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Executive Director

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TEXAS YOUTH COMMISSION

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RQ-746

September 7, 1994

The Honorable Dan Morales  
Attorney General, State of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

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SEP 12 94

SJS

ML-29019-94

29019

Dear General Morales:

Union Committee

We request your opinion whether under Hazardous Duty Pay provisions of §659.062, Government Code, time in service continues to accrue for longevity pay purposes during the first year of a Texas Youth Commission employee's service in a hazardous duty position. Legal opinions of the Comptroller of Public Accounts and of the Texas Youth Commission differ on the question, but neither opinion discounts the merits of the opposing view.

The two opinions differ on the proper interpretation of the following statute:

A state employee who has received longevity pay under Subchapter D [the longevity pay statutes] for service in a position that does not require the performance of hazardous duty and who transfers to a position for which the employee is eligible to receive hazardous duty pay is entitled to continue to receive longevity pay for the years of service to the state performed in the prior position. The employee is not entitled to additional longevity pay for the period in which the employee receives hazardous duty pay, but that period is included in computing the employee's total years of service as an employee of the state [Government Code, §659.062(c)].

One interpretation is that the second sentence of this section evidences the legislature's intent for the employee not to receive service credit for service in a hazardous position for both longevity pay and hazardous duty pay purposes. The other interpretation is that this sentence, particularly as applied to Texas Youth Commission employees, evidences the legislature's

The Honorable Dan Morales  
September 7, 1994

intent that service time may continue to accrue for longevity pay purposes during the first one-year period in a hazardous duty position in which the employee does not actually receive hazardous duty pay.

The Act making hazardous positions in the Texas Youth Commission eligible for hazardous duty pay took effect on September 1, 1993, (H.B.819, Acts 1993, 73rd Leg., ch 85, §1). This Act authorizes, but does not entitle, Texas Youth Commission employees to receive hazardous duty pay.

(1) An employee of the Texas Youth Commission, other than agency central office employees or employees whose work in an agency facility involves only occasional contact with youth, who has routine direct contact with youth placed in a residential facility of the commission or with youth released under the commission's supervision may receive hazardous duty pay in an amount that does not exceed the amount authorized by Subsection (a) of this section, subject to any condition or limitation related to receipt of the hazardous duty pay prescribed by:

- (A) Subsections (a)-(c) of this section; or
- (B) the General Appropriations Act.

(2) No hazardous duty payments shall be made from funds authorized for payment of across-the-board employee salary increases. The receipt of hazardous duty pay under this subsection does not qualify an employee for retirement benefits from the law enforcement and custodial officer supplement retirement fund [H.B.819, Acts 1993, 73rd Leg., ch.85, §1] (emphasis added).

Texas Youth Commission employees can expect to receive hazardous duty pay only if funds are available for the purpose. For fiscal year 1995, \$160,000 has been appropriated to the agency for this purpose. The question is whether the legislature intended that these employees forgo their longevity pay entitlement, at a time when they are not actually receiving hazardous duty pay, on only the possibility that they will receive hazardous duty pay in the future. This particularly affects those employees who would have been entitled to receive longevity pay for the first time during their first year in a hazardous duty position or who would have been entitled to receive an increase during that period. A literal reading of §659.062(c) would be that a Texas Youth Commission employee is not entitled to receive additional longevity pay only for the period the employee actually receives hazardous duty pay.

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September 7, 1994

We appreciate your opinion on this matter. Please let us know if we can be of further assistance to you in your consideration of it.

Sincerely,



Steve Robinson  
Executive Director

cc: The Honorable John Sharp, Comptroller of Public Accounts  
L. George Reynolds, Attorney, Office of the Comptroller  
Neil Nichols, General Counsel, Texas Youth Commission

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Opinion Committee

TEXAS YOUTH COMMISSION

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September 29, 1994

The Honorable Dan Morales  
Attorney General, State of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: 29019

DAU  
FILE # ML-29019-94  
I.B.# 29595

Dear General Morales:

Earlier this month, we requested your opinion of whether, under Hazardous Duty Pay provisions of Government Code, §659.062, time in service continues to accrue for longevity pay purposes during the first year of a Texas Youth Commission employee's service in a hazardous duty position. We now wish to broaden our earlier request for your opinion to include the additional question of whether part-time and hourly (in our case, "standby") employees who work in hazardous duty positions are eligible to receive hazardous duty pay under those same provisions.

We have learned that for many years the State Auditor and the Office of the Comptroller have said that hourly and part-time employees are not eligible for hazardous duty pay. Their reasoning, at least with regard to part-time employees, was that language in the statute making hazardous duty pay "in lieu of" (now "instead of") longevity pay evidenced the legislature's intent to limit hazardous duty payment only to those employees who otherwise would have been entitled to longevity pay.

An eligible employee is entitled to hazardous duty pay of \$7 a month for each year of service as an employee of this state in a position that requires the performance of hazardous duty, not to exceed 30 years of such service. Except as provided by Subsection (c), this hazardous duty pay is *instead of* other hazardous duty or longevity pay. [Government Code, §659.062(a)] (emphasis added)

If this interpretation of legislative intent is correct, then with few exceptions only full-time employees would be eligible to receive hazardous duty pay since only they would be entitled to

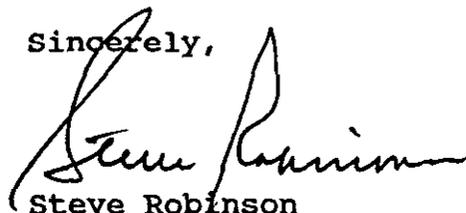
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September 29, 1994

have longevity pay included in their monthly compensation if other requirements are met (Government Code, §659.043).

The fact that the "instead of" language in the hazardous duty pay statute may be subject to different interpretations of legislative intent has caused us to question whether such statutory ambiguity should be resolved against part-time employees in hazardous duty positions, particularly since the legislature has not expressly excluded them. Previous Attorney General Opinions [JM-407 (1985); M-984 (1971)] have indicated that such ambiguities in statutes concerning state employee compensation or benefits should be interpreted in favor of the employees. Attorney General Opinion JM-204 (1984), which reaffirmed the holding of two previous Attorney General Opinions on the same subject, indicates that where a statute contains nothing limiting the definition of state employees to full-time, the statute should be interpreted to include part-time as well as full-time employees.

We appreciate your adding this question to our previous request for opinion, General Morales. Please let us know if we can be of further assistance to you in your consideration of it.

Sincerely,



Steve Robinson  
Executive Director

cc: The Honorable John Sharp, Comptroller of Public Accounts  
Lawrence F. Alwin, State Auditor  
T.C. Mallett, Director of Fiscal Management, Office of  
the Comptroller  
L.George Reynolds, Attorney, Office of the Comptroller  
Neil Nichols, General Counsel, Texas Youth Commission