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OPINION COMMITTEE

BQ-0341-6A

Via Certified Mail R.R.R. #7004 1350 0001 3076 6856

April 28, 2005

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711

FILE # ML-44202-05
I.D. # 044202

Dear Attorney General Abbott:

This is a request for an opinion from the Wise County Commissioners Court presented by the Wise County Attorney's Office to the Honorable Greg Abbott, Texas Attorney General.

R.E. #1: Whether a Statutory County Judge should be held to have knowledge of nonpayment of his complete salary under the subsections of Texas Government Code Sec. 25.0005 from the date the county initially collected the funds or from the date the Judge became aware the funds were not being paid to him.

R.E. #2: Whether Sovereign Immunity would be a factor in an omission by the County Commissioners and bar recovery of money damages due under Texas Government Code Sec. 25.0005 to the Statutory County Judge.

FACTS: In 1994, Wise County Commissioners elected to collect fees under Texas Government Code Sec. 51.072. Therefore, they were to utilize the funds following the guidelines under Texas Government Code Sec. 25.0005. The Commissioners did not act in accordance with these guidelines.

The compliance with the guidelines should have started in 1996 when Wise County received funds from the State. The Statutory County Judge, Judge Melton Cude, did not find out about the noncompliance until 2003 and the Wise County Commissioners corrected the situation at that time. However, Judge Cude would like to be compensated for the non-payment from the years 1996 until 2003.

Authority:

R.E. #1: According to your Honorable Opinion No. JC-0159 from Tom Green County, the Judge is entitled to this pay. Further, in Opinion JC-0182 from Fort Bend County, this would be an action for debt and therefore a four-year statute of limitation applies. However, I have had problems finding the applicable law to apply the four-year statute of limitations to this exact situation. I have found a wide variety of cases applying the four-year statute of limitations to varied areas of the law. I have even found back pay to employees under contract. Ex: *Haliburton v. City of San Antonio*, 974 S.W.2d 779 (Tex. App.--San Antonio 1998, no pet. h.). However, none of these cases address the application of a statute of limitations in this very specific situation, specifically, a county official, who happens to be a statutory county judge, asking for back pay. There seems to be several issues here that the law, case law, and application has not addressed in the past. Therefore, I would request an opinion on this question after due diligence in a search for an answer.

R.E. #2: Judge Cude's claim for back pay can be considered a request for damages. Further, claims for damages from Commissioners Court actions are subject to sovereign

immunity unless waived. Therefore, it would appear a waiver of sovereign immunity must exist constitutionally or statutorily before a court will have jurisdiction to hear the claim.

The judicial compensation statute in question does not appear to promulgate such a waiver. Therefore, according to Texas Government Code Sec. 311.034,

In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.

Further, case law appears to support a possible commissioners court claim of sovereign immunity. In *Ware v. Miller*, 82 S.W.3d 795, 804 (Tex. App.--Amarillo 2002, pet. denied), the Court found district courts had the right to review commissioners court decisions but this does not waive the right of sovereign immunity against suits for damages. See also *City of San Benito v. Ebarb*, 88 S.W.3d 711, 722-23 (Tex. App.--Corpus Christi 2002, pet. denied). The *Ware* decision and similar cases seem to indicate that no such waiver exists as to county officials seeking an award of back pay unless the waiver is expressly made.

Based on the reading of the statutes in conjunction with the case law, sovereign immunity seems to apply to the facts in this case.

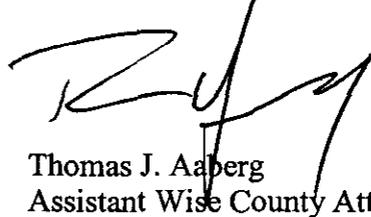
Request:

#1 When does the four-year statute of limitations for a collection debt run on back pay issues regarding Statutory County Judge's payment under Texas Government Code

Sec. 25.0005? Is it a discovery rule, tolling the limitation until discovery? As in this case, tolled until 2003. Is it a strict limitation rule, meaning the judge had a duty to know when the Commissioners made the decision to collect the fee and therefore affecting his salary? As in this case, starting the statute of limitations in 1996 and a continuing offense every year the money was not paid?

#2 Does Sovereign Immunity affect a claim for back pay (e.g. claims for damages) caused by an omission of the Wise County Commissioners Court that reduced Judge Melton Cude's salary for seven years?

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Aaberg', written over the typed name and title.

Thomas J. Aaberg
Assistant Wise County Attorney