



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 11, 2019

Dr. Austin A. Lane
President
Texas Southern University
3100 Cleburne Street
Houston, Texas 77004

Opinion No. KP-0268

Re: Payment for unused vacation leave after
employee separation (RQ-0279-KP)

Dear Dr. Lane:

You seek an opinion about the appropriate rate of pay for accrued but unused vacation leave when a university employee separates from his or her academic administrative position.¹ For context, you describe a hypothetical scenario involving a professor. The professor worked on a nine-month faculty appointment and in 2002 took on an additional administrative position. *See* Request Letter at 1. For the administrative position the professor received \$20,000 annually in addition to the professor's annual teaching salary of \$60,000. *See id.* After three years, the professor separated from the administrative duties and reverted back to the teaching salary only. *See id.* In subsequent periods, 2007–2008 and 2012–2013, the professor assumed on an interim basis similar administrative positions for different rates of pay. *See id.* As of 2014, the professor has performed no administrative duties and works solely in the capacity of a nine-month professor. *See id.* Now, in 2019, the university and the professor want a payout of the accrued yet unused vacation leave. *See id.* In light of this scenario, you ask two questions. *See id.* at 2. You first ask whether a university must remunerate a faculty member who separates from administrative duty for accrued and unused vacation hours “as a holistic sum (i.e., the faculty pay and administrative pay as one sum) or . . . based only upon the additional salary paid for the administrative position.” *Id.*

You refer us to chapter 661 of the Government Code, which provides for leave for state employees. *Id.*; *see* TEX. GOV'T CODE §§ 661.001–.924.² Specifically, Subchapter F of chapter 661 governs vacation leave for state employees. *See* TEX. GOV'T CODE §§ 661.151–.154. Within subchapter F, section 661.152 generally provides that a state employee is entitled to vacation leave

¹*See* Letter from Dr. Austin A. Lane, President, Tex. S. Univ., to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 4, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²TEX. GOV'T CODE § 661.001(1), (4)(B) (defining “employee” as “an individual, other than a state officer, employed by a state agency” and “state agency” to include “an institution of higher education as defined by section 61.003, Education Code”); *see also* TEX. EDUC. CODE § 61.003(8) (defining “institution of higher education” to mean “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in” section 61.003).

each fiscal year. *See id.* § 661.152(a). But the provision expressly excludes from that entitlement a higher education faculty member employed for a period of fewer than 12 months.³ *See id.* § 661.152(a)(2); *see also* Tex. Att’y Gen. Op. No. JM-401 (1985) at 2 (recognizing that, unlike usual state employees, a “faculty member with an appointment of less than 12 months is an employee with a contractual relationship governed by state law, the rules and regulations of the governing body of the institution, and terms of his appointments for specific years”). Under subsection 661.152(a)(2), a nine-month faculty position is not entitled to annual vacation leave.

Subchapter C governs payment for vacation time to state employees who separate from state employment. *See* TEX. GOV’T CODE §§ 661.061–.068. Within subchapter C, section 661.062 provides that a state employee who “has accrued six months of continuous state employment⁴ and who resigns, is dismissed, or otherwise separates from state employment by an institution of higher education is entitled to be paid for the accrued balance of the vacation time as of the date of separation.” *Id.* § 661.062(a) (footnote added). For purposes of subchapter C, a “state employee” includes an administrative or faculty employee at an institution of higher education “who has accumulated vacation leave during the employment.” *Id.* § 661.061(2)(F). In the hypothetical situation you describe, the employment which has accumulated vacation leave is the administrative position. Thus, only the administrative position forms the basis for any payment entitlement. For an employee in the circumstances you describe, subsection 661.063(b) provides that the payment is calculated by multiplying the “employee’s final rate of compensation in the last position held that accrues vacation” by the employee’s total number of hours of vacation time. *Id.* § 661.063(b) (providing calculation for an employee who separates from employment while holding a position that does not accrue vacation time). Accordingly, the compensation used for the calculation for payment of vacation leave about which you ask is only the compensation paid for the administrative position.

In your second question, you ask about the appropriate time for the payment for vacation leave “[i]n a scenario wherein a professor does not want to be paid for accrued and unused vacation at the time of separation from administrative duties.” Request Letter at 2. The statute triggers an entitlement for payment for vacation leave in only three instances: when the state employee resigns, is dismissed, or otherwise separates from employment. *See* TEX. GOV’T CODE § 661.062(a). As your hypothetical professor still works for the university we consider whether the professor has otherwise separated from employment under subsection 661.062(b), which identifies five circumstances that constitute such separation. *See id.* § 661.062(b). Subsection 661.062(b)(5) identifies the circumstance in which an employee “holds two or more positions, and

³Section 661.152 also excludes from the vacation leave entitlement a higher education employee who “is not employed to work at least 20 hours per week for a period of at least four and one-half months.” TEX. GOV’T CODE § 661.152(a)(1)(A). Because you tell us that your administrative positions such as provost, deans, associate deans, and department chairs “are employed full time for 12 months each fiscal year,” we assume the hypothetical administrative position is likewise employed so that this exclusion does not apply. Request Letter at 2.

⁴“State employment is continuous . . . while the employee is entitled to be paid a regular state salary, except that continuity of state employment is not interrupted while the employee is on a leave of absence without pay for less than one calendar month.” TEX. GOV’T CODE § 661.062(d).

separates from one that accrues vacation time, if the agency agrees to pay the employee for the accrued balance of the employee's vacation time." *Id.* § 661.062(b)(5). By its plain terms, subsection 661.062(b)(5) entitles an employee to the vacation leave payment upon the occurrence of the described change in employment circumstances and "if the agency agrees to pay the employee for the accrued balance of the employee's vacation time."⁵ *Id.* Thus, the entitlement arises on the fulfillment of both prerequisites, which will depend on particular facts. *See* Tex. Att'y Gen. Op. No. GA-0867 (2011) at 2 ("Attorney general opinions do not answer fact questions.").

⁵You do not ask us to opine about any budget restrictions implicated by your scenario. *See generally* TEX. GOV'T CODE § 661.006.

S U M M A R Y

Government Code subsection 661.063(b) provides that vacation leave pay for an employee who separates from state employment while holding a position that does not accrue vacation time is computed using the "employee's final rate of compensation in the last position held that accrues vacation." In the hypothetical scenario you describe, the administrative position is the last position held that accrues vacation, so the compensation used for the calculation for payment of vacation leave is only the compensation paid for the administrative position.

Subsection 661.062(b)(5) entitles an employee to payment for vacation leave upon the occurrence of the described change in employment circumstances and "if the agency agrees to pay the employee for the accrued balance of the employee's vacation time." Thus, the entitlement arises on the fulfillment of both prerequisites, which will depend on particular facts.

Very truly yours,



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