

District Attorney

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FILE # MU-48345-18
ID. # 48345

RO-0224-KP

April 20, 2018

Office of the Attorney General
Honorable Ken Paxton
Attorney General of Texas
Attn: Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

*Via Certified Mail & Return Receipt Request
No. 7015 3010 0001 3406 5431*

Re: Request for opinion.

Subject: Is an employee of the Eagle Pass Water Works System considered a municipal employee for purpose of Section 392.031 of the Local Government Code.

Dear General Paxton:

The City of Eagle Pass, Texas (City) is considering appointing an employee of the City of Eagle Pass Water Works System (System) as a member of the Board of Commissioners for the Eagle Pass Housing Authority (Authority). The Authority and the System were created by the City. Section 392.031(a) and (b) of the Local Government Code provides that a Commissioner may not be an officer or employee of the municipality. Is a System employee an employee of the municipality?

The City of Eagle Pass is a home rule municipality, which created the Eagle Pass Water Works System to operate water and sewer infrastructure in and around the City. The System is governed by the City Charter of Eagle Pass, Texas (Charter), the Code of Ordinances for Eagle Pass, Texas (City Code), State law, Ordinances and bond indentures related to the System.

Section 10-4(d) (iv) of the Charter generally requires that: (1) the Board of Trustees (Board) manage the System; (2) the Board meet no less than once a month to hear a report by the manager of the utility; and (3) the manager of the System shall deposit money generated by the utility in accordance with instructions from the City Council and in accordance with the debt instruments. The Council has the specific authority to set water rates, issue bonds and levy ad valorem taxes.

Chapter 21, Article 1, Division 1 of the City Code generally sets forth the following duties of the General Manager for the System:

1. He shall be the administrative officer of the System;
2. He shall govern the supervision over all employees of the System;
3. He shall report all violations to the City Manager;
4. He shall attend and control the water supply
5. He shall file a detailed report by February 1st of each year regarding the operation of the System; and,
6. He shall provide the City Secretary's Office with any approved amendments to the certificate of public convenience and necessity (CCN).

Bond Ordinance No. 87, enacted in 1948, provides that the Board of Trustees may make such regulations and by-laws for the orderly handling of its affairs as it may in its discretion see fit and shall thereafter operate and manage the system with the same freedom and in the same manner as are ordinarily enjoyed by the Board of Directors of a private corporation operating properties of similar nature.

The employees of the System receive a paycheck from the System and they participate in Texas Municipal Retirement System ("TMRS").

Is a System employee a municipal employee for purpose of Section 392.031 of the Texas Local Government Code? While the proposed Commissioner works for the System he may nonetheless be considered an employee of the municipality. For example, a System employee may also be a municipal employee for purposes of Section 392.031 of the Texas Local Government Code because:

1. The City as a home rule municipality created the System;
2. The System is governed by the City Charter of Eagle Pass, Texas, the Code of Ordinances for Eagle Pass, Texas state law and bond indentures related to the City;
3. Section 10-4(d) (iv) of the Charter general requires that the manager of the System to deposit money generated by the utility in accordance with instructions from the City Council and in accordance with the debt instruments;
4. Chapter 21, Article 1, Division 1 of the City Code generally requires the General Manager for the System to report all violations to the City Manager;
5. Case law has found that the waterworks system's holding and possession of property is a possession and holding by the City itself. *San Antonio Indep. Sch. Dist v. Water Works Bd. of Trustees*, 120 S.W.2d 861, 865 (Tex. Civ. App.-Beaumont 1938), writ refused: and,
6. The City elected to have the System employees participate in TMRS.

Based on the foregoing, is appointing a System employee as a Commissioner for the Authority prohibited under Section 392.031 of the Texas Local Government Code?

However, there is a view that the System employees are independent of the City. The employees of the System receive their paychecks from the System. The Board of Trustees operates and manages the System. The limited cases dealing with the System indicate:

The water works board of trustees was created under Article 1115, Tex.Rev.Civ.Stat.Ann., which expressly authorizes placement of the management and control of an encumbered municipal water system in the hands of a board of trustees, and provides that the powers and duties of such trustees may be specified in the contract of encumbrance....It is clear that the applicable statutes, as well as the provisions of the Charter of the City of Eagle Pass, manifest a purpose, "in creating the special Board, to remove the operation of the Water Works System...from the influence and control of the city governing body, and to free its operations from the vicissitudes of political control or manipulation."

City, a home rule city, purchased its own water works system in 1948. Appellant Board was created by ordinance on March 28, 1962, which ordinance provided for the issuance of revenue bonds. The day-to-day management of the water works system was placed in the hands of appellant Board...*Bd. of Trustees of City of Eagle Pass Water Works Sys. V. Deer Run Properties, Inc.*, 619 S.W.2d 609, 612 (Tex. Civ. App.-San Antonio 1981, no writ)

Bd. of Trustees of City of Eagle Pass Water Works Sys. V. Deer Run Properties, Inc., 616 S.W.2d 337,339 (Tex.Civ. App-San Antonio 1981, no writ)

In a suit between the City and the System, the Court stated, likely in dicta that:

In our view, the pleadings filed in this case by appellant Board and appellee City establish that one party's attempt to set water extension policy for the water works system is an invasion and infringement upon the other on its right, power, obligation and duty to govern, manage and control the water works system given to it by the City Charter, the indenture and the applicable Statutes.

Bd. of Trustees of Eagle Pass Water Works Sys. V. Deer Run Properties, Inc., 619 S.W.2d 609, 612 (Tex.Civ. App-San Antonio 1981, no writ)

Based on the foregoing, a Court could take the view that the System employees are separate from the influence and control of the governing body; thus, they are not employees of the municipality for purposes of Section 392.031 of the Texas Local Government Code.

Notwithstanding, it appears that the intent of Section 392.031 of the Texas Local Government Code is based on the belief that: (a) city officials and employees should focus on their city responsibilities and duties and not those of the housing authority, and (b) city employees may have to apply and enforce ordinances against the housing authority and its residents (i.e., building codes; code enforcement; payments for water, sewer, or trash service' or police and fire protection). Given the plausible intent of the statute, it would seem that employees of city departments or agencies like the System should not serve as a commissioner of a housing authority because it could take away from their primary employment as a water works system employee and they could become involved in situations where their city responsibilities and duties intersect with their housing authority duties and responsibilities.

In light of the foregoing, we request your opinion if a System employee is considered a municipal employee for purposes of 392.031 of the Local Government Code.

Thank you for your time and attention to this matter.

Respectfully,

A handwritten signature in cursive script that reads "Roberto Serna". The signature is written in black ink and is positioned above a horizontal line.

Roberto Serna
District Attorney
293rd Judicial District