



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 27, 1998

The Honorable Bill Turner
Brazos County District Attorney
Brazos County Courthouse
300 East 26th Street, Suite 310
Bryan, Texas 77803

Letter Opinion No. 98-031

Re: Whether a public hearing is required to
replace an assistant county auditor (ID# 39596)

Dear Mr. Turner:

Your request asks us to construe section 152.905 of the Local Government Code which requires district judges to hold a public hearing before setting the annual compensation of assistant county auditors. Specifically, you ask whether a public hearing is required under this section to replace an assistant county auditor in the middle of the budget year. You suggest that a public hearing is required only if the annual compensation of the appointed assistant auditor is changed. We concur.¹

Before we consider section 152.905, we look at the procedures for appointing and approving salaries of assistant county auditors set out in Local Government Code section 84.021(a).² Under

¹You do not ask and we do not consider whether the county budget may be amended during the middle of a fiscal year to change the assistant auditor's salary. See Local Gov't Code § 111.010(b) (after final approval of budget, commissioners court may spend funds only in strict compliance with budget except in emergencies), (c) (commissioners court may authorize an emergency expenditure as amendment to original budget only in case of grave public necessity); Letter Opinion No. 97-051 (1997) (commissioners court must comply with section 111.010 to change or amend budget); Attorney General Opinion JM-49 (1983) (district judges may during budget year direct change in county budget increasing salaries of assistant auditors but such changes may only be made in compliance with law).

²Local Government Code section 84.021(a) provides as follows:

From time to time the county auditor may certify to the district judges a list stating the number of assistants to be appointed, the name, duties, qualifications, and experience of each appointee, and the salary to be paid each appointee. The district judges, after careful consideration of the application for the appointment of the assistants and after inquiry concerning the appointees' qualifications, the positions sought to be filled, and the reasonableness of the requested salaries, shall prepare a list of the appointees that the judges approve and the salary to be paid each. The judges shall certify this list to the commissioners court, which shall order the salaries to be paid on the performance of services and shall appropriate an adequate amount of money for this purpose. [Emphasis added.]

this section, a county auditor may apply “from time to time”³ to the district judges for the appointment of named assistants and the salaries to be paid to them. Local Gov’t Code § 84.021(a). *See also* Attorney General Opinion JM-49 (1983) (district judges may at any time during the budget year direct change in county budget increasing salaries of assistant auditors).⁴ The district judges then decide whether the county auditor is entitled to assistant auditors and approve the persons appointed to those positions and their salaries. Local Gov’t Code § 84.021(a); *Guerrero v. Refugio County*, 946 S.W.2d 558, 568 (Tex. App.--Corpus Christi 1997, no writ). The district judges certify the list of approved appointees and their salaries to the commissioners court, which then must order payment of and budget sufficient funds for the salaries certified. Local Gov’t Code § 84.021(a); *Guerrero*, 947 S.W.2d at 567. In sum, upon the application of the county auditor, a district judge may replace an assistant auditor by simply certifying to the commissioners court the approved appointee and his or her salary. A public hearing is not required under this section to either appoint or set the salary of an assistant county auditor.

Local Government Code section 152.905 enacted in 1989⁵ requires the district judges to hold and set the annual compensation of the county auditor, assistant auditor, and court reporters at a public hearing. This section provides as follows:

(a) This section applies only to the compensation of the county auditor, assistant auditors, and court reporters.

(b) *Before setting the amount of annual compensation of the county auditor, assistant auditors, and court reporters*, the district judge or judges shall hold a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard.

(c) At the hearing, the district judge or judges shall *set the amount of compensation of the county auditor, assistant auditors, and court reporters considered at the hearing*. The vote must be recorded, transcribed, and maintained as a public record.

³The term “from time to time” is defined as “[o]ccasionally, at intervals, now and then.” *See* BLACK’S LAW DICTIONARY 601 (5th ed. 1979). *See also* Gov’t Code § 311.011 (absent special definition, words and phrases shall be read in context and construed according to rules of grammar and common usage). *But see infra* note 4.

⁴Local Government Code section 84.021(a) was formerly codified at V.T.C.S. article 1650. *See* Act of May 25, 1973, 63d Leg., R. S., ch. 339, § 1, 1973 Tex. Gen. Laws 765, 765; Act of May 1, 1987, 70th Leg., R.S., ch. 149, §§ 1, 49, 51, 1987 Tex. Gen. Laws 707, 1307-08 (repeal of article 1650, V.T.C.S. and adoption of Local Government Code section 84.021 as part of nonsubstantive recodification of statutes relating to local government). Former article 1650, prior to its codification in the Local Government Code, provided that “[t]he County Auditor of any county of this State may, at any time, with the consent of the District Judge or District Judges having jurisdiction as hereinafter provided, appoint a first assistant and other assistants. . . .” *See* Act of May 25, 1973, 63d Leg., R.S., ch. 339, § 1, 1973 Tex. Gen. Laws 765, 765 (emphasis added).

⁵*See* Act of May 23, 1989, 71st Leg., R.S., ch. 1169, § 1, 1989 Tex. Gen. Laws 4800, 4800.

Local Gov't Code § 152.905 (emphasis added).

We begin our analysis of section 152.905 by noting that the statute does not require the district judges to hold a public hearing to appoint an assistant county auditor.⁶ *Id.* By its terms, subsection (b) requires the district judges to hold a public hearing before setting the amount of the annual salary of the county auditor. Subsection (c) requires the district judges to set at the public hearing the salaries of the county auditor, assistant auditors, and court reporters considered at the hearing. Words used in a statute must be read and construed in context and according to common usage. Gov't Code § 311.011(a). Read in context of section 152.905, "set" or "setting" must mean "to fix at a certain amount."⁷ Thus, the district judges must hold and fix the amount of an assistant auditor's annual salary at a public hearing. It follows that the district judges must also hold and make any changes to the annual salary at a public hearing, since any change, by definition, fixes the salary at a different amount.

Your request notes, however, the ambiguity of the emphasized language in subsections (b) and (c). You state it is unclear to you whether these provisions require a public hearing to set the annual salary for the position of an assistant auditor or to appoint the individual to that position. If the first, then a public hearing is required only if the annual compensation is changed from that previously set for the position. Thus, an assistant auditor may be appointed to that position at a previously set salary through the section 84.021(a) certification process discussed above without a public hearing. If the second, a public hearing is required each time a new assistant is appointed to the position.

We believe, based on the purpose and legislative history of section 152.905, the more reasonable construction is that the public hearing requirement applies to setting the annual compensation for the assistant auditor's position rather than to appointing an individual to that position.⁸ The purpose of section 152.905 is to require district judges to make decisions that impact the county budget in a public forum.⁹ By its terms the statute requires the district judges to hold and

⁶See also Debate on H.B. 959 on the Floor of the Senate, 71st Leg. (May 19, 1989) (Senator Carriker stating that bill does not require public hearing to appoint auditor) (tape available from Senate Staff Services Office).

⁷See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1077 (9th ed. 1983) (defining "set").

⁸See Gov't Code § 311.023(1), (3) (in construing statute, court may consider object sought to be attained and legislative history).

⁹The bill analysis for the committee report provides the following background for House Bill 959 enacting Local Government Code section 152.905:

Current law provides for the district judges to set the salary of county auditors, court reporters and several other district and county employees. The only requirement on the part of the judges is that their action be taken by order and that it be recorded in the minutes of the district court. The commissioners court must fund the salary request. In recent years this

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set the salaries of the county auditor, assistant auditors, and court reporters, *i.e.*, salaries over which the district judges have control but which the county is required to pay and include in the county budget,¹⁰ at a public hearing. Representative Stiles, author of House Bill 959 enacting section 152.905,¹¹ explained the bill as follows:

Members, [House Bill] 959 would require district court judges to hold public hearings at which time they must set the amount of compensation of officers and employees under consideration.¹² You all are familiar with the fact that commissioners courts have to set tax rates, the commissioners courts and the legislature, and the cities, and the state have to have a public hearing when they set budgets. . . . I think it's only a good government amendment to the statute to say that there would be a hearing any time there is compensation of officers and employees under consideration.

Hearings on H.B. 959 Before the House Comm. on County Affairs, 71st Leg. (March 7, 1989) (footnote added) (tape available through House Video/Audio Services Office). By requiring the district judges to hold a public hearing, the legislature intended to subject the district judges' budgetary funding decisions to the procedures applicable to commissioners courts¹³ and other governmental bodies.¹⁴ Thus, the subject of the public hearing is, as is the case with county and other budgetary hearings, the district judges' determination of the line item amounts for salaries for the positions considered, which the county must budget for and pay. It is the determination of the

⁹(...continued)

procedure has caused undue financial pressures on the commissioners court[s] of many counties. Often, they are unable to award increases to county employees for whom they have control of salaries, but must fund those salaries the district judges mandate. Much of the public is not aware that the district judges have this authority, and are quick to blame the commissioners court for budg[et] cuts or tax hikes made to meet these salary increases.

House Comm. on County Affairs, Bill Analysis, H.B. 959, 71st Leg. (1989) (Background). *See also* Letter Opinion No. 92-44 (1992) at 3 (provision "allows the public to participate in funding decisions made outside of the normal county budgetary process.").

¹⁰*See* Local Gov't Code §§ 84.021(a) (assistant county auditor), 152.031 (county auditor); Gov't Code § 52.051 (court reporters); Letter Opinion No. 92-44 (1992) at 1, 3.

¹¹*See* Act of May 23, 1989, 71st Leg., R.S., ch. 1169, § 1, 1989 Tex. Gen. Laws 4800, 4800.

¹²*See infra* note 15.

¹³*See* Local Gov't Code §§ 111.007, .038, .067 (requiring commissioners court to hold public hearing on proposed budget); Letter Opinion No. 92-44 (1992) at 3 (funding of positions within discretion of commissioners courts open to public scrutiny and comment through statutory provisions of public hearings on county budgets).

¹⁴*See generally* *Commissioners Court of Caldwell County v. Criminal Dist. Atty., Caldwell County*, 690 S.W.2d 932, 934 (Tex. App.--Austin 1985, writ ref'd n.r.e.) (discussing objectives of budgetary process including public presentation of information and provision of public forum to present and resolve disputes regarding government funds).

line item amounts that impacts the county's budget not whether a particular individual is paid that amount.

We find support for our construction that the section 152.905 public hearing requirement applies to the annual compensation set for the assistant auditor's position rather than an individual appointed to that position in the legislative debate of House Bill 959. The Senate sponsor of House Bill 959, Senator Carriker, answered questions from the floor posed by Senator Montford during the second reading and floor amendment¹⁵ of the bill, clarifying that a public hearing was required to change the salary of the categories covered by the bill:

Q: What's the need for this bill? Do you all require the district judges to have a public hearing before they appoint an auditor?

A: Not before they appoint, but before they set the salary. It's merely to have a hearing so the process through which the salary is set will be known.

....

Q: Now, a cost of living raise by the judges for a court reporter--gotta have a public hearing on that?

A: The setting of the salary requires a public hearing and I assume the change in the salary would require a public hearing also. Changes in salary don't normally take place more often than annually, if that often, and an annual hearing, I think, is not a terribly onerous thing. The hearings would more than likely be held for all categories at one time which would amount to a single hearing to air the issues on the salary at which time the judge or judges would then set the salary as they please after having had that hearing.

Debate on H.B. 959 on the Floor of the Senate, 71st Leg. (May 19, 1989) (tape available from Senate Staff Services Office). The above colloquy shows the legislature's intent that the district judges hold a public hearing to set or change the salary for the categories covered by section 152.905 rather than for appointment of individual persons in these categories.

In summary, a public hearing is not required to appoint an assistant county auditor. A public hearing is required if the amount of annual compensation of an assistant county auditor is changed

¹⁵House Bill 959 as adopted by the House and sent to the Senate applied to the compensation of "a district or county officer or employee that is required by law to be set by one or more district judges." See S.J. of Tex., 71st Leg., R.S. 1524 (1989). The bill on second reading was amended on the Senate floor to apply only to "the county auditor, assistant auditors, and court reporters." *Id.* The House concurred in the Senate amendment. See H.J. of Tex., 71st Leg., R.S. 2345 (1989).

from that previously set for the position. Thus, a public hearing is required if the compensation of an assistant auditor appointed to replace an outgoing assistant auditor is changed from that previously set at a public hearing.

S U M M A R Y

A public hearing is not required to appoint an assistant county auditor. A public hearing is required if the amount of annual compensation of an assistant county auditor is changed from that previously set for that position. Thus, a public hearing is required if the compensation of an assistant county auditor appointed to replace an outgoing assistant auditor is changed from that previously set at a public hearing.

Yours very truly,



Sheela Rai
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Opinion Committee