



TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

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OPINION COMMITTEE

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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

FILE # ML-42039-D1
I.D. # 42039

SG

Dear General Cornyn:

The Commission for the Deaf and Hard of Hearing (Commission) recently underwent an audit by the Comptroller's Office, which resulted in a finding by the Comptroller that certain payments made by the Commission were invalid and should not have been paid. I do not agree with the position of the Comptroller, and have been unable to resolve the difference of opinion on these matters with them. Accordingly, I request your official opinion on the following questions in order to resolve the issues:

1. Are members of the Board for Evaluation of Interpreters (BEI) required to perform, without compensation and as a part of their statutory responsibility, evaluations of candidates for certification as interpreters?
2. Does the Commission's contracting with BEI members for interpreter evaluations constitute "contracting with its own members, therefore violating the conflict of interest common law provisions"?
3. Is the payment of travel expenses for evaluators, who are also BEI members, and who are required to travel to complete their evaluations, a prohibited compensatory per diem not authorized by law?
4. Is there any conflict of interest that would prevent members of the BEI from performing evaluations of interpreter candidates for compensation from the Commission?

I would like to offer the following information concerning the questions I have asked and arguments supporting my position. I hope it will be useful in answering the questions. I have also attached a copy of the audit findings of the Comptroller's Office.

RELEVANT LAW

The governing board of the Texas Commission for the Deaf and Hard of Hearing is the Commission created by Texas Human Resources Code § 81.002 (a):

- (a) The Texas Commission for the Deaf and Hard of Hearing is composed of nine members appointed by the governor with the advice and consent of the senate.

The BEI is created by Texas Human Resources Code § 81.007, which provides, in pertinent part:

§ 81.007. Board for Evaluation of Interpreters

(a) The commission may establish a program in accordance with this section for the certification of interpreters who have reached varying levels of proficiency in communication skills necessary to communicate with individuals who are deaf or hard of hearing.

(b) The commission shall appoint a board of seven persons to administer the certification program.

(c) Subject to approval of the commission, the board shall prescribe qualifications for each of several levels of certification based on proficiency and shall evaluate and certify interpreters using these qualifications.

* * *

(i) The commission shall determine the frequency with which it will conduct the interpreter examinations. The commission shall conduct the interpreter examinations:

(1) in Austin at the commission's office or in other space owned or leased by the state that can be obtained free of charge; or

(2) in other cities in this state in space that can be obtained free of charge.

(j) Repealed by Acts 1995, 74th Leg., ch. 835, § 28(3), eff. Sept. 1, 1995.

(k) The commission shall compensate an evaluator based on a fee schedule as determined by commission rule.

* * *

The applicable TCDHH rules include the following:

40 Tex. Admin. Code § 183.11. Board Function

The Board for Evaluation of Interpreters is an advisory committee appointed by the Texas Commission for the Deaf and Hard of Hearing. The Board is responsible for developing a program for certification of interpreters for the deaf in the State of Texas. The board shall also recommend to the commission:

(1) any rules which are necessary for the performance of its duties or the program and which are consistent with the laws of this state;

(2) to establish levels of certification; to determine skill levels of interpreters; to train evaluators and to oversee the evaluations conducted by teams of evaluators; and to recommend interpreters for certification by the commission;

(3) to determine and establish: method of application; method of evaluation; develop necessary evaluation materials; develop appropriate criteria for scoring evaluations; establish the term of the certification; establish procedures for grievance; establish procedures for revocation, suspension, or cancellation of certification; establish procedures for certification renewal; and any other pertinent activities relevant to the certification of interpreters;

(4) to make recommendations to the commission for approval regarding fees for evaluation and renewal of certification;

(5) to make recommendations to the commission for approval to establish ad hoc committees to assist in the consideration of pertinent matters. These groups shall make recommendations to the board for its consideration and approval.

40 Tex. Admin. Code § 183.19. Compensation

Board members shall not receive any compensation for their services, but can receive reimbursement for expenses in performing the duties of the office, subject to current funding patterns of the commission. Committee members must receive prior approval to be reimbursed for expenses incurred while attending a board meeting.

40 Tex. Admin. Code § 183.29. Contracted Evaluators

(a) Contracted evaluators will be composed of interpreters who have been interviewed, selected, trained by the board, and appointed by the commission. Qualifications of evaluators. Each evaluator shall be certified at either Level III, Level IV, or Level V of the certification program of the commission for at least five years; must be a resident of the State of Texas; and must have knowledge of linguistics, sign language theory, and interpreting. Evaluators who are responsible for evaluating the Oral, Morphemic Sign System (MSS), or Signing Exact English II (SEE II) interpreter candidates, are not required to be certified at Level III, Level IV or Level V interpreter because only one level of certification is offered by the commission. Responsibilities: Evaluate and score the interpreting and transliterating skills of interpreter candidates; occasionally administer the written examinations to candidates; attend mandatory evaluator training annually.

(b) Evaluators shall be compensated at an established rate of pay for services rendered. The rate of pay is established based on an annual review and approval from the Commission.

FACTS

The Texas Commission for the Deaf and Hard of Hearing is the state agency responsible for the certification of interpreters for persons who are deaf or hard of hearing. To assist the Commission with this function, there is an advisory committee called the Board for the Evaluation of Interpreters that is appointed by the Commission. Members of the BEI are usually experienced interpreters who also have extensive experience performing evaluations of candidates for certification. The nature of the work of the BEI requires this familiarity with the evaluation process. All actions taken by the BEI are subject to the approval of the Commission.

To obtain certification as an interpreter, an individual must take a test conducted by the Commission. Generally, and somewhat simplified, each test consists of two parts: interpreting from sign language to spoken English, and interpreting from spoken English to sign language. Rather than having the candidate for certification take the test in front of live evaluators, the Commission staff videotapes the person while they are interpreting from a standard test video of a person either speaking or signing. Then the tape of the candidate is given to a team of evaluators to be graded. The evaluators, usually a team of two or three certified interpreters who have been trained in evaluation, will sit together and watch the tape and each will score the candidate on a prepared score sheet. The results are then compiled by the staff and, upon approval by the Commission, the candidate is notified of the results.

The BEI does not have a direct role in evaluation of individual candidates. The work has already been done. They are primarily responsible for designing the test and making recommendations to the Commission rather than evaluating each individual candidate.

QUESTION ONE

Are members of the Board for Evaluation of Interpreters (BEI) required to perform, without compensation and as a part of their statutory responsibility, evaluations of candidates for certification as interpreters?

Analysis

I believe this issue is based on confusion about the meaning of § 81.007 (c), which states that “the board . . . shall evaluate and certify interpreters using these qualifications.” This is not the direct function of the board in practice, and, even if it were, § 81.007 (k) would justify paying *any* evaluator in accordance with the commission rules.

The functions of the BEI are described in 40 Tex. Admin. Code § 183.11, above. The board has general supervisory authority over the examination and evaluation process, but is not responsible for the evaluation of each and every test of a candidate for certification. Indeed, were they to do this, the unpaid advisory council membership would turn into a full-time job. The board trains and approves the evaluators, but does not perform evaluations as a part of its board duties. Section 81.007(b) provides that the board will administer the program, but this does not mean that all the functions of the administration must be performed by the board itself. Their role has always been to make recommendations to the Commission concerning the operation, oversight, and administration of the system. The agency interpretation and implementation of the statute is entitled to great weight.

Yet, even if the narrower interpretation that these are the duties of the board were correct, the board members would still be entitled to compensation under the law. Subsection (k) of §81.007 provides that the Commission (as distinguished from the board) “shall compensate an evaluator . . .” This is mandatory language, and requires that evaluators be compensated. The compensation of advisory committee members for services rendered is not prohibited. In this case, it is authorized by statute. Numerous appointed officials receive salaries for their services

(Public Utility Commissioners; Natural Resources Conservation Commissioners). Others are paid per diem for daily service, where statutorily authorized. Subsection (k) does not distinguish between board members and other evaluators for compensation, and they should be compensated for their work.

QUESTION TWO

Does the Commission contracting with BEI members for interpreter evaluations constitute “contracting with its own members, therefore violating the conflict of interest common law provisions”?

Analysis

This finding is based upon confusion between the members of the Commission for the Deaf and Hard of Hearing and the Board of Evaluation of Interpreters. The Commission’s governing board is created in § 81.002 (a) and is a board appointed by the Governor with the advice and consent of the Senate. The Board of Evaluation of Interpreters is an advisory committee appointed by the TCDHH board. § 81.007 (a). BEI members are not members of the governing board. There is no conflict of interest rule that prohibits a commission from contracting with members of an advisory committee.

The common law conflict of interest provisions are based on the personal interest in pecuniary gain that could be obtained by exercising one’s authority to one’s own benefit. In this case, the BEI members do not have authority to exercise. All recommendations of the BEI to the Commission are subject to a final vote by the Commission. In addition, the assignment of evaluators for the review of candidates is a staff function, not a BEI or Commission function.

QUESTION THREE

Is the payment of travel expenses for evaluators, who are also BEI members, who are required to travel to complete their evaluations, a prohibited compensatory per diem not authorized by law?

Analysis

This issue is based on the facts surrounding the actual payment. It is my understanding that the payments to the evaluators was not compensatory per diem, but rather fees for evaluation of tapes and travel that was required to meet with other evaluators when consultation about the results was required. The travel costs included reimbursement for meals and direct costs associated with travel. The TCDHH agrees that there is no statute authorizing the payment of compensatory per diem to BEI members.

QUESTION FOUR

Is there any conflict of interest that would prevent members of the BEI from performing evaluations of interpreter candidates for compensation from the Commission?

Analysis

This is the question that would have been more appropriate for the Comptroller to raise, and one the Commission would like to have answered at this time. It is the responsibility of the members of the BEI to develop the evaluation methods and test materials and recommend them for adoption by a vote of the Commission. Typically, individuals are selected for membership on the BEI because they are certified interpreters and have served as paid evaluators for a lengthy period. Their being very familiar with the system makes them attractive candidates for the BEI. Service on the BEI does not create, however, an unfair advantage for these people in obtaining work as evaluators. The decisions on who evaluates candidates are made by the Commission staff, not the BEI. There is a greater problem with finding enough qualified evaluators to review the interpreter certification candidates than with someone getting a monopoly on this work. In fact, a decision that members of the BEI could not perform evaluations could cause a minor crisis in the availability of qualified evaluators to perform evaluations in a timely manor.

I will greatly appreciate your response to this request. If there is any additional information that I may furnish, please do not hesitate to ask.

Sincerely,



David W. Myers
Executive Director

cc: The Honorable Carole Keeton Rylander, Comptroller of Public Accounts
Joe H. Thrash, Assistant Attorney General

Enclosure

DETAILED FINDINGS - PURCHASE

INVALID PAYMENTS

Finding

We identified eleven transactions in which the Commission contracted with members of the Board for Evaluation of Interpreters (BEI) for evaluation services. In addition, three of these transactions were not supported with documentation of the agreement.

The Commission employed the BEI members as contracted evaluators. Contracted evaluators are responsible for evaluating and scoring the interpreting and transliterating skills of interpreter candidates. In addition, the evaluators occasionally administer the written examinations to candidates and attend mandatory evaluator training. See 40 Tex Admin. Code sec. 183.29 (2000)

According to TEX. HUM. RES. CODE ANN. sec. 81.007(c) (Vernon Supp. 2000), BEI shall prescribe qualifications for each of several levels of certification based on proficiency and shall evaluate and certify interpreters using these qualifications.

First, the Commission paid BEI members for evaluator services that the members are required to perform per statute.

Secondly, the Commission contracted with its own members, therefore violating the conflict of interest common law provisions. Governing boards are subject to the strict common law rule regarding conflict of interest that bars a governmental body from entering into a contract in which one of its members is pecuniarily interested. See Tex. Att'y Gen. L0-93-12 (1993). As a result, the contracts were not valid, which made the payments to these members invalid.

Thirdly, the Commission erroneously paid compensatory per diem to BEI members for contract evaluator services. Compensatory per diem is a type of salary payment for services rendered to the state. There is no statute authorizing payment of compensatory per diem to BEI members. According to the attorney general, compensatory per diem cannot be paid "in absence of a specific statute authorizing compensatory per diem." Op. Tex. Atty Gen. No. JM-954 (1988).

The Commission did make reference to 40 Tex Admin. Code sec. 183.29 (2000) that defines contractor evaluators and their responsibilities. The Commission also provided a response to a letter written to the Office of the Attorney General that does not specifically address this situation. The Commission relied on their interpretations of this documentation as approval for contracting with BEI members for compensation.

Recommendation/Requirement

The Commission may not contract with BEI members for compensation.

Agency Response

BEI Board members generally begin as evaluators for the Commission before appointment to this advisory committee. See letter enclosed from Joe Thrash, Legal Liaison to the Commission, Office of the Attorney General for additional response. (See Appendix 6.) Please note that for many years the Commission has used BEI Board members as evaluators and paid them. No previous audit has raised this issue.

DETAILED FINDINGS - PURCHASE

Comptroller Response

The Commission has not provided us with any documentation to prove that the contract between the Commission and BEI board members is valid. Although an additional letter from the Office of the Attorney General addressing this issue is provided, as stated in the letter it is not an official opinion of the Attorney General of Texas rendered in accordance with Subchapter C, Chapter 402, Texas Government Code. Therefore, the letter does not give the Commission authorization to make these payments.

In addition, the Commission has noted that no previous audit of the Commission has questioned the Commission's contracting with or paying compensation to BEI members. The Commission is responsible for the legality of all its payments, regardless of whether we have ever questioned them. We have no authority to convert an unauthorized payment into an authorized one. Only the legislature may authorize the Commission to start making a type of payment that has previously been unauthorized. See, generally, 34 Tex. Admin. Code sec. 5.51(b)(4)(2001).