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OPINION COMMITTEE



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RQ-0486-GA

May 11, 2006

FILE # ML-44803-06
I.D. # 44803

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

Re: Request for an Opinion concerning a proposed Smith County Incentive Plan.

Dear Attorney General Abbott:

Smith County Precinct 1 Commissioner Joann Fleming has asked that the Smith County Criminal District Attorney's Office request an Attorney General's Opinion regarding a proposed incentive bonus plan for certain Smith County employees. A copy of the Productivity/Incentive Pay Program Recommendation and a copy of the Smith County Incentive Plan presented to the Smith County Commissioners Court in December of 2005 are attached for review as Exhibits A & B respectively.

Questions:

Does the proposed Smith County incentive bonus plan meet the requirements of Article III, Section 53 of the Texas Constitution and what is the effect if any of an incentive bonus plan that does not include all county employees?

Background:

The Commissioners Court of Smith County, Texas is reviewing a proposal for an incentive bonus plan for employees in departments reporting directly to the Commissioners Court. During a presentation to the Commissioners Court, Smith County Precinct 4 Commissioner Joann Hampton expressed a concern about the legality of an incentive bonus plan that did not include all employees of Smith County. Precinct 1 Commissioner Joann Fleming requested an Attorney General's Opinion if research on the issue did not yield a definite conclusion.

Law:

The Constitution of the State of Texas states:

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

TEX. CONST. art. III § 53 (LEXIS through 2005 legislation).

The Office of the Attorney General has stated in past opinions that, "...section 53 does not prohibit terms of employment that tie compensation to performance. For instance, bonuses are permissible where a bonus plan has been approved as part of compensation before the rendering of services." Tex. Att'y Gen. Op. No. GA-0368 (2005) at 2 (citing Tex. Att'y Gen. Op. No. JC-0376 (2001) at 2 and Tex. Att'y Gen. Op. No. JM-1253 (1990) at 2-3).

Issues:

The proposed bonus plan states, "The Smith County Incentive Plan is provided at the discretion of the Commissioners Court. The Smith County Commissioners Court reserves the right to administer, modify or terminate the Plan with or without notice." Exhibit B, p.2. Therefore, if a proposed plan is totally at the discretion of a commissioners court and may be modified without notice, is the plan, in substance approved as part of an employee's compensation prior to the employee rendering service? Further, if the incentive plan is totally at the discretion of the commissioners court, is the plan in substance tied to the employees performance?

Employees under the supervision and authority of elected officials, such as employees in a county clerk's office or a constable's office, receive compensation through the budgetary authority of a county commissioners court. However, an elected official is not supervised by the commissioners court nor are the employees working for the elected official supervised by the commissioners court.

An elected county officer, despite the commissioners court's control over the officer's budget, is free to select assistants of his or her "own choice". An elected county officer "occupies a sphere of authority,...within which another officer may not interfere or usurp. This "sphere of authority" consists of those duties the Texas Constitution and statutes delegate to the officer. Thus, an elected county officer may "decide how to use the employees who work in his or her office to accomplish the officer's constitutional and statutory duties. Similarly, although a county commissioners court sets an elected county officer's budget, the officer may determine how best to use the funds to accomplish the office's constitutional and statutory duties.


Tex. Att'y Gen. Op. No. GA-0037 (2003) at 3 (citations omitted). Therefore, if an elected official chooses not to participate in an employee incentive bonus plan, will the exclusion of the employees in that official's office be legal under state law?

Additionally, the proposed bonus plan states, "To be eligible for the incentive payment an employee must meet the following criteria: Department Heads must have a fully implemented business plan approved by the Commissioners Court." Exhibit B, p.1. Therefore, if a department head does not have a fully implemented business plan approved, the employees of that department will not be eligible for participation in an incentive plan. The resultant ineligibility will, in practice be based on the performance of the department head, and not on the employees performance. If other department heads have received approval of, and fully implemented their business plans, then the employees of their department will be eligible to participate in an incentive plan. In such a situation will the exclusion of the employees of the department head without an approved and implemented business plan be legal?

Request:

Research on incentive bonus plans in local government has not yielded information on the legal consequences or legal effects of broad discretion in the pre-determined bonus plans and whether this would be considered a form over substance argument in the application of section 53 of the Texas Constitution. Further, research has not yielded information on the legal consequences or legal effects of a bonus plan that is not consistently applied across all employees of a county. Therefore, the Smith County Criminal District Attorney's Office, at the request of the Smith County Commissioners Court respectfully requests an opinion from the Office of the Attorney General of Texas on the above stated issues.

Respectfully,



Michael B. Gary
Assistant Criminal District Attorney for Smith County

PRODUCTIVITY/INCENTIVE PAY PROGRAM RECOMMENDATION

Background

Employee incentive pay programs are designed to motivate employees to contribute to the successful operation of their departments and the County. The ultimate goal of these programs is to try to stimulate behavior that will lead to the attainment of either individual or department goals that are significantly over, above and beyond, normal job responsibilities. A formal incentive pay program should be in writing and should contain pre-determined allocation guidelines.

Compensation experts note that a successful incentive pay program requires extensive communications to employees and clear measurement indicators that employees can relate to and feel they can impact. Experts further note that a successful program should provide for the payment of a truly meaningful award.

Current State

At the present time, we have a business plan for each department that reports directly to the Commissioners Court. The quality of these business plans varies with some containing well written objectives (SMARTLY)* and others containing vague objectives which cannot be measured.

Also at this time we have completed annual performance evaluations for staff members in these departments. In my professional opinion, most of the completed performance evaluations reflect one or the other of the common "performance evaluation traps" noted below:

- Leniency Tendency – Manager rates all associates higher than is deserved. The manager may do this in an effort to be well liked, avoid conflict and/or to compensate for his/her perception that the staff is underpaid.
- Central Tendency – Manager rates all associates as average/meets expectations. The manager may do this in an effort to avoid conflict and/or because he/she is not familiar enough with an employee's work to note performance which is either above or below expectations.

Conclusion

Based on the current state I believe that we will need to phase in an incentive pay program. Phase One of the incentive pay program to be implemented FY05-06 will be very basic. The guidelines for the program for non-exempt employees and front line supervisors would be as follows:

- Full time employee with a minimum of one year service
- Annual performance evaluation rating of meets expectations or above.

The guidelines for the program for Department Heads would be as follows:

- Full time employee with a minimum of one year service
- Annual performance evaluation rating of exceeds expectations or above
- Fully implemented business plan approved by the Commissioners Court

Additional guidelines for the program would be as follows:

- Incentive checks will be issued annually, mid quarter of Q1 of the fiscal year**
- An individual must be an active employee in good standing on the date incentive checks are distributed in order to be eligible to receive payment. An individual on an approved leave of absence will receive his/her incentive check upon returning to work
- Incentive pay is considered supplemental wages and as such is subject to federal income tax and all applicable employment taxes such as FICA

In this phase I would recommend an across-the-board formula for incentive pay distribution. For example, all non-exempt employees meeting the criteria receive x% of their base salary; all Department Heads meeting the criteria receive x% of their base salary or a flat dollar amount of \$x.

Attached is a sample of what each of the above scenarios would look like.

Future State

Phase Two of an incentive pay program would include the basic guidelines above with the following additions:

- Achievement of individual performance objectives established by the employee and supervisor/Department Head
- Achievement of Department Business Plan Objectives as established by the Department Head and the Commissioners Court

In order to add these guidelines to the program we should have individual performance objectives and Department Business Plan Objectives for FY05-06 finalized no later than 12/31/05. Once these guidelines are in place we will have more flexibility in the distribution of incentive pay dollars since those distribution decisions will clearly be based on objective, measurable performance criteria.

*SMARTLY – Specific, Measurable, Accountable, Realistic, Time bound, Learning Experience, Year-round

**Given the funds available for incentive pay, I believe smaller quarterly incentive checks would be less meaningful than one larger annual incentive check.

SMITH COUNTY INCENTIVE PLAN

The bonus plan of Smith County is designed to provide incentive compensation for all eligible employees in departments that report directly to the Commissioners Court. Those departments are:

- Commissioners Court
- Records Service
- Veterans Service
- Physical Plan
- Personnel
- Probate Court
- Purchasing
- Fire Marshal
- Pre-Trial
- Road and Bridge

To be eligible for the incentive payment an employee must meet the following criteria:

- Full time employee with a minimum of one year service at the end of the fiscal year.
- Annual performance evaluation rating of meets expectations or above. Department Heads must have an annual performance evaluation rating of exceeds expectations or above.
- Be an employee in good standing on the date incentive checks are distributed. Employees on an approved leave of absence will receive their incentive checks upon returning to work.
- Department Heads must have a fully implemented business plan approved by the Commissioners Court.

Additional guidelines of the Smith County Incentive Plan are as follows:

- Incentive payments will be made Q1 of the fiscal year based on performance for the prior fiscal year.
- Incentive payments are considered supplemental wages and as such are subject to federal income tax and all applicable employment taxes such as FICA.
- Monies for the Incentive Plan will come from the Workforce Fund and be in an amount recommended by the County Judge and approved by the Commissioners Court.
- Each eligible employee's incentive payment will be computed as a percentage of base salary or will be a flat dollar amount.

The Smith County Incentive Plan is provided at the discretion of the Commissioners Court. The Smith County Commissioners Court reserves the right to administer, modify or terminate the Plan with or without notice. Incentive payments are not intended to be a binding contract between employees and Smith County.

HR 9/1/05