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RQ-0550-KP

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The Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
Submitted via email to opinion.committee@oag.texas.gov on July 24, 2024

RE: Reimbursement of Legal Fees to Elected Officials

General Paxton,

This request for a reasoned opinion contains appropriate briefing of the following issues:

1. In a county that administers its roads through the *ex officio* road commissioner method, does the nepotism prohibition forbid one commissioner from hiring a close relative of another commissioner to a position within the first commissioner's road and bridge department that has been authorized in the county budget by the commissioners court?
2. If a commissioner has made a hire such as the one described in Question 1, and the commissioner is subsequently indicted, tried and then acquitted based on the District Attorney's decision to present no evidence after determining that the behavior indicted does not allege a crime, may the commissioners court reimburse the commissioner his legal defense costs?
3. If the District Attorney who made the decision to present no evidence at the commissioner's trial is the subject of a grievance filed with the Office of the Chief Disciplinary Counsel of the State Bar, and if the District Attorney succeeds in defending herself, can the Commissioners Court reimburse the District Attorney her legal defense costs?
4. Budget Concerns: If a commissioners court wishes to reimburse either the commissioner or the district attorney, but finds that they do not have enough money in line-items that this would fall under, may the commissioners court direct additional funds be re-allocated from other budget items to that budget item? Would this require a finding of "grave, public necessity"? If the commissioners court must wait until additional money is available in a new budget year, must the commissioners court establish an interest and sinking fund in the current year, or after a preceding event such as acquittal or grievance dismissal?

Question 1

In a county that administers its roads through the *ex officio* road commissioner method, does the nepotism prohibition forbid one commissioner from hiring a close relative of another commissioner to a position within the first commissioner's road and bridge department that has been authorized in the county budget by the commissioners court?

On August 13, 2020, I sent a request for opinion to your office, RQ-03372-KP, asking the same first question. However, before your office could respond, a Liberty County Grand Jury indicted the commissioner in question, Bruce Karbowski, Commissioner, Pct 1. Because your office has a policy, very reasonably, of declining to opine on matters in litigation, I requested that the opinion request be denied.

The District Attorney determined that in *ex officio* road commissioner counties, each commissioner is the final hiring authority for road and bridge employees in their individual precinct. Therefore, the only appointments that are prohibited by the nepotism statute in this context are those with whom the commissioner is related (within a prohibited degree). This argument does not vitiate the prohibition against trading appointments.

“Older opinions from the attorney general office concluded that no member of the commissioners court could employ relatives of other members of the court in that such employment is an act of the commissioners court as a whole rather than the individual member.” § 7.23. Nepotism, 35 Tex. Prac., County And Special District Law § 7.23 (2d ed.) (*citing* Tex. Att’y Gen. Op. Nos. O-6337 (1945), O-5452 (1943), and O-2925 (1940)). The theory that animated these nepotism questions appears to be the theory that *all county employees are employed by commissioners court*. “Under [the previous statute], an official is required to apply to the commissioners court (formerly, until 1925, only the county judge) for the authority to appoint deputies and assistants”. § 7.16. Deputies and assistants, 35 Tex. Prac., County And Special District Law § 7.16 (2d ed.). “The act of a county commissioner in employing a person to be paid out of or from public funds is the act of the commissioners court. . .” Tex. Att’y Gen. Op. No. O-6337 2 (1945). In another of this period, the requestor stated that “we are in doubt as to whether or not such action would be prohibited. . .since the employment need not be confirmed by the commissioners court nor voted on by the Court”. Tex. Att’y Gen. Op. No. O-2925, 2 (1940). Because “the County Commissioners’ Court must necessarily, for it is its duty, approve employment”, one county commissioner is prohibited from hiring the relative of another. *Id.*

Other opinions from as early as the 40’s distinguish between jobs which only the commissioners’ court can fill and those that individual commissioners of the court can fill. *See* Tex. Att’y Gen. O-4585 (1942). Where a statute gives the county judge the specific authority to hire a stenographer, the county judge’s authority to hire is independent of commissioners court and the “Commissioners’ Court has no further jurisdiction in the matter”. *Id.* at 2. Therefore, a county judge may employ as a stenographer the prohibited relative of another member of the court. *Id.* The same result occurred in 1975, after a statute was passed authorizing precinct, county and district officers to hire secretarial personnel. Tex. Att’y Gen. Op. LA-115 (1975); *also citing* Tex. Att’y Gen. Ltr. Adv. No. 79 (1973) “where it was noted that nepotism statutes have been considered not violated when a relative of a member of a governing body, where the governing body does not exercise control over the person to be selected”.

Thus, since the commissioners court is prohibited by statute from influencing the appointment of deputies and assistants, relatives of the commissioners court may be employed by other county officials although the court itself may not employ its own relatives. However, individual members of the commissioners court may, if vested with the authority to independently employ, hire relatives of other members of the court. Older opinions from the attorney general office concluded that no member of the commissioners court could employ relatives of other members of the court in that such employment is an act of the commissioners court as a whole rather than the individual member.

§ 7.23. Nepotism, 35 Tex. Prac., County And Special District Law § 7.23 (2d ed.).

The only relatively recent Attorney General's opinion, Op. JM-801(1987), to conclude that *ex officio* commissioners are prohibited from hiring another commissioners relative is listed as "overruled to the extent inconsistent with DM-158 (1992). In that latter opinion, your office revisited the legislative history and arrived at the conclusion that the hiring authority statute did not intend to grant final hiring authority to the *ex officio* road commissioner. There are multiple opinions since then that have reversed the conclusion of JM-801 and said that individual commissioners, not the full commissioners court, holds final hiring authority. *See, e.g.*, Tex. Att'y Gen. Op. DM-158 (1992) (opining that "A county commissioners court. . . lacks authority to overturn an *ex officio* road commissioner's discharge of an employee working in that commissioner's precinct and paid from county road and bridge funds."); *also* Tex. Att'y Gen. Letter Op. No. 97-021 (" . . . [W]e note that...commissioners have...the power to hire and fire any employee 'in the commissioner's precinct."); Tex. Att'y Gen. Op. GA-0295 ("Once the commissioners court has authorized an employee position in a precinct, the *ex officio* road commissioner has authority to hire someone for that position as well as authority to fire that person."); *cf.* Tex. Att'y Gen. Op. JM-1155 (1990) ("The statutes governing *ex officio* road commissioners have provided since their enactment that *ex officio* road commissioners act 'under the direction of the commissioners court.'")

It is not the pattern or practice of Liberty County Commissioners Court to review the hiring decisions of individual commissioners. I believe it would come as a surprise to the court to find that it could do so. No opinion that I can find has completed this syllogism, no matter how naturally the conclusion may flow from the two premises:

1. An *ex officio* commissioner has final hiring authority over positions in his road and bridge precinct that were authorized by the full commissioners court. A commissioners court cannot force a single commissioner to hire or fire a particular person. At most, the court could defund a position or positions within that commissioners precinct.
2. Public officers can only be held liable for nepotism where the public officer or officers hold(s) the exclusive final hiring authority and that authority is exercised by hiring a person related to either the public officer, in the case of a single hiring authority, or to any member of a board (court, council, etc.) if that board is the final hiring authority.
3. An *ex officio* road commissioner cannot, as a matter of law, violate the nepotism law by hiring another commissioner's relative in the first commissioners road and bridge department.

I ask for your opinion as to whether this syllogism is correct.

Question 2

If a commissioner is indicted for a hire described in Question 1, and the commissioner is acquitted of the charge based on the DA's determination that there is a lack of evidence, namely that the conduct of the commissioner, as a matter of law, could not meet the elements of the offense, may a commissioner's court reimburse the commissioner for the legal expenses generated in his defense?

Section 157.901 of the Local Government Code grants to public officers the right to representation by the District Attorney, the County Attorney or both in a civil suit brought against the public officer "from the performance of public duty". Tex. Loc. Gov. Code § 157.901(a). If the matter is criminal or there are multiple employees requiring defense, then conflicts of interest might arise for the district or county attorneys providing defense, which might necessitate the appointment of private counsel. See White v. Eastland Cnty., 12 S.W.3d 97 (Tex. App. 1999). However, § 157.901 does not provide an independent basis for provision of defense costs for criminal charges. *Id.* at 102. A commissioner's court does have the *discretion* to employ counsel or reimburse defense costs of its officers and employees in criminal matters. *Id.* at 3. A commissioner's court who exercises discretion to deny an award of defense costs is protected by absolute immunity. *Id.* at 104. Many opinions from your office have condensed this analysis to require:

1. The public officer's actions which gave rise to the criminal charges/civil suit to be within the performance of the public officer's duties; Tex. Att'y Gen. Op. JM-824 (1987); Tex. Att'y Gen. Op. KP-0016 (2015);
2. That the county commissioners have a good faith belief that "public interest is at stake" in the underlying litigation or that the public interest is served by such reimbursement, and not only the private interest of the public officer; *Id.*; see also Tex. Att'y Gen. Op. JC-0294 (2000), *citing* Tex. Att'y Gen. Op. Nos. JM-968 (1988), Tex. Att'y Gen. Op. Nos. MW-252 (1980).

Is it appropriate for a commissioner's court evaluating a request for reimbursement from one of its members in the circumstances described in this letter to consider the following in determining whether the reimbursement would aid a legitimate public interest?

1. That the indictment complained of behavior which could only be accomplished through the use of the commissioner's official powers and duties, that is, the Commissioner was indicted for the use of his official powers.
2. The chilling effect that improper prosecution may have on good, qualified candidates running for office;
3. The chilling effect that such improper prosecution may have on officeholders' execution of official duties.
4. The fact that the commissioner was acquitted.

Question 3

May a commissioners court pay the legal defense costs incurred by a district attorney in successfully defending against a grievance filed against her with the Office of Chief Disciplinary Counsel of the Texas State Bar?

Commissioner Bruce Karbowski was indicted in late August 2020 during the lame-duck portion of a previous Liberty County District Attorney. When current District Attorney, Jennifer Bergman, assumed the duties of that office in 2021, she moved for dismissal of the indictment against Bruce Karbowski on the grounds that the Commissioner's behavior did not meet the elements of the offense of nepotism, as reasoned in Question 1 above. When that motion was denied, the 75th Judicial District Court ordered the matter to trial. At trial, in October of 2022, the Liberty County District Attorney's Office presented no evidence and the Court instructed the jury to acquit the Defendant. Subsequently, Commissioner Bruce Karbowski was acquitted.

Shortly thereafter, a grievance was filed by a local citizen against District Attorney Jennifer Bergman, alleging that she and her office were dishonest when arguing before the court and jury that there was no evidence of a crime. District Attorney Bergman's grievance was ultimately dismissed by the Chief Disciplinary Counsel. Mrs. Bergman employed counsel during her defense.

Past Attorney General opinions have examined the authority of a commissioners court to repay a district attorney's defense costs in the context of Chapter 157 of the Texas Local Government Code, Chapter 104 of the Texas Civil Practice and Remedies Code and the common law. *See, e.g.* Tex. Att'y Gen. Op. Nos. GA-0523 (2007); GA-0755 (2010); JC-0047 (1999); JM-1276 (1990), MW-252 (1980).

Chapter 104 deals with the provision of legal defense to state officers and employees. Tex. Civ. Prac. & Rem. Code Ann. § 104.001 (West). A criminal district attorney is not a "state officer" for purposes of § 104.001 and is therefore not entitled to reimbursement of legal expenses from the State of Texas. Tex. Att'y Gen. Op. GA-0523, 2 (2007); Tex. Att'y Gen. Op. GA-0755 (2010) (reaching same conclusion for district attorneys as well).

Chapter 157 covers defense of local public officers and employees. Tex. Loc. Gov't Code Ann. § 157.901 (West). District attorneys, your office has opined, are not county officers for the purposes of § 157.901. *See* Tex. Att'y Gen. Op. GA-0755 (2010) (*citing* to Tex. Att'y Gen. Op. Nos. JC-0047 (1999) (district judge is not a county officer), JM-1276 (1990), MW-252 (1980)). The courts have established that counties have the discretion to reimburse legal expenses incurred by a public officer in defense against a criminal or civil claim, but no duty to do so. *See, e.g. White v. Eastland Cnty.*, 12 S.W.3d 97 (Tex. App. 1999).

Is a bar grievance a civil claim qualifying for reimbursement of defense costs when it arises in circumstances such as this, namely, that the grievance arose over a specific decision the district attorney made in the performance of her duties and that decision was made in good faith reliance on the then-current state of authority?

Question 4

If a commissioners court wishes to reimburse the commissioner or district attorney but finds that they do not have enough money in line-items that this would fall under, may the commissioners court direct additional funds be re-allocated from other budget items to that budget item? Would this require a finding of “grave, public necessity”? If the commissioners court must wait until additional money is available in a new budget year, will the future reimbursement payment violate any budgetary laws such as the Art. XI, sec. 7 sinking fund requirement for county debt?

“After final approval of the budget, the commissioners court may spend county funds only in strict compliance with the budget, except in an emergency.” Tex. Loc. Gov't Code Ann. § 111.010(b) (West). “The commissioners court may authorize an emergency expenditure as an amendment to the original budget only in a case of **grave public necessity** to meet an unusual and unforeseen condition that could not have been included in the original budget through the use of reasonably diligent thought and attention.” *Id.* at (c) (Emphasis mine.) Lastly, “[t]he commissioners court by order may amend the budget to transfer an amount budgeted for one item to another budgeted item without authorizing an emergency expenditure.” *Id.* at (c). This last statute “also allows a midyear amendment without an emergency to transfer funds from one budgeted item to another, subject to other applicable law.” Tex. Att'y Gen. Op. KP-0416 (2022).

“. . .[N]o debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund. . .”.

Tex. Const. art. XI, § 7.

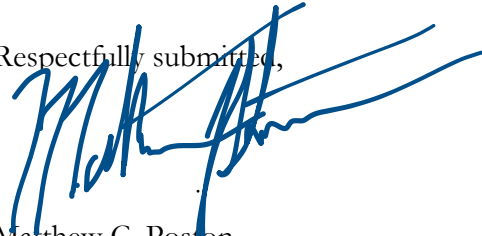
“We conclude that the word ‘debt,’ as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract. . . to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation.” McNeill v. City of Waco, 89 Tex. 83, 88, 33 S.W. 322, 324 (1895). “It has been held many times by our courts that warrants evidencing an attempt by a city or county to incur a debt without, at the same time, complying with the constitutional provisions requiring the levy of a tax to meet interest and sinking fund, are absolutely void.” Sumerlin v. Fowler, 229 S.W.2d 75, 77 (Tex. Civ. App. 1950).

If an interest and sinking fund must be established at the time the debt is “incurred” under the language of the amendment, then when would the obligation to reimburse defense costs be “incurred”: at the time the legal services were performed for the commissioner, at the time he presents the invoices for payment, or only after commissioners court has approved the repayment of defense costs? Surely, a county cannot be indebted by a discretionary decision until its commissioners court takes action to accept the debt. But what if the matter is first brought up in a year in which the county cannot pay—must an interest and sinking fund be established in the first year while waiting for a new year’s budget? Or, as common sense would suggest, would the interest and sinking fund obligation only arise if the commissioners court votes to approve repayment in year one of this hypothetical?

That is, if a county were to move money from a line item that has surplus funds to another line item, already established, that is dedicated to legal fees, would such a move be prohibited by law without a finding of a grave public necessity? If this move is insufficient or if no money is otherwise available, must a commissioners court establish an interest and sinking fund this year in order to pay the amount next year?

Thank you for your time and attention to this matter.

Respectfully submitted,



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