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RECEIVED

OCT 19 2007

October 15, 2007 **OPINION COMMITTEE**

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

RQ-0640-GA

FILE # ML-45403-67
45403

Re: Does the County Auditor have the right to refuse payment of county hospital payroll on the grounds that this is a unconstitutional grant of public money, or must the county auditor accept the hospital administrator's determination that there is adequate quid pro quo so as to avoid a constitutional violation?

Dear General Abbott,

Calhoun County has a county owned hospital known as Memorial Medical Center. The hospital administrator wants to pay a former hospital employee \$12,000.00 in wages after the employee terminated employment. The county auditor has refused to approve payment of the \$12,000.00 in county funds to the former employee in the belief that the payment will violate Texas Constitution Article III, Section 52 which state that a governmental entity may not "...lend its credit or grant public money...."

The hospital administrator has subsequently issued a memo, which places additional obligations on the former employee as "quid pro quo" for the \$12,000.00 payment and has obtained legal memorandum from the hospital's attorney supporting this position. The county auditor has consulted with this office for legal advice and remains unconvinced by the hospital administrators' "quid pro quo" argument to avoid the Constitutional prohibition and continues to believe the payment would violate the Constitution.

Accordingly, as the elected District Attorney for Calhoun County, Texas I am pursuant to Section 402.043 of the Texas Government Code requesting an Attorney General Opinion on a situation that has arisen here in Calhoun County between our Commissioner's Court, County Auditor and or local county hospital Memorial Medical Center.

Attached to this letter and enclosed herein is a letter with attachments from the attorney for the hospital Anne Marie Odefey. Please accept this paperwork as a brief, which details the relevant information.

I generally agree with her factual statements in her letter of October 10, 2007 with one addition.

After the memos of September 17, 2007 and before the memo of September 19, 2007 from the hospital administrator (CEO) a payment of \$12,000.00 in gross wages was attempted to the terminated employee. This payment was challenged and stopped by the hospital and this payroll to the terminated employee was voided. A copy of this voided payroll transaction is enclosed.

I disagree with hospital counsel's legal conclusion at the end of page 3 of her letter that:

"Furthermore, none of my research has indicated that this issue (*quid pro quo*) is for the County Auditor to determine."

I would direct your attention to Section 263.101 of the Health and Safety Code which states that a hospital created under this chapter is subject to inspection by an authorized representative of the commissioner's court. Our County Auditor is such a representative. Section 263.053 states that the hospital board of managers shall certify all bills and accounts, including salaries and wages, and transmit them to the commissioners court, which shall provide for their payment in the same manner that other charges against the county are paid. This is the function performed by our treasurer and auditor who work in close conjunction on these matters.

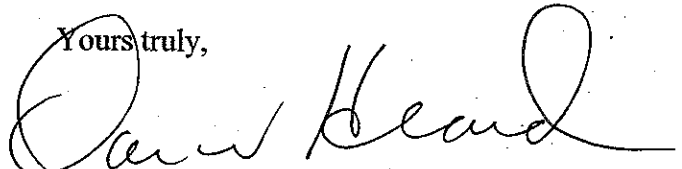
In addition to the voided payroll transaction for \$12,000.00 I am providing a copy of the letter dated October 1, 2007 from our County Auditor refusing to approve the payroll to the terminated employee and a copy of Attorney General Opinion JM-1989.

Legal Issue Presented

Does the County Auditor have the right to refuse payment of county hospital payroll on grounds that this is a unconstitutional grant of public money, or must the county auditor accept the hospital administrator's determination that there is adequate quid pro quo so as to avoid the payment being a violation of the Texas Constitution?

Thank you for your assistance.

Yours truly,



Dan W. Heard

CC:

Anne Marie Odefy
County Judge

ROBERTS, ROBERTS, ODEFEY & WITTE

ATTORNEYS AT LAW

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DAVID ROBERTS
WANDA ROBERTS
ANNE MARIE ODEFEY
SANDRA WITTE

TOM GARNER, JR.
(1935-2002)

JERRY L. CLARK

October 10, 2007

HAND DELIVERED

Mr. Shannon Salyer
Assistant District Attorney
Calhoun County Courthouse
211 S. Ann Street
Port Lavaca, Texas 77979

Re: Payment of Salary of Lynn Voskamp

Dear Shannon:

You have requested that I reduce to writing the legal opinion that I gave to the Board of Managers of Memorial Medical Center ("MMC") concerning the payment of Lynn Voskamp's salary for the period of September 15, 2007 through October 14, 2007.

The facts of the situation are as follows:

1. Ms. Voskamp submitted her letter of resignation on September 14, 2007, which gave Mr. Currier 30 days advance notice, making the resignation to be effective on October 14, 2007. (See Exhibit "1").

2. Mr. Currier, the CEO of MMC, by Memo dated September 17, 2007, accepted Ms. Voskamp's letter of resignation and advised that he elected to award Ms. Voskamp payment in lieu of her serving as an employee for the following 30 days in order to avoid any embarrassment for her or potential questions on the part of the staff of MMC. Additionally, the Memo stated that, "Should I have need of your service during the period in question I shall feel free to call on you." (See Exhibit "2").

3. Mr. Currier also issued a Memo to the Board of Trustees dated September 17, 2007 advising the Board of Ms. Voskamp's departure, and stating, "I decided that her continuation in the position after the decision to leave would be of little benefit and might actually be counterproductive and therefore I decided to pay her in lieu of working her 30 day notice." (See Exhibit "3").

COPY

4. On September 19, 2007, Mr. Currier issued a Memo, which was subsequently acknowledged by Ms. Voskamp, which clarified Ms. Voskamp's continuing obligations to MMC as he briefly alluded to in his Memo to Ms. Voskamp (Exhibit "2"). This Memo stated,

Although you will not be required to report to work at the hospital each day, you have committed to be available to the hospital as needed to perform the duties of your position, and other duties as required. This may include telephone calls and meetings, review of documents and providing assistance with business issues which may arise in your departments. This may involve work up to 40 hours per week as needed. (See Exhibit "4")

5. As a salaried management employee of MMC, Ms. Voskamp is not required to provide time records of her service.

6. By letter dated October 1, 2007, Ms. Cindy Mueller, County Auditor, advised MMC Board of Managers President and Mr. Currier that she would be unable to approve any payroll for Ms. Voskamp pending a determination of such expenditures being in compliance with the state statutes governing county finances.

7. Mr. Currier has advised that Ms. Voskamp has in fact performed assigned duties for MMC during the period between September 14, 2007 and the present day.

MMC is a County Hospital created under Chapter 263 of the Texas Health and Safety Code. As an entity created by the County, the County maintains its control over the hospital by having the authority to appoint its Board of Managers, approve its annual budget and the salaries of employees created within the budget. However, MMC is generally managed by the Board of Managers appointed by the Court (H&S 263.041, 263.042 and 263.046) and the Board of Managers is required to retain a "Superintendent" (H&S 263.071) and the Superintendent serves as CEO of the hospital (H&S 263.072). The Superintendent has the duty to appoint employees, subject to the consent of the Board of Managers, but has the sole authority to determine the duties of the employee, as well as the right to discharge the employee. (H&S 263.076)

MMC's Bylaws further outline the CEO's duties. With respect to employees, the CEO has the right to "select, employ, control and discharge all hospital personnel and employees." (Bylaws §7.02(c), See Exhibit "5") The contract between MMC and Mr. Currier also addresses Mr. Currier's duties with respect to employees and specifically states,

4.4 EMPLOYMENT, ASSIGNMENT, REASSIGNMENT AND SALARIES

Notwithstanding anything to the contrary contained herein, the CEO is vested with the authority to employ and discharge any employee whose position is included in BOARD approved staffing patterns and organization, and whose position has been budgeted. Provided, any initial salary shall not exceed the amount for which the position has been budgeted, and any salary increase shall not be greater than the maximum percent for annual salary increases included in the budget as approved by the BOARD. The CEO shall have the authority to accept all resignations of employees of MMC. The CEO shall have the authority to develop and establish administrative regulations, rules and procedures which the CEO deems necessary for the efficient and effective operation of MMC, consistent with the BOARD's lawful directives, policies, federal and state law, regulatory authority rules and accreditation standards.

Article III, Section 52 of the Texas Constitution provides in relevant part that, a political subdivision in this state may not "lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation." This provision has been interpreted by the Texas Attorney General to prohibit a City from advancing compensation to an employee (Op. JM-1194 (1990)) and the payment by a county for the salary of an employee while he was receiving specialized training, if not part of the duties of the employee (Op. O-1940 (1940)), among other things. In summary, the Attorney General has found that, when paying funds or providing something of value to a third party, the political subdivision must receive an adequate *quid pro quo* that serves a public purpose. (See JM-1146 (1990); LO-93-93 (1993)). *Quid pro quo* is defined by Black's Law Dictionary as "a thing exchanged for another thing of more or less equal value." The determination of whether or not the political entity receives an adequate *quid pro quo* is fact specific and is initially up to the person making the determination. (See JM-1146). In the cases where the adequacy of the *quid pro quo* was at issue, the Attorney General found that it was the Board of the political entity to determine. However, none of the Attorney General opinions addressed the situation such as the one at hand, where the code, the bylaws of the entity and the contract with the CEO gave the CEO the final decision making authority relative to the issue.

On the other hand, a comparable situation arose between a sheriff and the County Commissioner's over the operation of a jail commissary. (See DM-67 (1991)). In that case, the County Commissioner's were apparently not pleased with the contract entered into by the Sheriff with a commissary company. The Attorney General explained that generally, the sheriff does not have authority to contract for the County. However, the Attorney General also found that the legislature has given the sheriff express authority to

enter into a contract for the operation of a jail commissary. Ultimately, the Attorney General found that the County Commissioners had no authority to control the sheriff's exercise of discretion with regard to choosing the commissary company to contract with, nor the terms of the contract, so long as the County was obtaining an adequate *quid pro quo*. There is no implication in any of the Attorney General opinions that I researched that the adequacy of the *quid pro quo* was for determination by the County Auditor.

Ultimately, the legal issues raised by the County Auditor are:

1. Whether or not the Hospital received an adequate *quid pro quo* from Ms. Voskamp to justify the payment of her salary from September 15, 2007 through October 14, 2007.
2. Whether it is the Auditor, the Board of Managers or the CEO of the Hospital that determines the adequacy of the *quid pro quo*.

Under the terms of the Health and Safety Code, the MMC Bylaws and the contract between MMC and Mr. Currier, it is clear that Mr. Currier has the authority to make the determination about whether or not the hospital will receive sufficient *quid pro quo* from Ms. Voskamp to justify the payment of her salary through October 14, 2007. It is apparent that Mr. Currier has made the determination that in fact, considering all the circumstances, Ms. Voskamp has provided adequate *quid pro quo* services for this payment. To my knowledge, the Board of Managers has not taken any affirmative action to overrule Mr. Currier's position. Furthermore, none of my research has indicated that this issue is for the County Auditor to determine.

My legal opinion is that this payment is a legal payment which Mr. Currier has the authority to make under all of the provisions stated above.

If you have any further questions regarding this matter, please advise.

Yours truly,

ROBERTS, ROBERTS, ODEFEY & WITTE



Anne Marie Odefey

AMO/tk
Enclosures:

October 10, 2007

Page 5

cc: Mr. Elwood E. Currier, CEO (Hand Delivery)
Memorial Medical Center

cc: Memorial Medical Center (Hand Delivery)
Board of Managers

cc: Michael Pfeifer, County Judge (Hand Delivery)