculated against new justices of the court of appeals with old district judges' differentials compared to old justices? Or should all district judges' salary differentials be calculated against the salary of the most senior member of their regional court of appeals?

3.) Are visiting judges eligible to receive "benefit replacement pay?"

As you know, many retired, former district judges and appellate judges continue to hear cases upon appointment by the regional presiding judge in their area of the state. These judges are entitled to receive the same salary as the current judge of the court they are sitting in, pro-rated on a daily basis. This salary could vary depending on whether the judge of the particular court they are substituting for is an "eligible state-paid judge." That phrase is defined under Subsection 659.121(3), Government Code. It specifically provides that an "eligible state-paid judge" means "an individual who on August 31, 1995: . . . held office; and . . . was eligible for state payment of the employee tax under Section 606.065 as that section existed on that date."

There are other fact situations that may or may not impact this situation. Since all state district and appellate judges who hold office on August 31, 1995, are eligible for "benefit replacement pay", would a visiting judge who is actually sitting or currently appointed to hear a case on that date be eligible for this pay? If so, would that eligibility be "portable?" In other words, would it carry forward to future appointments if the judge of the court who the visiting judge is substituting for is ineligible for benefit replacement pay (i.e. assumed office after August 31, 1995)?

Finally, Section 659.126, Government Code, provides that a state employee or judge who leaves state employment after August 31, 1995, and does not return for twelve (12) months loses his or her right to receive benefit replacement pay. Although, it may be rare, a visiting judge may qualify as eligible to receive this pay on August 31 and yet have a twelve month gap in active service during some future period. If this occurred, would he become ineligible or would eligibility depend on the status of the judge in whose court he is substituting?

4.) How will the salary differential for certain statutory county court at law judges be calculated under Section 25.0005, Government Code?

Under Subsection 25.0005(a), Government Code, statutory county court at law judges in counties which do not participate in the additional court costs program under Section 51.702 of the Code are to be paid an amount "at least equal to the amount that is \$1,000 less than the total annual salary received by a district judge in the county." The total annual salary for these purposes is to include all supplements and contributions paid by the state or the county. Any benefit replacement pay paid to the district judge in the county therefore would have to be included in this "total annual salary."

If there is one district judge in the county, this calculation is an easy one. If there is more than one district judge in the county though and one or more are eligible for the benefit replacement pay and others are not (i.e. they assumed office after August 31, 1995), which district judge's salary is to be used as the benchmark for calculation of this differential?

A number of counties need to know the answer to this question because they are in the process of setting their county budgets for the upcoming fiscal year beginning on September 1, 1995.

5.) How will the salaries of district attorneys who are subject to the provisions of the Professional Prosecutors Act, Chapter 46, Government Code, be calculated?

The Professional Prosecutors' Act, Chapter 46, Government Code, applies to a number of district attorneys, criminal district attorneys and county attorneys performing the duties of district attorneys in the state. Under Subsection 46.003(a), each prosecutor is entitled to receive state compensation *equal to the compensation that is provided for a district judge in the General Appropriations Act.* (Emphasis added). As I have pointed out, the salary of a district judge may vary under the appropriations bill depending on whether he or she is an eligible state-paid judge within the definition of Subsection 659.121(3), Government Code. Which salary shall the district attorney's salary be equal to, an eligible state-paid judge or an ineligible state-paid judge?

As you can see, the answers to these questions will impact a large number of judicial and prosecutorial positions in Texas. This impact will begin to be felt in the very near future as the September 1 beginning date of the fiscal year for many counties is approaching rapidly. So, time is a critical element in this request. Both the Comptroller and a number of counties request your guidance on these matters prior to September 1, 1995.

Sincerely,



JOHN SHARP
Comptroller of Public Accounts

cc: The Honorable Teel Bivins, State Senator, District 31
The Honorable Anna Mowery, State Representative, District 97