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OPINION COMMITTEE



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TOM RUGG
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December 4, 2003

Honorable Greg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0141-GA

FILE # ML-43369-03
I.D. # 43369

Re: Request for Opinion

Dear General Abbott:

Jefferson County is seeking guidance from your office concerning the legality of several types of fees that have been paid to justices of the peace. This request was made to our office by the Jefferson County Judge through his administrative assistant (who is an attorney). We believe that his request adequately states the issues on which we seek your opinion and also adequately addresses the applicable legal authority. Because the controversy surrounding this matter persists and because other counties may well also be similarly situated we seek your opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Rugg", written over a horizontal line.

Tom Rugg

Cc:
John Johnson

August 28, 2003

Mr. Tom Rugg, First Assistant-Civil
Criminal District Attorney's Office
(via courthouse mail)

Dear Tom:

In recent discussions between Judge Griffith, Jim Allison and other county judges about how various counties handle arraignments and inquests, Judge Griffith described Jefferson County's method of paying justices of the peace for doing inquests and arraignments. Mr. Allison said in response that he did not think it was legal for the county to pay elected officials over and above their salary as adopted in the annual budget to perform these duties.

The Judge asked me to look at the issue and, if it appeared that our practices were not statutorily sound, to seek an opinion from your office on the issue.

Having researched the issue, I would like an opinion on the following questions:

Are inquests and arraignments statutory duties of justices of the peace? If inquests and arraignments are statutory duties of justices of the peace for which the county pays them a salary, what authority exists, if any, to compensate justices of the peace in an amount over and above their salary for performing those duties?

Because we are in the budget process and would like this question resolved before the budget is finalized, I offer the following information for your consideration.

Article 49.04(a), Code of Criminal Procedure, provides that a justice of the peace *shall* conduct an inquest into the death of a person who dies in the county under certain circumstances. (*emphasis added*).

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As you know, it has been the practice for a number of years to compensate justices of the peace over and above their salary for each inquest they conduct (that amount for the last several years has been \$25 per inquest). As early as 1971 (the first year for which the county's budget document was readily available in the Auditor's Office), justice of the peace budgets included a line item for "mileage (inquests)." From the 1980s to the present, the justice of the peace budgets included a line item for either "inquests" or "auto mileage (allowance)" and, since 1999-2000, both.

Ch. 152 of the Texas Local Government Code addresses compensation, expenses and allowances of precinct and county officials. It requires that the commissioners court set the amount of compensation, office and travel expenses, and all other allowances for county and precinct officers... paid wholly from county funds (§152.011), and that salary, expenses, and other allowances of elected county or precinct officers be set at a regular meeting of the court during the regular budget hearing and adoption proceedings. *Id.* §152.013(a).

When an increase is proposed in the salary, expenses or allowances of an elected official paid wholly from county funds, the commissioners court is required to publish those proposed increases in a newspaper of general circulation at least 10 days before those increases are adopted. *Id.* §152.013(b).

Whether it was called an inquest fee or auto allowance, as I understand it, the fee during much this time was to compensate justices of the peace for using their personal vehicles while conducting inquests. The commissioners court has the authority to pay the travel expenses of justices of the peace (*Id.* §152.011), so long as that expense (or allowance) is adopted as part of the regular budget process and that any proposed increase in that expense is published. *Id.* §152.013 (a) and (b).

The former art. 1053, Texas Code of Criminal Procedure, provided that a justice of the peace was entitled to the sum of \$10, to be paid by the county, for an inquest. That statute, however, was repealed in 1985. (*see* Brooks' Texas Practice, County and Special District Law, Vol. 36, §23.20). I have been unable to find any current statutory authority for payments to justices of the peace over and above their salaries for performing inquests, one of their statutory duties.

In preparing the 1995-1996 budget, I understand from staff in the Auditor's Office that the county auditor made the decision to change the line item from "auto allowance" back to "inquest."

During the 1999-2000 budget adoption process, the justices of the peace were given auto allowances in addition to the inquest fee. They continue to receive both an auto

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allowance and inquest fees. The inquest fee appears as a separate line item in the budget of each justice of the peace and the judges are paid as if they were an outside vendor.

Unlike inquests, justices of the peace have no statutory obligation to do arraignments. Since about 1990, justices of the peace have been compensated for arraigning jail inmates on weekends. This additional compensation is reflected as "overtime" in payroll records and is budgeted not in the budgets of the individual justices of the peace but in the county's "general services" account. The current rate is approximately \$240 per day (their regular hourly rate of \$29.85 for a minimum of eight hours, regardless of how long they actually work). The amount paid varies from individual to individual, from pay period to pay period and from year to year.

This appears to be inconsistent with an Attorney General's opinion concluding that a justice of the peace may not be compensated on an hourly basis (Tex. Atty. Gen. Op. No. M-1197 (1972)), with the constitutional requirement that justices of the peace be compensated on a salary basis (TEX. CONST. art. XVI, §61) and with statutory requirements that salaries of elected county and precinct officials be set during the annual budget process. TEX. LOC. GOV'T CODE ANN. §152.013.

I am told by staff in both the Auditor's Office and the Purchasing Department that records for years prior to the 1999-2000 fiscal year have been destroyed and there is apparently no record in either office of the publication of proposed increases relative to inquest fees or "overtime" for conducting arraignments for prior years. I am checking with the Port Arthur News to determine how far back their records go. I will let you know if I receive any information relevant to this matter.

Increases in salary and auto allowances have been published, as required, at least since the 1999-2000 fiscal year. It is not so clear that allowances for inquests and arraignments have ever been published.

The Texas Attorney General has concluded that when the notice requirement is not met, the increases in salary, expenses or allowances are invalid. Tex. Atty. Gen. Op. No. MW-516 (1982). A county retains a cause of action to recover such improperly expended funds for salaries even though the money has already been spent and the budget year has passed. *Fausett v. King*, 470 S.W.2d 770, (Tex. Civ. App.-El Paso 1971).

I believe based on the foregoing that justices of the peace must be paid on a salary basis and that the commissioners court does not have the authority to compensate them over and above their salary for performing inquests, one of their obligatory statutory duties.

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I believe the commissioners court does have the authority to pay justices of the peace for certain expenses and allowances (i.e., travel expense or auto allowance), including, possibly, an allowance for doing arraignments (which is not a statutory duty, *per se*), but only if those amounts are set by the court in a regular meeting during the regular budget hearing and adoption proceedings, and only if proposed increases in those amounts from year to year are published in a newspaper of general circulation.

I hope you will find this information useful in formulating an opinion. Again, we hope to have this issue resolved before we finalize the budget. Please contact me if you have any questions.

Sincerely,

John Johnson