



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 25, 2020

The Honorable Wiley B. McAfee
33rd & 424th Judicial District Attorney
Post Office Box 725
Llano, Texas 78643

Opinion No. KP-0330

Re: Method for calculating the percentage of judicial functions a county judge performs for purposes of determining entitlement to a salary supplement under section 26.006 of the Government Code (RQ-0336-KP)

Dear Mr. McAfee:

You ask about the appropriate method to calculate the percent of judicial functions a county judge performs for purposes of determining entitlement to a salary supplement under section 26.006 of the Government Code.¹ Section 26.006 states, in relevant part:

(a) A county judge is entitled to an annual salary supplement from the state in an amount equal to 18 percent of the state base salary paid to a district judge as set by the General Appropriations Act in accordance with Section 659.012(a) if at least 40 percent of the functions that the judge performs are judicial functions.²

(b) To receive a supplement under Subsection (a), a county judge must file with the comptroller's judiciary section an affidavit stating that at

¹See Letter from Honorable Wiley B. McAfee, Dist. Att'y, 33rd and 424th Jud. Dists., to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Feb. 28, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0336KP.pdf>.

²The annual compensation for a district judge provided in the Eighty-sixth Legislature's General Appropriations Act is \$140,000. See General Appropriations Act, 86th Leg., R.S., ch. 1353, § 1, art. IV-31, 2019 Tex. Gen. Laws 4035, 4584; see also TEX. GOV'T CODE § 659.012(a)(1) (providing that "a judge of a district court is entitled to an annual base salary from the state as set by the General Appropriations Act in an amount equal to at least \$140,000"). Eighteen percent of \$140,000 is \$25,200. "According to the Comptroller of Public Accounts, Judiciary Section, during fiscal year 2018, 220 of the 254 constitutional county judges received the state salary supplement." LEGISLATIVE BUDGET BD., IMPROVE OVERSIGHT OF THE TEXAS COUNTY JUDGE SUPPLEMENT 1 (Apr. 2019), http://www.lbb.state.tx.us/Documents/Publications/Staff_Report/2019/4750_County_Judge_Salary_Supplement.pdf.

least 40 percent of the functions that the judge performs are judicial functions.

TEX. GOV'T CODE § 26.006(a)–(b) (footnote added).

As discussed in a prior opinion issued by this office, county judges perform various roles that differ to some extent based on the county. *See* Tex. Att'y Gen. Op. No. KP-0090 (2016) at 1–2. By statute, the county judge serves as “the presiding officer of the commissioners court.” TEX. LOC. GOV'T CODE § 81.001(b). The Texas Constitution establishes the commissioners court as the principal governing body of the county, and the duties of commissioners courts “include aspects of legislative, executive, administrative, and judicial functions.” *Comm'rs Ct. of Titus Cty. v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997); *see* TEX. CONST. art. V, § 18(b).

In addition to establishing the county judge's role on the commissioners court, article V, sections 15 and 16 of the Texas Constitution establish a county court in each county and provide for the county judge to preside over the county court. TEX. CONST. art. V, §§ 15, 16. Chapter 26 of the Government Code governs the procedures and jurisdiction of these constitutional county courts. *See* TEX. GOV'T CODE §§ 26.001–.353. This office concluded in KP-0090 that when a county judge exercises criminal or civil jurisdiction as authorized by chapter 26 of the Government Code, the county judge performs a judicial function. Tex. Att'y Gen. Op. No. KP-0090 (2016) at 2–3; *see also* Tex. Att'y Gen. Op. No. GA-0426 (2006) at 5 (concluding that “when a county judge sits as a magistrate, he performs judicial functions”).

Unless otherwise specified, a constitutional county court “has concurrent jurisdiction with the justice courts” in certain civil cases and may also have criminal jurisdiction over certain misdemeanors. *See* TEX. GOV'T CODE §§ 26.042(a), .045(a). Subchapter E of chapter 26, however, contains numerous statutes that may expand or limit the jurisdiction of specific county courts. *See id.* §§ 26.103–.353. For example, section 26.176 expands the jurisdiction of the County Court of Fisher County to have “original concurrent jurisdiction with the justice courts in all civil matters in which the justice courts have jurisdiction under general law,” whereas, section 26.327 limits the County Court of Travis County to “the general jurisdiction of a probate court” with “no other civil or criminal jurisdiction.” *Id.* §§ 26.176, .327. Thus, the extent to which a county judge performs functions or duties under chapter 26 will depend on the specific county court at issue. The Office of Court Administration has explained that in practice some county courts perform extensive judicial functions while others do not, noting that “[i]n more urban counties, the county judge typically devotes his or her full attention to the administration of county government.”³

A county judge is entitled to the salary supplement “if at least 40 percent of the functions that the judge performs are judicial functions.” *Id.* § 26.006(a).⁴ You ask whether that calculation “depends on the time spent on judicial functions as a percentage of the total time a county judge

³OFFICE OF COURT ADMIN., STUDY ON THE ADEQUACY & APPROPRIATENESS OF ADDITIONAL COMPENSATION PAID TO CERTAIN COUNTY JUDGES 3 (2014), www.txcourts.gov/media/683099/County-Judge-Salary-Study-FINAL.pdf.

⁴Commissioners courts set the salary of the county judge, and salaries vary widely by county. *See generally* TEXAS ASS'N OF COUNTIES, SALARY SURVEY 3–8 (2020 ed.), [https://www.county.org/TAC/media/TACMedia/Resources for County Officials/2020/Salary-Survey.pdf](https://www.county.org/TAC/media/TACMedia/Resources%20for%20County%20Officials/2020/Salary-Survey.pdf) (listing county judge salaries ranging from \$16,226 to \$198,793).

spends on all functions” or instead on “the number of judicial functions performed as a percentage of the total number of functions performed.” Request Letter at 1 (emphasis omitted). The language the Legislature chose does not specify how to calculate the percentage of judicial functions performed by the county judge. A common-sense process for doing so could involve calculating the percentage of time a county judge spends on judicial functions relative to all functions performed. However, the language of the statute does not require the calculation use such a formula. *See* TEX. GOV’T CODE § 26.006(a). A construction limiting eligibility of the salary supplement to only those county judges spending forty percent of their time on judicial functions would require reading a time element into the statute beyond what the Legislature adopted. In construing statutes courts will refrain from “reading words or elements into a statute that do not appear on its face.” *See Bates v. United States*, 522 U.S. 23, 29 (1997). Therefore, we cannot conclude as a matter of law that the salary supplement is available only to those judges who spend at least forty percent of their *time* on judicial functions. Likewise, limiting the salary supplement to only those county judges whose list of functions include at least forty percent judicial functions imposes a numerical requirement not found within the language of section 26.006. Thus, we cannot conclude as a matter of law that the salary supplement is only available when the *number* of judicial functions performed as a percentage of the total number of functions performed is equal to or greater than forty percent.⁵ Given the broad nature of subsection 26.006(a), a court could conclude that either method of calculation is appropriate under the plain text.

In order to receive the supplement, the county judge must file with the Comptroller an affidavit “stating that at least 40 percent of the functions that the judge performs are judicial functions.” TEX. GOV’T CODE § 26.006(b). In your second question, you ask what remedies are available to county or district attorneys, or other representatives of county or state government, if a county judge claims entitlement to the supplemental pay but the district or county attorney does not believe that forty percent of his or her functions are judicial. Request Letter at 1. As you note, section 26.006 of the Government Code does not provide a remedy for when a judge files an affidavit claiming that forty percent of his or her functions are judicial but the facts suggest that they are not. *Id.* at 2; *see* TEX. GOV’T CODE § 26.006.⁶ However, the Legislature authorized the State Auditor to audit or investigate “any entity receiving funds from the state” upon legislative directive. TEX. GOV’T CODE § 321.013(a). Given that the salary supplement in section 26.006 derives “from the state,” and is distributed by the Comptroller of Public Accounts, the State Auditor may investigate assertions that an affidavit submitted by a county judge incorrectly claims that forty percent of his or her functions are judicial. *Id.* § 26.006(a), (b). “If in the course of an audit the State Auditor finds evidence of improper practices of financial administration, . . . the State Auditor . . . shall immediately report the evidence to the Governor.” *Id.* § 321.016(a).

⁵In its 2019 report on the county judge salary supplement, the Legislative Budget Board raised a concern that the statutory language in section 26.006 “is not conducive to quantifiable measurement because an objective metric, such as percentage of work time or a specific number of cases,” is not included within the statutory language. LEGISLATIVE BUDGET BD., IMPROVE OVERSIGHT OF THE TEXAS COUNTY JUDGE SUPPLEMENT 1 (Apr. 2019), http://www.lbb.state.tx.us/Documents/Publications/Staff_Report/2019/4750_County_Judge_Salary_Supplement.pdf.

⁶Subsection 26.006(c) expressly prohibits a county from reducing “the county funds provided for the salary or office of the county judge as a result of the salary supplement” provided by subsection 26.006(a). TEX. GOV’T CODE § 26.006(c). However, criminal provisions prohibit requesting a supplemental salary based on false statements in an affidavit, and such action could result in criminal prosecution. *See* TEX. PENAL CODE § 37.02(a) (“Perjury”).

S U M M A R Y

Subsection 26.006(a) of the Government Code authorizes a county judge to obtain an annual salary supplement if at least forty percent of the functions that the judge performs are judicial functions. The Legislature did not specify a method for how to calculate the percentage of judicial functions performed by the county judge. Therefore, we cannot conclude as a matter of law that the salary supplement is available only to those judges who spend at least forty percent of their time on judicial functions, nor can we conclude that it is only available when the number of judicial functions performed as a percentage of the total number of functions performed is equal to or greater than forty percent. Given the broad nature of subsection 26.006(a), a court could conclude that either method of calculation is appropriate.

The Legislature authorized the State Auditor, upon legislative directive, to audit or investigate any entity receiving funds from the State. The State Auditor may therefore investigate an allegation that an affidavit submitted by a county judge incorrectly claims that forty percent of his or her functions are judicial.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

RYAN M. VASSAR
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee