



Office of the Attorney General  
State of Texas

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December 17, 1993

Mr. Michael E. Hines  
Executive Director  
Texas Commission on Fire Protection  
P.O. Box 2286  
Austin, Texas 78768-2286

Letter Opinion No. 93-113

Re: Appointment of a fire department head under Government Code section 419.032, appointment of and temporary fill-in work of a part-time fire protection employee under Government Code section 419.0321, and rule-making authority to define *duties related to fire suppression* as used in Government Code section 419.0321 (ID# 22316)

Dear Mr. Hines:

You have asked us several questions about Senate Bill 1110, Acts 1993, 73d Leg., ch. 912. That bill, *inter alia*, amended Government Code ("code") section 419.032, *id.* § 7, and added a new section 419.0321 to the code, *id.* § 8. The first question is as follows:

1. Do the provisions of the new subsection 419.032(f) pertaining to temporary appointment of a fire department head and the requirement of certification within one year apply to the head of a fire department whether or not the individual may be assigned fire suppression duties?

As amended by Senate Bill 1110, section 419.032 now provides, in pertinent part:

(a) A fire department may not appoint a person to the fire department, except on a temporary or probationary basis, unless the person:

(1) has satisfactorily completed a preparatory program of training in fire protection at a school approved by the commission; and

(2) meets the qualifications established by the [Texas C]ommission [on Fire Protection] under Subsection (b).

(b) The commission by rule may establish qualifications . . . that relate to the competence and reliability of persons to assume and discharge the responsibilities of fire protection personnel.

(c) Fire protection personnel who receive temporary or probationary appointment and who fail to satisfactorily complete a basic course in fire protection, as prescribed by the commission, before one year after the date of the original appointment forfeit, and shall be removed from, the position. . . .

(d) The commission may certify persons who are qualified under this subchapter to be fire protection personnel. The commission shall adopt rules relating to presentation of evidence of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the commission for approved fire protection education and training programs in this state and shall issue a person meeting the rules a certificate evidencing satisfaction of Subsections (a) and (b). . . .

. . . .

(f) A local government may appoint a person to the position of head of the fire department, though the person is not certified by the commission as fire protection personnel, if the person either has at least 10 years' experience as a volunteer fire fighter or may be eligible to become certified under the provisions of Subsection (d) relating to other states or jurisdictions. The appointment is on a temporary basis pending certification of the person as fire protection personnel by the commission under this subsection. The temporary appointment may not be extended beyond one year by renewal of appointment or otherwise. . . .

Gov't Code § 419.032, *as amended*, Acts 1993, 73d Leg., ch. 912, § 7. The above-quoted subsection (f) was added by Senate Bill 1110.

You suggest that the provisions in subsection (f) relating to qualifications for and certification of temporary fire department heads may apply to the appointment of a department head who has only administrative, not fire suppression, duties because "fire administration" is included in the duties described in the definition of *fire protection personnel* contained in section 419.021(3). The phrase *fire protection personnel* is defined as follows:

(a) In this subchapter:

. . . .

(3) "Fire protection personnel" means:

(A) permanent, fully paid, full-time law enforcement officers designated as fire and arson investigators by an appropriate local authority; or

(B) permanent, fully paid, full-time fire department employees who are not secretaries, stenographers, clerks, budget analysts, or similar support staff persons or other administrative employees and who are assigned duties in *one or more* of the following categories:

- (i) fire suppression;
- (ii) fire inspection;
- (iii) fire and arson investigation;
- (iv) marine fire fighting;
- (v) aircraft fire fighting and rescue;
- (vi) fire training;
- (vii) fire education;
- (viii) *fire administration*; and
- (ix) any other position necessarily or customarily related to fire prevention and suppression.

Gov't Code § 419.021(3)(B), *as amended*, Acts 1993, 73d Leg., ch. 912, § 4 (emphasis added).

We agree with you; subsection (f) applies even to purely administrative department heads because they are "fire protection personnel." Section 419.021 defines *fire protection personnel* as including certain persons "who are assigned duties" in "fire administration" regardless of whether the person also has duties in "fire suppression." Therefore, we conclude in answer to your first question that subsection (f) of section 419.032 applies to any uncertified person appointed to the position of fire department head regardless of whether that person is assigned fire suppression duties, so long as the person fits within the statutory definition of *fire protection personnel*.

Your second question is as follows:

2. Does [subsection (f)'s] requirement of certification within one year apply to [a] head of a fire department who was appointed prior to the effective date of S.B. 1110?

We believe that the new subsection (f) applies by its terms only to appointments occurring on or after the effective date of Senate Bill 1110.<sup>1</sup> Appointments that occurred before the effective date of subsection (f) would be governed by the law then in effect.

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<sup>1</sup>Senate Bill 1110 took effect on September 1, 1993. Acts 1993, 73d Leg., ch. 912, § 28.

You suggest that subsection (f) may be retroactive because code section 419.039 provides, in pertinent part:

(a) A person commits an offense if the person:

....

(3) appoints *or retains* a person in violation of Section 419.032. ....

Gov't Code § 419.039(a)(3) (*emphasis added*). We do not read this provision as an expansion of the application of section 419.032(f) to include retention of department heads appointed before the effective date of Senate Bill 1110. Section 419.032 contains time limits on temporary or probationary appointments, *id.* § 419.032(a),(c),(f), and subsection (a)(3) of section 419.039 prohibits the retention of a person in violation of those time limits, as well as the retention of a person who was not lawfully appointed in the first place.

Your third question is as follows:

3. Are the provisions of new § 419.0321, concerning the new certification class for part-time fire protection employees self-executing, or do they require Commission rules to be implemented before such certificates may be issued?

Section 419.0321, which was added to subchapter B by Senate Bill 1110, provides, in pertinent part:

(a) A fire department may employ part-time fire protection employees under this section. The commission shall create a separate certification class for part-time fire protection employees.

(b) To become certified as a part-time fire protection employee, a person must:

(1) satisfy the requirements of Section 419.032(a) and (b) or Section 419.032(d) for certification as fire protection personnel; and

(2) be employed by a fire department as a temporary or probationary part-time fire protection employee.

(c) A fire department may not employ a person as a part-time fire protection employee, except on a temporary or probationary basis, unless the person has been certified by the commission as a part-time fire protection employee. ....

Gov't Code § 419.0321(a) - (c); Acts 1993, 73d Leg., ch. 912, § 8 (*italics removed*).

We note that section 419.0321(a) expressly requires the commission to "create a separate certification class for part-time fire protection employees." This language indicates that such a class does not exist until created by the commission. Furthermore, code section 419.026 requires the commission to "set and collect a fee of not more than \$35 for each certificate that the commission issues . . . under this subchapter." You suggest that the commission already has done this by promulgation of section 437.3(a) in title 37 of the Texas Administrative Code, providing that "[a] \$20 certification fee is required for each certificate issued by the commission." We disagree. Section 437.3 applies only to certificates issued "to full-time, full-paid fire protection personnel," 37 T.A.C. § 437.1, not to part-time fire protection employees. The commission may not issue a certificate to a part-time fire protection employee until it sets and collects a fee pursuant to code section 419.026.

On the other hand, subsections (a) and (c) of section 419.0321 do permit a fire department to hire an uncertified part-time fire protection employee on a temporary or probationary basis, subject to the time limit for such employment that is contained in subsection (c).<sup>2</sup> We believe this part of the section is self-executing.

Your fourth question is as follows:

4. Does the temporary fill-in work of a part-time fire protection employee permitted by subsection 419.0321(f) count towards the limitation of 500 hours a year in duties related to fire suppression under subsection 419.0321(e)(2)?

Subsections (e) and (f) of section 419.0321 provide:

(e) A part-time fire protection employee may not:

(1) work more than 24 hours a week or average more than approximately 24 hours a week during a work cycle, as appropriate, for an employing fire department; or

(2) work more than 500 hours a year for an employing fire department in duties related to fire suppression.

(f) A part-time fire protection employee may work, on a temporary basis only, in place of a person who is fire protection personnel who is absent from work because of vacation, illness, injury, or administrative leave. Work may not be assigned under this

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<sup>2</sup>A temporary or probationary employment may not extend beyond one year or be renewed, except that on petition of a fire department one year or more after the date that a temporary or probationary part-time employment expires, the commission may reinstate the person's temporary or probationary part-time employment." Gov't Code § 419.0321(c); Acts 1993, 73d Leg., ch. 912, § 8 (italics removed).

subsection in a manner that will cause a reduction in the number of authorized full-time positions in a fire department. Hours worked under this subsection are not counted when computing hours under Subsection (e)(1).

Gov't Code § 419.0321(e),(f); Acts 1993, 73d Leg., ch. 912, § 8 (italics removed).

The statute expressly excludes fill-in work under subsection (f) from the 24-hours-per-week limitation of subsection (e)(1) but says nothing about excluding fill-in work hours from the 500-hours-per-year limitation of subsection (e)(2). "It is a settled rule that the express mention or enumeration [in a statute] of one person, thing, consequence, or class is equivalent to an express exclusion of all others." *State v. Mauritz-Wells Co.*, 175 S.W.2d 238, 241 (Tex. 1943). Therefore, the legislature's express statement that fill-in work does not count towards the 24-hour requirement is equivalent to an express statement that such work does count towards the 500-hour requirement. Accordingly, we conclude that the temporary fill-in work of a part-time fire protection employee permitted by subsection (f) of section 419.0321 does count towards the limitation of 500 hours per year in duties related to fire suppression under subsection 419.0321(e)(2).

Your fifth and final question is as follows:

5. Does the Commission have the authority to adopt a rule that clarifies the phrase used in subsection 419.0321(e), "duties related to fire suppression," to include duties required for, and directly concerned with the control and extinguishment of fires, including such incidental non-fire fighting functions as fire-housekeeping, equipment maintenance, lecturing, attending fire drills, and making in-service inspections of homes, businesses, and schools for fire hazards?

You suggest that such rule-making authority may be found in subsection (a) of code section 419.008, which provides that "[t]he commission may adopt rules for its internal management and control and for the administration of its powers and duties," or in subsection (a)(5) of code section 419.022, which permits the commission to "establish minimum educational, training, physical, and mental standards for admission to employment as fire protection personnel in a permanent, temporary, or probationary status and for advanced or specialized fire protection personnel positions."

We do not believe that either of these statutory grants of rule-making authority to the commission include the authority to define *duties related to fire suppression*. "[R]ules and regulations adopted by administrative agencies may not impose additional burdens, conditions or restrictions in excess of or inconsistent with statutory provisions." *Bexar County Bail Bond Bd. v. Deckard*, 604 S.W.2d 214, 216 (Tex. Civ. App.--San Antonio 1980, no writ), "[A]n administrative agency may implement and fill in details relating to statutory provisions listing or naming powers or activities granted or proscribed, but the

agency may not by its own rules extend or add to the powers or activities listed in the statute." *Carp v. Texas State Bd. of Examiners in Optometry*, 401 S.W.2d 639, 642 (Tex. Civ. App.--Dallas 1966), *rev'd on other grounds*, 412 S.W.2d 307 (1967), *app. dismiss'd, cert. denied*, 389 U.S. 52 (1967). We therefore conclude that the commission does not have authority to define by rule the meaning of the phrase *duties related to fire suppression* as that phrase is used in section 419.0321, subsection (e).<sup>3</sup>

### S U M M A R Y

Subsection (f) of section 419.032 of the Government Code (the "code") applies to any uncertified person appointed to the position of fire department head regardless of whether that person is assigned fire suppression duties, so long as the person fits within the statutory definition of *fire protection personnel* contained in code section 419.021. Subsection (f) applies by its terms only to appointments occurring on or after the effective date of Senate Bill 1110, which added the new subsection (f). Acts 1993, 73d Leg., ch. 912. Appointments that occurred before the effective date of Senate Bill 1110 would be governed by the law then in effect.

Subsections (a) and (c) of code section 419.0321 are self-executing and do permit a fire department, without the need for prior regulatory implementation by the Texas Commission on Fire Protection (the "commission"), to hire an uncertified part-time fire protection employee on a temporary or probationary basis, subject to the time limit for such employment that is contained in subsection (c). The provisions for certification of part-time fire protection employees contained in section 419.0321 are not self-executing, however, and require regulatory implementation.

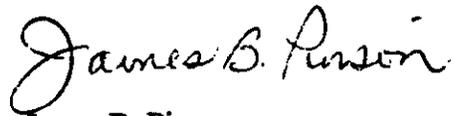
The temporary fill-in work of a part-time fire protection employee permitted by section 419.0321(f) does count towards the limitation of 500 hours per year in duties related to fire suppression

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<sup>3</sup>You contend that the phrase *duties related to fire suppression*, which is used in section 419.0321(e), is broader than *fire suppression duties*, which phrase is not used. We will not comment on this contention because you have not asked us to construe the phrase.

under section 419.0321(e)(2). The commission does not have authority to define by rule the meaning of the phrase *duties related to fire suppression* as that phrase is used in section 419.0321(e).

Yours very truly,

A handwritten signature in cursive script that reads "James B. Pinson".

James B. Pinson  
Assistant Attorney General  
Opinion Committee