



The Texas A&M University System

Office of the Chancellor

John B. Connally Building, 7th Floor • 301 Tarrow • College Station, Texas 77840-7896
Phone (979) 458-6000 • Fax (979) 845-2490 • Campus Mailstop 1122 • <http://tamusystem.tamu.edu>

RECEIVED

JUN 15 2000

June 14, 2000

FILE # ML-41472-00

I.D. # 41472

OPINION COMMITTEE

The Honorable John Cornyn
Attorney General of the State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

RQ-0246-JC

Re: Request for Opinion concerning the application of Texas Government Code §661.063, as amended by the 75th Legislature

Dear General Cornyn:

We are requesting an opinion from your office relating to the following question:

Does the application of Tex. Govt. Code §661.063 (as amended) to payment for vacation balances accrued prior to September 1, 1997 violate any right that an employee has in the value of that balance?

Tex. Govt. Code §661.063 provides:

COMPUTATION OF PAYMENT. (a) Except as provided by Subsection (b), the payment to a state employee under this subchapter shall be computed by multiplying the employee's rate of compensation on the date of separation from state employment by the total number of hours of vacation time determined under Section 661.064.

(b) The payment under this subchapter to a state employee who separates from state employment while holding a position that does not accrue vacation time shall be computed according to this subsection. The employee's final rate of compensation in the last position held that accrued vacation time shall be multiplied by the employee's total number of hours of vacation time determined under Section 661.064.

(c) Under this section, rate of compensation:

- (1) includes an emolument in lieu of base pay for which the state employee was eligible; and
- (2) does not include longevity or hazardous duty pay.

Universities

Prairie View A&M University • Tarleton State University • Texas A&M International University • Texas A&M University • Texas A&M University-Commerce • Texas A&M University-Corpus Christi
Texas A&M University-Kingsville • Texas A&M University-Texarkana • West Texas A&M University

Agencies

Texas Agricultural Experiment Station • Texas Agricultural Extension Service • Texas Engineering Experiment Station • Texas Engineering Extension Service • Texas Forest Service
Texas Transportation Institute • Texas Veterinary Medical Diagnostic Laboratory • Texas Wildlife Damage Management Service

Prior to amendment, which took effect on September 1, 1997, the computation of payment for accrued vacation leave at separation from state employment was the same for all employees, regardless of whether or not they were in a vacation-accruing position at the time of separation. The payment to all employees was computed by multiplying the employee's rate of compensation on the date of separation from employment by the total number of hours accrued. The amendment changed the manner in which the computation of payment for accrued vacation is determined for employees who are not in vacation-accruing positions at the time of separation. *See*, Tex. Govt. Code §661.063(b). Section 92(a) of Acts 1997, 75th Leg., ch. 1035 provides that the change made to this section applies only to a separation from state employment that occurs on or after September 1, 1997, the effective date of the amendment.

Within The Texas A&M University System, there are employees who were at one time in vacation-accruing positions, but have since transferred to non-vacation-accruing positions. This is particularly true of faculty members who went from 12-month appointments, in which they accrued vacation, to 9-month appointments, which do not accrue vacation. Many of these faculty members were placed on 9-month appointments prior to the change in Tex. Govt. Code §661.063. At the time of the change in status, these faculty members were not paid for their accumulated vacation time and had their accrued vacation balances frozen. Although the law allowed for such payment¹, it was (and still is) the policy of The Texas A&M University System to not agree to make such payment under

¹Tex. Govt. Code §661.062 provides, in part:

(a) A state employee who, at any time during the employee's lifetime, has accrued six months of continuous state employment and who resigns, is dismissed, or otherwise separates from state employment is entitled to be paid for the accrued balance of the employee's vacation time as of the date of separation, if the individual is not reemployed by the state in a position under which the employee accrues vacation leave during the 30-day period immediately following the date of separation from state employment.

(b) A separation from state employment includes a separation in which the employee:

.....

(2) moves from a position in a state agency that accrues vacation time to a position in that agency that does not accrue vacation time, if the agency agrees to pay the employee for the accrued balance of the employee's vacation time[.]

these circumstances². Many of these employees have received salary increases since their transfer. Therefore, if they had separated from state employment prior to September 1, 1997 they would have received a greater amount for payment of their accumulated vacation than they will when they ultimately leave state employment.

A prior opinion of the Attorney General concluded that "vacation entitlement is a benefit and right that accrues proportionately for each month of service during the year and becomes a vested right of the employee that cannot be destroyed or impaired by his resignation, dismissal or separation from state employment." *See*, Attorney General Opinion M-1075 (1972). Prior to September 1, 1997 the frozen vacation balances had a specific value, which was based upon the employees' current rate of compensation. After September 1, 1997 that value was decreased, in some cases substantially, because the value was now determined based upon the rate of compensation in the last vacation accruing position, rather than the current rate of compensation. Does this decrease in value, due to the change in law, violate the vested right that these employees have in their vacation entitlement?

²The Texas A&M University System Regulation 31.03.01 - *Vacation* provides, in part:

2.3 When an employee who has at least six continuous months of state employment transfers from a vacation-accruing position to a non-vacation-accruing position, the employee will be paid in a lump sum for any unused accrued vacation after 30 days in the non-accruing position. Exceptions to paying for accrued vacation at transfer are:

- (1) when the PIN does not change, *as in the case of a faculty member who goes from a 12-month appointment to a 9-month appointment*,
- (2) when an employee transfers temporarily to a non-vacation-accruing position and is expected to return to an accruing position, or
- (3) when the employee and the department where the employee will be working in the non-accruing position agree that the balance should be frozen.

In these cases, the employee will retain the vacation credit and may use it if the employee returns to a leave-accruing position or be paid for it upon resignation, dismissal or separation from state employment. An employee may not use vacation while in a non-vacation-accruing position.

(Effective November 3, 1997. Prior to November 3, 1997 lump sum payment upon transfer from a vacation-accruing position to a non-vacation-accruing position was not available for any System employee.)

The Honorable John Cornyn
June 14, 2000
Page 4


If so, may The Texas A&M University System replace the lost value of this entitlement?

In addition to a state employee being entitled to a lump sum payment for accrued vacation upon separation from state employment, the estate of a deceased state employee is entitled to a lump sum payment for accrued vacation at the time of the employee's death. Tex. Govt. Code §661.033. However, in this instance, the payment to the estate of the deceased employee is calculated by multiplying the employee's rate of compensation at the time of death by the number of hours accrued. Tex. Govt. Code §661.034. There is no difference in the method of calculation if the employee was in a non-vacation-accruing position at the time of death.

The Attorney General has determined that accrued vacation time of a state employee is not only a vested right of the employee, but also of the employee's estate. *See*, Attorney General Opinion M-1075 (1972). With the change to Tex Govt. Code §661.063, the value of this vested right varies depending on whether the right belongs to the employee or to his/her estate. Does it violate the vested right of the living employee who separates from state employment to have the value of his/her vacation entitlement computed by a formula which results in a decreased value, rather than the formula used for computing the value of a deceased employee's vacation entitlement? If so, may The Texas A&M University System replace the lost value of this entitlement?

Thank you for your consideration of this matter. If you have questions or require additional information, please call me at 979/458-6000.

Sincerely,


Howard D. Graves
Chancellor

xc: Mr. Delmar L. Cain
nm:h/ago00605