

Texas Department of
Mental Health and Mental Retardation

Don A. Gilbert, M.B.A.
Commissioner

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FIRST ASSISTANT ATTORNEY GENERAL
ATTORNEY GENERAL'S OFFICE

July 17, 1995

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Opinion Committee

Opinion Committee *SJS*

The Honorable Dan Morales

Attorney General of Texas

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Austin, Texas 78711-2548

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Opinion Committee



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Dear General Morales:

Your advice and counsel are respectfully requested concerning the following question:

Whether Section 551.022(d)(3) of the Health and Safety Code creates a property interest in employment for employees of department facilities that is protected by the fourteenth amendment to the United States Constitution.

Section 551.022(d)(3) provides that a superintendent of a facility of the Texas Department of Mental Health and Mental Retardation "may . . . (3) remove an officer, teacher, or employee for good cause and with the board's consent."

While the "good cause" language in the statute suggests that such a property interest was intended by the legislature, an argument can be made that the statutory language is permissive only and therefore does not create a property interest. A review of case law from this and other jurisdictions reveals a number of cases in which a property interest has been recognized by the court 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. See Grounds v. Tolar Independent School District, 856 S.W.2d 417, 419 (Tex. 1993) and cases cited therein. A distinction can be drawn between the language addressed in these cases and the language found in Section 551.022(d)(3), which appears to be more permissive in nature than the language discussed in the various cases.

On the other hand, a review of the legislative history of Section 551.022(d)(3) and other related statutory provisions, together with an application of various rules of statutory construction, supports an argument that Section 551.022(d)(3) creates a property interest in employment for department facility employees. Prior to 1991, when the Health & Safety Code was enacted by the Texas legislature, the predecessor to Section 551.022 was contained in Vernon's Ann. Civ. Stat. arts. 3175 and 3176. The relevant portion of article 3176 read:

"The Superintendent . . . shall have the following powers: . . . 3. To remove for good cause, with the consent of the Board, any officer, teacher or employee." This earlier language appears to be less permissive than that of the current statute, in that it indicates that the superintendent shall have certain enumerated powers, including the power to remove certain employees for good cause. The term "may" is absent from the predecessor statute. Although this change might suggest a legislative intent to change the statute from requiring good cause to exist prior to an employee's termination to merely allowing it, the fact that the "good cause" language was retained in Section 551.022(d)(3) is also significant. It has been held that every word or phrase in a statute is presumed to have been used intentionally, with a meaning and purpose. Valley Intern. Properties, Inc. v. Los Campeones, Inc., 568 S.W.2d 680 (Tex. Civ. App. - Corpus Christi 1978), ref. n.r.e., appeal dismissed 99 S.Ct. 1205, 440 U.S. 902, 59 L.Ed.2d 450. Thus, the term "good cause" is not superfluous; indeed, its retention in the current statute indicates a legislative intent to retain its original meaning from the earlier statute.

This argument takes on greater significance when the present statutory scheme applicable to TDMHMR is compared to the scheme as it existed in 1940, which is discussed in attorney general opinion O-1857, rendered on January 26, 1940. In that opinion, it was observed that the statutes in effect at the time provided not only that state hospital employees could be removed for good cause, but also that the superintendent could be removed for good cause by the Board of Control, and any member of the Board of Control could be removed for good cause by the Governor. In addition, the reasons for the Governor's dismissal of a member of the Board of Control were to be specified and filed with the Secretary of State. By contrast, Section 532.014 of the Health and Safety Code specifically provides that "[t]he head of a facility serves at the will of the commissioner." Moreover, since 1940, the general provision allowing good cause removal of a member of the Board of Control has been eliminated in favor of the specifically enumerated reasons for removal of a board member contained in Section 532.007. Finally, since 1965, when TDMHMR was first created by the legislature, the Commissioner has served at the "pleasure" or "will" of the Board, as presently stated in Section 532.011(c) of the Health and Safety Code.

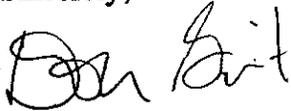
The present statutory scheme applicable to TDMHMR, therefore, contains "at will" language with respect to board members, the Commissioner, and the head of each TDMHMR facility, but has retained the "good cause" language since at least 1940 with respect to facility employees. The fact that such "good cause" language has been retained with respect to certain employees, while various amendments have removed such language for other employees, could indicate that the legislature intended for facility employees to be removed only for "good cause."

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In light of the fact that there are at least two plausible interpretations of the statutory language in question, your opinion concerning this matter is respectfully requested.

This request is of urgent importance to TDMHMR in attempting to set a policy direction for the future that will position the agency to be an efficient and effective mental health and mental retardation authority for the state. I, therefore, ask that this legal opinion be expedited and our hope is that we can have direction on this issue within 60 days. Your consideration of this request is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Gilbert". The signature is written in a cursive, somewhat stylized font.

Don Gilbert
Commissioner