



Office of the Attorney General  
State of Texas

MORALES  
ATTORNEY GENERAL

October 13, 1995

Mr. Don A. Gilbert  
Commissioner  
Texas Department of Mental Health and  
Mental Retardation  
P.O. Box 12668  
Austin, Texas 78711-2668

Letter Opinion No. 95-063

Re: Whether employees of the  
Department of Mental Health  
and Mental Retardation are "at  
will" employees (RQ-837)

Dear Commissioner Gilbert:

You ask "whether section 551.022(d)(3) of the Health and Safety Code creates a property interest in employment for employees of [Department of Mental Health and Mental Retardation] facilities that is protected by the fourteenth amendment to the United States Constitution." Section 551.022(d)(3) provides that the superintendent of such a facility "may . . . remove an officer, teacher, or employee for good cause and with the board's consent."

A public employee has a claim for notice and a hearing before termination "only if such termination would infringe a liberty or property interest." *Johnson v. Southwest Miss. Regional Medical Ctr.*, 878 F.2d 856, 858 (5th Cir. 1989). Such a property interest in a job may be created if a public employee "has a legitimate claim of entitlement to it, a claim which would limit the employer's ability to terminate the employment." *Id.* Such a claim "must be determined by reference to state law." *Id.*

The Texas Supreme Court, in *Grounds v. Tolar Independent School District*, 856 S.W.2d. 417 (Tex. 1993), held that the Term Contract Nonrenewal Act, Educ. Code §§ 21-201 to -11, created such a property right, which, following the United States Supreme Court, it defined as "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 419 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)). As your letter to us correctly notes, *Grounds* and the cases it cites recognize that such an interest may be created "because of statutory or other language providing that an employee may be dismissed 'only for just cause' or similar language, or for certain specified reasons."

You suggest, however, that the language of section 551.022(d)(3), which includes the word "may" may be sufficiently "permissive" so as not to create such a property interest. While it is true that "may" generally indicates discretion, in our view the discretion at issue in that sentence is the discretionary authority to remove. That is, the superintendent may or may not remove an officer, teacher, or employee. But should he do so, he must remove such persons "for good cause and with the board's consent." To read "may" otherwise would be to read the requirements of good cause and the board's

consent out of the statute. We cannot do so, since we must presume that the legislature had a purpose for this language.<sup>1</sup>

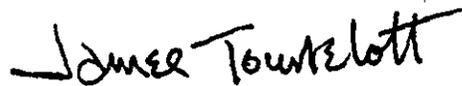
Moreover, as you point out, the prior statutory scheme provided for good-cause removal for higher officials, including superintendents and members of the Board of Control, whereas the present statutory scheme "contains 'at will' language with respect to board members, the commissioner, and the head of each Texas Department of Mental Health and Mental Retardation ('TDMHMR') facility, but has retained the 'good cause' language since at least 1940 with respect to facility employees." This seems to us clear evidence that the legislature understands the effect of the "for cause" language, and intends by it to create a property interest in employment for such employees.

Accordingly, we conclude that section 551.022(d)(3) of the Health and Safety Code does create for employees of TDMHMR facilities a property interest in employment of the sort protected by the Due Process Clause of the Fourteenth Amendment.<sup>2</sup> We note that such an interest is a creature of state law, and may be taken away by state law. It has been held that when such an interest is created for a general class by state legislation, a legislative act taking the interest away is the only process due. See *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993); see also *Moulton v. City of Beaumont*, 991 F.2d 227, 231-32 (5th Cir. 1993). Under the statute as written, however, TDMHMR employees' right to their employment is protected by section 551.022(d)(3).

### S U M M A R Y

Section 551.022(d)(3) of the Health and Safety Code creates for officers, teachers, and employees of Texas Department of Mental Health and Mental Retardation facilities a property interest in their employment of the sort protected by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

Yours very truly,



James Tourtelott  
Assistant Attorney General  
Opinion Committee

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<sup>1</sup>Former article 3176, V.T.C.S., the predecessor of section 551.022(d)(3) of the Health and Safety Code, provided that "[t]he superintendent . . . shall have the following powers: . . . 3. To remove for good cause, with the consent of any officer, teacher or employee." V.T.C.S. article 3176 (1925), *repealed* by Act of April 29, 1991, 72d Leg., R.S., ch. 76, § 19, 1991 Tex. Gen. Laws 515, 647. The language was changed in connection with the nonsubstantive revision of laws on health and safety. Health & Safety Code § 1.001(a). The purpose of the revision was to make the law more understandable, and not to change it substantively. *Id.*

<sup>2</sup>You do not ask, and we do not consider, what process may be due such employees.