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The Honorable John Cornyn
Attorney General
209 W. 14th St.
Austin, TX 78701

RECEIVED

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OPINION COMMITTEE

FILE # ML-41900-01
I.D. # 41900

Dear Attorney General Cornyn:

In my capacity as Midland County Attorney, and under the authority of *Tex. Gov't. Code §402.043*, I ask your opinion in regards to the following legal questions.

1. My first question is similar to the question your office addressed in *Tex. Atty. Gen. Op. JC-0227(2000)*. *Tex. Gov't Code § 26.006(a)* provides that "a county judge is entitled to an annual salary supplement from the state of \$10,000 if at least 40 percent of the functions that the judge performs are judicial functions." Specifically, my question is whether a county may pay the employer's share of employment taxes on the "salary supplement" paid to a county judge pursuant to §26.006 from the state-provided funds. It is my opinion that the county may not do so. §26.006 does not specifically address this question.

In *Tex. Atty. Gen. Op. JC-0227*, the Attorney General was asked the same question with regard to the state salary supplement provided to county attorneys by *Tex. Gov't. Code §46.0031*. Your office ruled that §46.0031 does not permit a county to pay the employer's share of employment taxes on state "supplemental salary compensation" for a county attorney from the state-provided funds.

You resolved the question in *JC-0227* by reference to the general statutory scheme and the legislative history of §46.0031. As you noted, Federal law provides that both the employer and the employee pay a share of the tax for old-age, survivors, and disability insurance. *26 U.S.C. §§3101, 3111* (1994). As you also noted, Subchapter B of chapter 606 of the Government Code authorizes political subdivisions in this state to pay the employer's share of taxes in order to obtain social security coverage for their employees. *Tex. Gov't Code Ann. § 606.027* (Vernon 1994). These statutes create a presumption that the public employer will pay the employer's share of the tax, just as the public employee will pay the employee's share.

JC-0227 states in pertinent part as follows:

The effect of using state funds appropriated for the state salary supplement to pay for the employer's share of employment taxes on the supplement would be to shift the burden of those taxes from the employer to the employee. Given the presumption in state and federal law that a public employer will pay the employer's share of employment taxes, we believe an express legislative statement is necessary to shift responsibility for the employer's share of the employment taxes on a state salary supplement from the employer to the employee. Section 46.0031 contains no such express statement. Therefore, we conclude that the legislature did not intend the state funds provided for the county attorney salary supplement to be used to pay the employer's share of employment taxes on the salary supplement and that other funds must be used to pay those taxes.

The Opinion in *JC-0227* relied heavily upon the use of the term "salary" as opposed to merely "compensation" The opinion analyzes the two terms and concludes that the term "compensation" is a more comprehensive term than "salary," and includes nonmonetary benefits, such as an employer's contributions toward insurance, retirement, or social security coverage, whereas "salary" is a subset of "compensation" and generally does not include such nonmonetary benefits.

Similarly, §26.006 also states that the supplement that the County Judge is entitled to receive is for an "annual salary supplement." The supplement provided under §26.006 is not provided as supplemental "compensation." It is, therefore, my opinion that this indicates the legislature's intent that the state-provided funds be used for salary and not for non-monetary benefits such as the county's share of employment taxes.

2. My second question is similar to my first question. *Tex. Gov't. Code §46.004(a)* provides that "each state prosecutor is entitled to receive not less than \$22,500 a year from the state to be used by the prosecutor to help defray the salaries and expenses of the office." May a county pay the employer's share of employment taxes on any part of the §46.006 supplement out of the supplement? Although I have not found any authority that directly addresses this specific question, at least two Attorney General Opinions address §46.006. In *Tex. Atty. Gen. Op. JM-428(1986)* your office stated that "funds received under this statute are not subject to appropriation or control by the commissioners court." That opinion relied in part upon the opinion in *Tex. Atty. Gen. Op. JM-70(1983)*. In *JM-70*, the Attorney General stated that "the funds received by a district attorney pursuant to the Professional Prosecutors Act may be used in his sole discretion for the purposes authorized under the statute and are not subject to control by the commissioners court."

Allowing a county to pay the employer's share of payroll burden out of the supplement for the prosecutor's office would be completely contrary to the previous opinion of the Attorney General's office that these funds are not subject to control by the commissioners court. Therefore, it is my opinion that the county must pay the employer's share of payroll burden from the county's general fund and may not due so from the supplement. Furthermore, the use of the word "salaries" in the statute is also similar to the language in §46.0031. Therefore, it is also my opinion that the same reasoning used in *JC-0227* with regard to the county attorney supplement

also applies with regard to the prosecutor supplement provided under §46.004. Accordingly, the county would be prohibited from using the supplement to pay the employer's share of payroll burden.

3. My third question in this line is whether the county may pay employment taxes on salary supplements paid out of the District Attorney's "hot check" from the hot check fund? *Tex. Code Crim. Pro. Art. 53.08* provides that "expenditures from this fund shall be at the sole discretion of the attorney, and may be used only to defray the salaries and expenses of the prosecutor's office." Expenditures from the hot-check fund are solely within the prosecutor's discretion. *Tex. Atty. Gen. Op. JC-0062 (1999); DM-357 (1995); MW-439 (1982)*. The prosecutor may use money from the fund to increase the salaries of his staff without first receiving the approval of the commissioners court. *Tex. Atty. Gen. Op. JM-313*. A Commissioners Court is without any right to administer the "hot check" fund or to be involved in making expenditures from it. *Tex. Atty. Gen. Op. JM-738 (1987)*.

It is my opinion that when the "hot check" fund is used to pay all or part of the salary of an employee in the District Attorney's office, the rationale of *JC-0227* applies and the county may not pay the employer's share employment taxes out of the fund. Furthermore, allowing the county to pay the employment taxes out of the fund without the agreement of the District Attorney would directly violate the District Attorney's sole discretion over the fund. Therefore, it is my opinion that employment taxes on salary or salary supplements paid from the "hot check" fund must be paid from the county's general fund, and not from the "hot check" fund.

My final two questions depend upon your answers to the first three questions. If your opinion is that the county can pay the employer's share of employment taxes from the funds in question (county judge supplement, district attorney supplement and hot check fund), then the final two questions are moot. The next two questions will assume, therefore, that your answer to the first three questions is that the county may not pay the employer's share of employment taxes out of the funds in question.

4. Is any part of the claim of the County Judge or Assistant District Attorneys for employment taxes improperly paid out of the salary supplement barred by a statute of limitations? In *Tex. Atty. Gen. Op. JC-0182 (2000)* you concluded that the four year statute of limitations of *Tex. Rev. Civ. Prac. Code Ann. §16.004(a)(3)* applies as an affirmative defense to claims of county court at law judges for unpaid salary if the county chooses to raise the defense. §16.004 establishes a four year period of limitations for causes of action for "debt." It is my opinion that the same section applies to claims of the County Judge and District Attorneys. It is up to the county to raise this as an affirmative defense to their claim for unpaid salary.

5. My final question involves the issue of interest. Does interest accrue on the amount owed to the officers or employees, and if it does, at what rate does it accrue?

Prejudgment interest is defined by the Texas courts as "compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy*, 962 S.W.2d 507 (Tex. 1998). Prejudgment interest may be awarded on a breach of

contract claim. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex. 1988); *Robert S. Wilson Inv. v. Blumer*, 837 S.W.2d 860,862 (Tex. App.--Houston [1st Dist.] 1992, no writ). If the sum payable is not ascertainable from the contract, then prejudgment interest may be appropriate in equity. *Perry Roofing*, 744 S.W.2d at 930. The equitable prejudgment interest rate is the same as the rate of interest on judgments as specified in *Tex. Rev. Civ. Stat. art. 5069-1.05*. In 1997, art. 5069-1.05 was codified in Chapter 304 of the Texas Finance Code. No Substantive change in law was intended by the codification. *Tex. Fin. Code Ann. § 1.001(a)*. *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112 (Tex. App.-Corpus Christi 1999). The prejudgment interest begins accruing on the date of the injury. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555 (Tex. 1985); *Hansen v. Academy Corp.*, 961 S.W.2d 329 (Tex. App.-Houston[1st Dist.]).

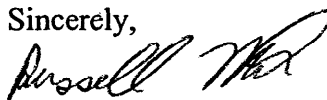
In *Robert S. Wilson Inv. v. Blumer*, 837 S.W.2d 860 (Tex. App.--Houston [1st Dist.] 1992, no writ), the Court of Appeals held that in a wrongful termination lawsuit, if the amount of damages can be determined from the face of the contract, prejudgment interest is payable at the rate of six percent per annum pursuant to article 5069-1.03. Where the non-breaching party's damages cannot be calculated from the face of the employment contract, prejudgment interest accrues at the prevailing rate that exists on the date judgment is rendered in accordance with 5069-1.05. *Winograd v. Willis*, 789 S.W.2d 307 (Tex. App.--Houston [14th Dist.] 1990, writ denied).

In my opinion, if a county has illegally paid its share of employment taxes from one of the sources in issue, interest accrues on the sum owed to the county officers and employees. Furthermore, it is my opinion that the interest would be calculated in accordance with *Tex. Fin. Code §304.003* (formerly 5069-1.05). The damages suffered by the officers and employees is the amount of employment taxes improperly deducted from their paycheck. These amounts can only be calculated by reference to the appropriate sections of the Internal Revenue Code. Therefore, the amount of damages cannot be determined from the face of the contract.

Prejudgment interest calculated under *Texas Finance Code § 304.003* is calculated using the rate calculated by the consumer credit commissioner on the 15th day of each month. The interest should be computed as simple interest and should not be compounded. *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112 (Tex. App.-Corpus Christi 1999); *Tex. Fin. Code Ann. §304.103* (Vernon 1998).

Thank you for your assistance and attention to this matter. Please do not hesitate to contact me at any time if you have any questions or require any additional information or briefing on this matter.

Sincerely,



Russell W. Malm

**cc: Bill Morrow
Al Schorre
Carole Wayland**