



JOSEPH D. BROWN
GRAYSON COUNTY CRIMINAL DISTRICT ATTORNEY

RECEIVED

OCT 22 2009

OPINION COMMITTEE

October 19, 2009

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-46216-09
I.D. # 46216

RQ-0834-GA

Re: Request for Opinion – May the Grayson County Commissioners Court, in the middle of a budget year, amend the budget of the Grayson County Clerk to reduce that office’s salary line item in an amount equal to the pay which was due to county clerk employees for a time period the employees did not work at the direction of the elected county clerk because of a weather related emergency?

Dear General Abbott,

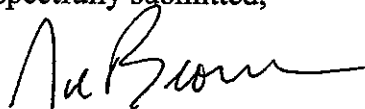
In August of 2009, the Grayson County Clerk closed her office approximately thirty (30) minutes early because of a thunderstorm and resulting power outage in the county courthouse. The County Clerk dismissed several employees for that time period. Despite the request of the County Clerk, the Grayson County Commissioners Court refused to pay the employees in question for this time period that they did not work.

On October 7, 2009, this office issued an opinion (attached as Exhibit 1) which held that, pursuant to Texas Attorney General Opinion JC-0239, the Grayson County Commissioners Court could not withhold payment to these employees in such circumstances, even in spite of a forty-hour work week uniform pay policy which had been implemented by the county.

On October 12, 2009, following this office’s opinion, a Grayson County commissioner requested this office’s opinion as to whether the Commissioners Court could amend the county budget in the middle of the fiscal year, to reduce the salary line item for the county clerk in an amount equal to the pay received by the employees who were dismissed because of the thunderstorm. By letter dated October 16, 2009, (attached as Exhibit 2), this office responded with the opinion that such a mid-year budget amendment would constitute an unconstitutional encroachment upon the authority of an elected officeholder, in this case the Grayson County Clerk. The reasoning for this opinion is contained the letter dated October 16, 2009, attached as Exhibit 2.

The Grayson County Commissioners Court has requested your opinion regarding the matter. Accordingly, I am forwarding to you all of the material and opinions provided to and by my office in this regard. My opinions in the attachments contain legal brief which I understand your office requires in these circumstances. If you need additional briefing or information, please let me know.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. D. Brown", with a long horizontal flourish extending to the right.

Joseph D. Brown
Criminal District Attorney
Grayson County, Texas

JDB/ds

Attachments



JOSEPH D. BROWN
GRAYSON COUNTY CRIMINAL DISTRICT ATTORNEY

October 7, 2009

The Honorable Wilma Blackshear Bush
Grayson County Clerk
100 W. Houston
Sherman, Texas 75090

Re: Request for Opinion – “Is Grayson County obligated to pay an employee for time that was not worked during a time period in which a county office where the employee worked closed because of a thunderstorm and accompanying power outage at the direction of the elected official supervising the employee?”

Dear Ms. Bush:

You have asked this office for an opinion regarding whether the county must pay employees for a time period for which you closed your office for what you consider a weather emergency. It is my understanding that the county has refused to pay employees in the county clerk's office for time that was not worked on the afternoon which you, the elected county clerk, closed your office because of a thunderstorm and accompanying power outage. My understanding is that the county's refusal to pay these employees is based on the county's uniform pay policy, adopted by the county, which provided:

“County employees are to be compensated upon a 40-hour work week, based upon the benefits and holiday approved by Commissioners Court, unless otherwise noted. Compensation will only be paid for hours worked, sick leave, annual leave, and holidays approved by Commissioners Court.”

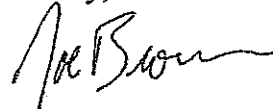
On January 25, 2001, this office addressed the same question in relation to requests from several elected officials following a snow storm. At the time, we expressed the opinion that Texas Attorney General Opinion JC-0239, directly addressed this question. That opinion provides, in pertinent part:

"In our opinion, a county commissioners court authority to set a county employees compensation encompasses the authority to adopt a policy premising full salary and benefits upon a 40-hour work week. Nevertheless, a county commissioners court generally may not second guess a county officers use of county employees to accomplish the officer's constitutional or statutory duties. Nor may a county commissioners court second guess a county officer's determination that dismissing county employees under his or her supervision on the afternoon before a county holiday, or at any other time, serves a public purpose or constitutes a legitimate use of official work time... a county commissioners court may adopt a policy requiring a county employee to work or account for 40 hours of work each week to be eligible for compensation or benefits, but the court may not apply the policy to interfere in the administration of another county officer's office. If the county commissioners court infers from a county officer's office closure... that the elected county officer does not require all of the full-time employees assigned to that officer, the commissioners court remedy is to apply its budgetary authority to reallocate resources."

In September of this year, I requested from the Grayson County Commissioners Court any information which it wished to provided regarding the legal basis for its denial of payment to your office's employees. I received an email response from Commissioner Gene Short forwarding a brief email from James Allison, a legal representative of the County Judges and Commissioners Association of Texas. This response provided no legal authority to question the opinion and conclusion this office reached in its January 25, 2001, opinion. In fact, Mr. Allison's email provided no opinion regarding the legal issues addressed, and merely restated the relevant portions of Attorney General Opinions JC-131(1999), JC-239(2000) and JC-214(2000). Accordingly, it remains the opinion of this office that the county commissioners court, nor the county auditor, nor the county treasurer, may withhold payment of an employees full salary and benefits, in spite of the 40-hour work week uniform pay policy, when the employee was dismissed from the office for all or part of the work day by a supervising elected official.

By copy of this letter, I am forwarding this opinion to Grayson County commissioners and all other affected departments.

Sincerely,



Joseph D. Brown
Criminal District Attorney
Grayson County, Texas

CC:	Judge Drue Bynum	Judge Jim Fallon	Richey Rivers, County Auditor
	Commissioner Gene Short	Judge Brian Gary	Tracy Powers, District Clerk
	Commissioner Johnny Waldrip	Judge Rayburn "Rim" Nall	Sheriff Keith Gary
	Commissioner David Whitlock	Judge James Henderson	Virginia Hughes, Treasurer
	Commissioner Jackie Crisp	Judge Carol Siebman	Andrea Mory, Director of Human Resources
		Judge Butch Morgan	

Joe Brown

From: Gene Short
Sent: Friday, September 18, 2009 9:05 AM
To: Joe Brown
Subject: FW: Request for Opinion

Gene Short
Grayson County Commissioner Pct. 4
100 West Houston St., 3rd Floor
Sherman, Texas 75090
903-813-4318 Office
903-893-5207 Fax
903-821-2688 Cell

From: James Allison [mailto:j.allison@allison-bass.com]
Sent: Thursday, September 17, 2009 4:17 PM
To: Gene Short
Subject: RE: Request for Opinion

Commissioner Short: In response to your inquire, the attempts by the Attorney General to clarify the authority of an elected official and the Commissioners Court over the work and compensation of county employees have left considerable confusion. Opinions JC-131 (1999) and JC-239 (2000) affirm two principles: 1) Elected officials are entitled to direct the performance of duties by their employees; and 2) Commissioners Court is entitled to determine the compensation of county employees. JC-239 also affirms that "a county commissioners court's authority to set a county employee's compensation encompasses the authority to adopt a policy premising full salary and benefits upon a forty-hour work week." However, the AG also held "neither the county commissioners court, nor the county auditor, nor the county treasurer may withhold payment of an employee's full salary and benefits although the employee was dismissed from the office for all or part of the day by the supervising official." Rather, the AG directs that the Commissioners Court utilize its budgetary authority to enforce such a policy: "If a county commissioners court infers from a county officer's office closure or allocation of county resources that the elected county officer does not require all of the full-time employees assigned to that office, the commissioners court's remedy is to apply its budgetary authority to reallocate county resources." This ability of the Commissioners Court to enforce its fiscal policies by budget amendment was also affirmed in Opinion JC-214 (2000) holding that reductions in budgets are within the discretion of the court. In summary, 1) the Commissioners Court may adopt a policy premising full salary and benefits upon a forty-hour work week; 2) the Commissioners Court may not enforce the policy by summarily ordering non-payment of the current salary when an employee is released from work by an elected official; 3) the Commissioners Court may enforce its policy by reducing the compensation to be paid the employee during the remainder of the fiscal year by the adoption of a budget amendment

under Section 111.011, Local Government Code. Jim Allison, County Judges and Commissioners Association of Texas

From: Gene Short [mailto:shortg@co.grayson.tx.us]
Sent: Monday, September 14, 2009 11:45 AM
To: j.allison@allison-bass.com
Subject: FW: Request for Opinion

Jim,

What do you think about this?

Gene Short
Grayson County Commissioner Pct. 4
100 West Houston St., 3rd Floor
Sherman, Texas 75090
903-813-4318 Office
903-893-5207 Fax
903-821-2688 Cell

From: Joe Brown
Sent: Friday, September 11, 2009 10:18 AM
To: Gene Short; David Whitlock; Jackie Crisp; Johnny Waldrip; Drue Bynum
Cc: Wilma Bush; Andrea Mory; Richey Rivers; Virginia Hughes
Subject: Request for Opinion

Commissioners and Judge Bynum --

The County Clerk has asked for my opinion regarding whether the County must pay employees for a time period for which she has closed the office for what she considers a weather emergency. It is my understanding that the County has refused to pay employees of the County Clerk's office for time that was not worked on an afternoon the County Clerk closed her office because of a thunderstorm and accompanying power outage. My understanding is the County's refusal to pay these employees is based on the Uniform Pay Policy, adopted by the County, which provides:

"County employees are to be compensated upon a 40-hour work week, based upon the benefits and holiday approved by Commissioners Court, unless otherwise noted. Compensation will only be paid for hours worked, sick leave, annual leave, and holidays approved by Commissioners Court."

On January 25th, 2001, this office addressed this same question in relation to requests from several elected officials following a snow storm. At the time, we expressed the opinion that Texas Attorney General Opinion JC-0239, directly addressed this question. That opinion provides, in pertinent part:

"In our opinion, a county commissioners court's authority to set a county employee's compensation encompasses the authority to adopt a policy premising full salary and benefits upon a forty-hour work week. Nevertheless, a county commissioners court generally may not second-guess a county officer's use of county employees to accomplish the officer's constitutional or statutory duties. Nor may a county commissioners court second-guess a county officer's determination that dismissing county employees under his or her supervision on the afternoon before a county holiday, or at any other time, serves a public purpose or constitutes a legitimate use of official work time. . . . A county commissioners court may adopt a policy requiring a county employee to work or account

for forty hours of work each week to be eligible for compensation or benefits, but the court may not apply the policy to interfere in the administration of another county officer's office. If a county commissioners court infers from a county officer's office closure . . . that the elected county officer does not require all of the full-time employees assigned to that office, the commissioners court remedy is to apply its budgetary authority to reallocate county resources."

This office's opinion in 2001 stated that neither the county commissioner's court, nor the county auditor, nor the county treasurer, may withhold payment of an employee's full salary and benefits, in spite of the 40-hour per week uniform pay policy, when the employee was dismissed from the office for all or part of the day by a supervising elected official.

In preparation for the issuance of a formal opinion on this question, I am requesting that the Commissioner's Court provide to me its legal basis for denying payment to the effected employees. It is my understanding that the Commissioner's Court may have received a legal opinion, perhaps informally, from legal counsel for the Texas Association of Counties, which the court believes justifies the refusal to pay the effected employees. I am requesting that you, or the attorney who provided this advice, provide me with the specific legal basis for this opinion.

For your benefit, I have attached hereto copies of Attorney General Opinions JC-239 and my letter of January 25, 2001 addressing the matter.

Thank you.

Joe Brown
Criminal District Attorney
Grayson County, Texas
200 S. Crockett
Sherman, TX 75090
(903) 813-4361
(903) 892-9933 fax



JOSEPH D. BROWN
GRAYSON COUNTY CRIMINAL DISTRICT ATTORNEY

October 16, 2009

The Honorable Gene Short
Grayson County Commissioner
100 W. Houston
Sherman, Texas 75090

The Honorable Wilma Bush
Grayson County Clerk
100 W. Houston
Sherman, Texas 75090

Re: Request for Opinion – “May the Grayson County Commissioners Court amend the budget of the County Clerk to reduce salaries of employees who were excused from work because of a thunderstorm and accompanying power outage at the direction of the elected County Clerk, in an amount equal to the pay for the amount of time off taken by the employees?”

Dear Mr. Short and Ms. Bush:

In follow up to this office’s opinion of October 7, 2009, Commissioner Short has inquired as to our opinion to whether the Commissioners Court may amend the County Clerk’s budget to reduce the salaries of employees who took time off at the direction of the county clerk because of what the County Clerk deemed to be a weather emergency. Commissioner Short asks whether the Commissioners Court may legally reduce the salary line item for each of the employees who took off in an amount equal to the pay which the employees would receive for the time they were off work at the direction of the county clerk.¹ It is my opinion that such a budget amendment would be a constitutionally impermissible encroachment upon the authority of the elected office holder.

As set forth in our opinion of October 7, 2009, pursuant to Texas Attorney General Opinion JC-0239, a commissioners court generally may not second guess a county officer’s use of county employees to accomplish the officer’s constitutional or statutory duties. Nor may a county commissioners court second guess a county officer’s determination that dismissing county employees under his or her supervision on the afternoon before a holiday, or at any other time,

¹ This sentence is the only difference in this letter and the letter of October 13, 2009, and has been revised to more accurately reflect the facts of the request.

serves a public purpose or constitutes a legitimate use of official work time. *See* Texas AG Opinion JC-0239. To deny payment to employees who were dismissed by an elected officeholder has the effect of second guessing that elected officer holder's determination about the appropriate use of county resources.

In our opinion, for the county to amend an elected officer holder's budget in the middle of a budget year for the sole purpose of punishing the elected official's exercise of his discretion, is an end run around the prohibition that AG Opinion JC-0239 clearly sets forth. In both instances, whether a commissioners court is denying payment in the first paycheck after an office is closed, or at the end of the fiscal year, the net effect is to second guess the elected officeholder's decision about what is the appropriate use of county resources.

The specific remedy granted to the Commissioners Court, according to AG Opinion JC-0239 is the reduction of the number of employees to an elected officeholder, pursuant to the court's authority under §151.002 of the Local Government Code. In the words of the Attorney General:

"If a county commissioners court infers from a county officer's office closure or allocation of county resources that the elected county officer does not required all of the full-time employees assigned to that office, the commissioners court remedy is to apply its budgetary authority to reallocate the county resources." *See* Tex.Loc.Gov't Code Ann. §151.002(Vernon 1999)

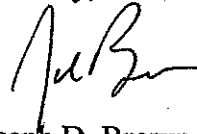
It is important to note that the Attorney General's opinion in JC-0239, involving a fact situation similar to the current fact situation, did not provide that a remedy for the commissioners court in this situation was a budget amendment for the elected officeholder's budget, during the middle of the fiscal year. In fact, the Local Government Code provision cited by the Attorney General (§151.002) as providing the statutory authority for the county commissioners court remedy, specifically addresses the commissioners court's authority to determine the number of employees that may be appointed for an elected officeholder. The Attorney General's office did not indicate that a middle-of-the-fiscal-year budget amendment would be an appropriate remedy for the commissioners court, and in light of the punitive nature of such an amendment, we do not believe this action by a commissioners court to be constitutionally appropriate.

It should also be noted that a commissioners court may not reduce an elected official's budget in the middle of a budget year if it does not transfer the funds to another item already included in the county budget unless the commissioners court determines that there is an emergency. *See* Tex.Loc.Gov't Code §111.070(b) Texas Attorney General Opinion GA-0037(2003). Similarly, §111.079 of the Local Government Code which provides that the commissioners court is not prevented from changing the budget "for county purposes" applies only in emergency situations. *See* Texas Attorney General Opinion GA-037(2003), JM-784(1987); *Goolsbee v. Tex & New Orleans R.R. Co.*, 243 S.W.2d 386, 388 (Tex. 1951). Thus, with the exception of transfers between items included in the county budget, the Grayson County Commissioners Court "may spend county funds only in strict compliance with the budget, unless an emergency exists." *See* Texas Attorney General Opinion GA-0037, Tex.Loc.Gov't Code Ann. Section 111.070(a).

In summary, as stated in our letter of October 7, 2009, the Grayson County Commissioners Court cannot refuse to pay employees for time which they did not work due to the elected officeholder closing her office because of what she deemed a weather emergency. Furthermore, the Grayson County Commissioners cannot, in the middle of a budget year, amend its budget to reduce the salary line items for such employees in an amount equal to the pay the employee would receive for the time off taken.

If you have any questions, please do not hesitate to call.

Sincerely,



Joseph D. Brown
Criminal District Attorney
Grayson County, Texas

CC: Judge Drue Bynum
Commissioner Johnny Waldrip
Commissioner David Whitlock
Commissioner Jackie Crisp

Judge Jim Fallon
Judge Brian Gary
Judge Rayburn "Rim" Nall
Judge James Henderson
Judge Carol Siebman
Judge Butch Morgan

Richey Rivers, County Auditor
Tracy Powers, District Clerk
Sheriff Keith Gary
Virginia Hughes, Treasurer
Andrea Mory, Director of
Human Resources