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OPINION COMMITTEE

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FILE # ML-45383-07
I.D. # 45383

October 2, 2007

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

RQ-0633-GA

Re: Whether a municipality must pay a fire fighter or police officer for an appearance as a witness in a civil service hearing before a hearing examiner when the firefighter or police officer is subpoenaed in his or her capacity as a fire fighter or police officer and testifies during time off.

Dear General Abbott:

The purpose of this letter is to request an opinion on whether a municipality must pay a fire fighter or police officer for an appearance as a witness in a civil service hearing before a hearing examiner when the firefighter or police officer is subpoenaed in his or her capacity as a fire fighter or police officer and testifies during time off.

Section 142.009 of the Texas Local Government Code is the current codification of article 1583-3 of the Texas Revised Civil Statutes. Article 1583-3 required cities to pay police officers for their appearance in criminal matters. A transfer of the Article occurred when the Penal Code was codified in 1969. The statute was transferred to Article 1269r and it thereafter provided that "A municipality shall pay firemen and policemen for appearances made on their timeoff, as witnesses in criminal suits or in suits in which the municipality or other political subdivision or governmental agency is a party in interest." Article 1269r was codified as section 142.009 of the Texas Local Government Code in 1987.

Section 142.009(a) of the Texas Local Government Code requires a municipality to "pay a fire fighter or police officer for an appearance as a witness in a criminal suit or a civil suit in which the municipality or other political subdivision or government agency is a party in interest if the appearance: (1) is required; (2) is made on time off; and (3) is made by the fire fighter or police officer in the capacity of a fire fighter or police officer." TEX. LOC. GOV'T CODE

142.009(a). The intent of this legislation is apparent from its text and history. It prevents municipalities from refusing to pay firefighters and police officers when those city employees are required to appear in a court proceeding because of their capacity as a fire fighter or police officer. Elsewhere, it expressly requires the municipality to pay the fire fighter or police officer at his or her overtime rate when applicable.

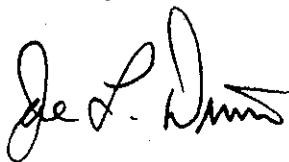
In municipalities which have adopted the Fire Fighters' and Police Officers' Civil Service Act, TEX. LOC. GOV'T CODE § 143.001, *et seq.* (the "Act"), a fire fighter or police officer who is disciplined or passed over for promotion can appeal to an independent third-party hearing examiner. *See* TEX. LOC. GOV'T CODE § 143.057. This is an adversarial proceeding in which the civil servant challenges the decision of the municipality. If the parties cannot agree on a hearing examiner, the municipality's civil service director must request "a list of seven neutral arbitrators from the American Arbitration Association." *Id.* at § 143.057(d). The selected hearing examiner may "issue subpoenas" to force the attendance of witnesses. *Id.* at § 143.057(f). Witnesses for these civil-service hearings sometimes include fire fighters and police officers. The hearing examiner's decision is final and binding on all parties. *Id.* at § 143.057(c).

The Fifth Circuit has discussed what constitutes a "suit." "A suit consists of: (1) an adversarial proceeding, (2) which arises as a result of a deprivation or injury, (3) which involves at least two parties, (4) which compels the attendance of the parties, (5) which asserts and prosecutes a claim against one of the parties, and (6) which demands the restoration of something from the defending party." *In re Murphy*, 271 F.3d 629, 632-33 (5th Cir. 2001) (citing Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1821)). A civil-service appeal before a hearing examiner would appear to fall within this definition. *See also*, *Fewox v. McMerit Constr. Co.*, 556 So.2d 419, 423 (Fla. 2d DCA 1989) (holding that an arbitration proceeding was a "suit" under Florida's insurance code). Specifically, the hearing is an adversarial proceeding between a civil servant and his employer. Witnesses can be compelled to attend the hearing. The civil servant asserts and prosecutes his or her claim that a department head's decision was wrong and demands the restoration of his or her position or promotion.

Construing section 142.009(a) of the Texas Local Government Code to require municipalities to pay fire fighters and police officers for their compelled appearance to a civil-service hearing furthers the underlying purpose of the statute. Obviously, a witness who appeared voluntarily and the appealing civil servant would not be entitled to be paid for their appearance because such appearance would not be "required." *See* TEX. LOC. GOV'T CODE § 142.009(a)(1).

Your time and attention to this matter is greatly appreciated.

Sincerely,



Joe Driver
Chairman, Law Enforcement Committee