Texas Commission on Fire Protection

P.O. Box 2286 • Austin, Texas 78768-2286 • (512) 873-1700

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RQ-480

The Honorable Dan Morales
Attorney General of Texas
209 W. 14th Street
Austin, Texas 78701

Attention: Opinion Committee

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Michael E. Hines
Executive Director

Ernest A. Emerson
State Fire Marshal

Dear General Morales:

On behalf of the Texas Commission on Fire Protection (the "Commission"), I would like to request a formal opinion on the following questions relating to Chapter 419, TEX. GOV'T CODE:

1) Does §419.032(a) TEX. GOV'T CODE prohibit a fire department from employing, on a permanent part-time basis, fire fighters who do not meet the certification requirements established by the Commission pursuant to section 419.032(b)?

2) Does §419.032(a) prohibit the employment, on a temporary or probationary basis, of part-time fire fighters who do not meet the certification requirements established by the Commission under subsection (b)?

3) If the answers to the foregoing questions are affirmative, does any compensation, other than reimbursement of expenses incurred in responding to a fire, constitute part-time employment in violation of §419.032(a) TEX. GOV'T CODE, when paid to a "volunteer" fire fighter who does not meet the Commission's certification requirements by a fire department that is a department of a local government?

In regard to the first question posed, the Commission staff is of the opinion that §419.032(a) does prohibit part-time employment on a permanent basis of fire fighters who do not meet the certification requirements. Pursuant to the rulemaking authority granted in §419.032(b), the Commission has adopted requirements for certification as basic structural fire protection personnel. 37 TAC §423.1(b)(4) requires as a condition of certification that a person must:

> "(4) complete one year of employment, with a duty assignment defined by the Commission as full time, full-paid structure fire protection personnel..."
>
> The Commission has defined "full-time" in 37 TAC §421.5(b)(16) as:
>
> "The number of hours that represents the regular, normal, or standard amount of time per week that employees of a government entity normally devote to work related activities."

In addition, §419.032(d) provides that "The Commission may certify persons who are qualified under this subchapter to be fire protection personnel." In defining "fire protection personnel", §419.021(3), subpart C provides that fire department employees are included within the definition if they are:

> "...permanent, fully paid, full-time fire department employees who are not secretaries, stenographers, clerks, budget analysts, or similar staff support persons or other administrative employees and who are assigned duties in one or more of following categories:
> (i) fire suppression;
> (ii) fire inspection;
> (iii) fire and arson investigation;
> (iv) marine fire fighting;
> (v) air craft crash 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. (emphasis added.)"

Accordingly, it is clear from both the statute and Commission rules that full-time employment is a requirement for certification. The prohibition in §419.032(a) is also clear: "A fire department may not appoint a person to the fire department, except on a temporary or probationary basis, unless the person...meets the requirements established by the Commission under subsection (b)." (emphasis added). For purposes of this section, it is assumed that the term "appoint" and "employ" are synonymous as they are used interchangeably in subsection (c) of §417.032.

The source law for Chapter 419 (formerly Chapter 416), TEX. GOV'T CODE, was article 4413(35), TEX. REV. CIV. STAT. ANN. Section 10 of that act provided that "This Act shall apply only to fully paid firemen." This language was carried forward as §416.011, TEX. GOV'T CODE, by Acts1987, 70th Leg., Chapter 147, §1. During the same session of the legislature, H.B. 278, Acts 1987,

70th Leg., Chapter 339, §9 amended §10 of Article 4413(35) to provide "This Act applies to fire protection personnel as defined in §1b of this Act." However, §416.011, TEX. GOV'T CODE was repealed by Acts 1989, 71st Leg., Chapter 4, §2.71(e).

The elimination of the limitations of the predecessor law in applying only to "fully paid fire fighters" strongly suggests that the prohibition of §419.032(a), TEX. GOV'T CODE, may apply to persons other than fully paid, full-time fire protection personnel. It should be noted that §419.032(a) prohibits a fire department from appointing (or employing) a person to the fire department unless certain qualifications are met, one of which is full-time employment. The subsection does not state that a person may not be appointed to a full-time position in the fire department without meeting qualifications; rather, it states that a person may not be appointed to the fire department without meeting certification requirements.

In summary, although under the predecessor law part-time employment of un-trained un-certified fire fighters was unregulated, under the current provisions of §419.032(a), TEX. GOV'T CODE and Commission rules, it is prohibited. Any other interpretation would circumvent the basic purpose of Chapter 419, subchapter B, of ensuring the competence of persons employed and compensated by a fire department to provide fire protection to the people of this state.

In regard to the second question posed concerning part-time employment on a temporary or probationary basis, the Commission staff believes that such part-time employment on a temporary or probationary basis is also prohibited by §419.032. Subsection (c) of that section discusses temporary or probationary appointment and refers to "fire protection personnel," which by definition must be full-time fully paid fire department employees. Accordingly, temporary or probationary appointments are limited to full-time employees.

If, however, it is determined that temporary or probationary appointments as referenced in §419.032(a) and (c) are not limited to full-time fire department employees, then it is the position of the Commission staff that a part-time temporary or probationary appointment may not extend beyond one year under the terms of §419.032(c).

In regard to the third question posed, it is the position of the Commission staff that a fire department, as defined in §419.021(2) as " a department of a local government with permanent, fully paid, full-time employees organized to prevent or suppress fires," may not otherwise employ uncertified part-time employees in contravention of §419.032. Further, it is the staff's position that any

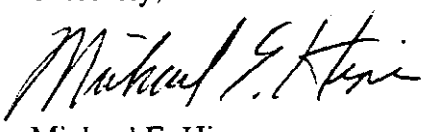
compensation other than reimbursement of expenses incurred in responding to a fire, constitutes part-time employment in violation of §419.032(a), when paid to a "volunteer" fire fighter who does not meet the Commission's requirements by a fire department as defined in §419.032(2).

Attorney General Opinion JM-1251 (1990) did not address the issue of part-time employment; however; the opinion stated that persons employed by a fire department that is a department of a local government would be subject to the provision requiring that "fire department appointees" meet Commission requirements. A person is an appointee of a fire department even if he or she is labeled as a "volunteer" depending on the nature of the duty performed and the fact of compensation. See Attorney General Opinion JM-469 (1986).

In conclusion, the direct employment of fire fighters by a local government's fire department subjects those persons to the Commission's requirements, and part-time employment contravenes the basic policy as expressed in Chapter 419, subchapter B of certifying only full-time fire department employees.

If you require additional information to reach a decision in this matter, please contact either the undersigned, or Jack Woods, the Commission's General Counsel.

Sincerely,



Michael E. Hines
Executive Director

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