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OPINION COMMITTEE

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December 5, 2000

The Attorney General of Texas
Supreme Court Building
Attn: Opinions Committee
Post Office Box 12548
Austin, Texas 78711-2548
CERTIFIED MAIL NO.: 7000 0600 0023 3677 6577

RQ-0324-JC

Re: Request for attorney general's opinion pursuant to V.T.C.A., Government Code, Section 402.043

Dear Sir/Ma'am:

I will first present the facts, the question to you, the applicable law/attorney general's opinions, and then my conclusion.

FACTS AS TO FIRST QUESTION:

Frio County government is an "at-will" employer and has adopted in the past and has now an employees policies and procedures manual (Frio County, Texas Employee Handbook, referred to hereinafter as "Handbook").

Prior to December 1, 2000, the Handbook had no provisions in it to pay county employees for accrued vacation time and for accrued compensatory time. However, the Handbook did provide and still provides upon termination of employment that a county employee could be paid for accrued vacation time that has been so earned through the last day of work.

The Handbook further provides that accrued vacation time of up to 5 days could be carried over by an employee from the old "benefit year" into a new "benefit year." (The Handbook defines a "benefit year" as the 12-month period that begins when the employee starts to earn vacation time.)

Also the Handbook provides only for non-monetary compensation to county employees for hours worked in excess of the normal 40-hour work week with a "cap" of 240 hours for employees engaged in non-emergency activities and 480 hours for those engaged in public safety or emergency response activities.

Unbeknownst to the Frio County Commissioners Court, several Frio County Deputy Sheriffs in the past had requested (through the Frio County Sheriff) from the Frio County Treasurer that they be paid for accrued vacation time, and at least one deputy sheriff asked for payment of part of his accrued compensatory time in addition to his accrued vacation time which he received; and he was even paid for his "5-day carry-over" vacation time.

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The county treasurer informed me and the commissioners court that this "has always been done," and she didn't think she needed to come to the commissioners court for authority to pay accrued vacation time (or compensatory time) to those requesting it.

The reason that this came to light is that two other Frio County Deputy Sheriffs requested that they be paid for their accrued vacation time including the "5-day carry over" in vacation time that a previous deputy had been paid. The two deputies were told by the county treasurer that they had not submitted their requests before the end of the county's fiscal year (i.e. September 30, 2000); and, therefore, they could not be paid because there was no money in the new fiscal year's budget to pay them.

The two deputies requested at a special called meeting of the Frio County Commissioners Court on December 1, 2000, that they be paid for their accrued vacation and compensatory time, to which request no action was taken by the commissioners court pending this request for an attorney general's opinion.

On December 1, 2000, after having met on November 29, 2000, the Frio County Employee Handbook Committee (composed of various elected county and precinct officials) recommended amending in the Handbook to allow any county employee to sell his accrued vacation time (over and above the 5 days of accrued vacation time that may be carried over past the first "benefit year" and each succeeding "benefit year") but with several provisos: 1) the employee's supervisor must recommend this to the commissioners court, 2) the commissioners court at its special called or regular meeting must approve the payment, 3) the county treasurer at his/her discretion will make the payment after the completion of the "benefit year" but on or before the following December 31st, and 4) no vacation time may be accrued during the first 180 days ("Introductory Employee Period") of a new employee's term of employment with the county.

QUESTION:

May the two deputies who are requesting payment of accrued vacation time (even though at the time that it was accrued there was no policy for this type of payment) be paid it as the two other deputies were paid, including compensatory time which one of the two other deputies had been paid in the past.

The Frio County Treasurer has stated in commissioners court that it had been long been the practice and custom for the county treasurer's office (previous county treasurers) to pay, upon request of an employee's supervisor to the county treasurer, accrued vacation and compensatory time to an "eligible" employee. Furthermore, the commissioners court had not been informed of these payments, and, therefore, were not in a position to approve and authorize these payments.

Although the county treasurer maintains that "several years" ago there was an agenda item on the commissioners court agenda to allow the county treasurer to pay accrued vacation time and compensatory time to those employees requesting same and that the court voted to give her authority to do so, to date neither she nor the county clerk have been able to locate this agenda item in the commissioners court's minutes. Assuming that this action was taken by the commissioners court several years ago, I would ask does section 113.041 (a,d) of the Texas Local Government Code (hereinafter referred to as "Code") give to the county treasurer blanket authority to make these payments instead of the county treasurer coming before the commissioners court on a case-by-case basis to seek permission; and, even if the county treasurer had this blanket authority, could she still do this when the Handbook (prior to December 1, 2000) was silent as to paying accrued vacation time to requesting employees and when the Handbook even now provides only for non-monetary compensation for hours in excess of the normal 40-hour week?

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THE LAW AND PREVIOUS ATTORNEY GENERAL'S OPINIONS:

Section 113.041(a), (d) of the Code states, *inter alia*:

“(a) The County Treasurer shall disburse the money belonging to the county and shall pay and apply the money as required by law and as the commissioners court may require or direct, not inconsistent with law.

“(d) If the treasurer doubts that the legality or propriety of an order, decree, certificate, or warrant presented to the treasurer for payment, the treasurer may not make the payment. The treasurer shall report the matter to the commissioners court for the court's consideration and direction.

*****”

Attorney General's Opinion No. JM-910 (1988) provides a good, comprehensive overview of a commissioners court's authority “to grant vacation and sick leave benefits to both elected and appointed county officials and to pay such officials for the unused portions thereof.”

The facts set out in this opinion parallel those in the instant situation. The Galveston County Personnel Policies Manual did not authorize the accrual of vacation time as did ours until the December 1, 2000, amendment: there was no provision for the accrual of vacation time and payment of same except for the “5-day carry over” rule. However, in reading this opinion it states that since vacation time is “compensation” (see Attorney General's Opinions MW-438 (1982); H-1142, H-1113 (1978); H-860, H-797 (1976); sections 152.011 and - .-13 of the Code) which if accrued it may be paid to a requesting employee.

As for a county treasurer paying an employee upon request accrued compensatory time, Op. Atty. Gen. No. M-1252 (although this opinion pertains to whether a State employee who resigns, is dismissed or is separated should be paid for accrued vacation time) it would appear that accrued compensatory time are for services rendered to the county; and, as this opinion states, that “such payment constitutes salaries within the meaning of Article 6813b (now recodified in V.T.C.A., Government Code).”

Therefore, one might conclude that accrued vacation time and compensatory time could be compensated as salaries (although not contemplated as such during budget hearing process that the commissioners court conducts every year during August and September). Even though the Handbook is silent as to paying accrued vacation time (except when an employee terminates a county employment), it does specifically prohibit monetary payment for compensation time.

MY CONCLUSION:

It would appear that accrued vacation and compensatory time may be paid upon request by an employee and justified on the basis that these are “salaries” for services rendered to the county; although this conclusion may be weakened by the fact that the commissioners court had no knowledge of these payments being made from the county treasurer. Although the Handbook is in place for the county, it is nothing more than guidelines for county government and would in no way trump or supersede state or federal law (See Reynolds Manufacturing Co. v. Mendoza, 644 S.W. 2d 536, 539 (CA-CC, 1982, no writ: company's employee handbook constituted no more than “general guidelines” and could not be read as an express contractual limitation on the company's power to terminate the employment of its at will employee). A

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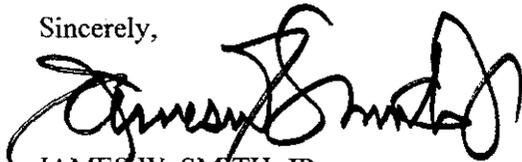
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problem is that, if accrued vacation and compensatory time is found by your office to be "salaries," how could the commissioners court during its budgetary process set up a line item for such when it would be very difficult if not almost impossible to foresee how much in the way of funds could be allocated for this line item in the budget. I do not know the answer to that.

Finally, I am enclosing the following excerpts from the Handbook for your information:

- a. "302.00 VACATION BENEFITS;"
- b. "306.00 OVERTIME HOURS AND COMPENSATORY TIME OFF."

Sincerely,



JAMES W. SMITH, JR.

JWSJr/ymm

xc: Files

Encls: as stated