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FILE # ml-42155-01
I.D. # 42155



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September 17, 2001

The Honorable Susan Gusky
Texas Attorney General's Office
P.O. Box 12548
Austin, Texas 78711-2548

VIA FACSIMILE
1-512-472-6538

RE: Request for Attorney General's opinion

RQ-0435-JC

Dear Ms. Gusky:

Pursuant to Section 402.043 of the Government Code, I respectfully request the Attorney General's opinion regarding issues pertaining to the salary grievance procedures established by Chapter 152 of the Local Government Code. I believe these questions affect the public interest and the proper performance of elected officials in all counties of the State.

Since the issues involve the county budgeting process and the answers may significantly affect the fiscal year 2001-2001 budget, I respectfully request that every effort be made to expedite this opinion.

Sincerely,

Leslie Poynter Dixon

LESLIE POYNTER DIXON
Criminal District Attorney

BRIEF IN SUPPORT OF REQUEST FOR ATTORNEY GENERAL'S OPINION

STATEMENT OF FACTS

Van Zandt County has a population of approximately 48,000 and has four elected constables serving four precincts. On July 31, 2001, the Van Zandt County Judge, as the budget officer filed a proposed budget for the fiscal year 2001-2002 which begins October 1, 2001. In the proposed budget, the County Judge allocated an annual salary of \$18,876 for each constable. The proposed budget did not provide an increase in salary over the previous budget year for the constables or for any other elected official.

On August 20, 2001, a public hearing was held on the proposed budget. After the public hearing but on the same day, the Van Zandt County Commissioners Court met in a regular meeting of the court during the regular budget hearing and adoption proceedings and adopted the proposed budget; setting the salary, expenses, and other allowances of elected county and precinct officers. The salary of each of the four constables was set at \$18,876, as had been proposed by the County Judge.

On August 21, 2001, under direction from the Commissioners Court, the Van Zandt County Auditor provided written notice to each elected county and precinct officer of the officer's salary and personal expenses to be included in the budget. The document provided by the Auditor was entitled "Van Zandt County Salary Structure for Fiscal Year 2001-2002" and included notice that the document was to serve as the written notice required by Section 152.013 of the Local Government Code. The Auditor served the written notice by telephonic document transfer.

The constables of Precinct One and Four each maintain offices within their respective

Justice of the Peace office buildings. The telephonic document transfer to each of these two constables was made to the telecopier number published on each constable's letterhead. The same telecopier numbers are used by the respective justices of the peace. The Auditor maintained "transmission verification reports" verifying the transmission of the notice to Constable, Precinct One and Constable, Precinct Four. The Auditor also maintained verification reports of separate transmissions to the Justices of the Peace for Precincts One and Four. Copies of the transmission verification reports to Justices of the Peace, Precincts One and Four and Constables, Precinct One and Four are attached as Appendix A.

After the salary structure had been disseminated, the Constable, Precinct Two and the Constable, Precinct Three requested a hearing before the salary grievance committee pursuant to the provisions of Section 152.016 of the Local Government Code. The four justices of the peace also requested hearings before the grievance committee. The Van Zandt County Judge, serving as a non voting chairman of the committee scheduled these six hearings for August 30, 2001. The current Van Zandt County salary grievance committee is comprised of nine public members. After the hearing of August 30, 2001, nine members of the salary grievance committee voted to recommend the increases asked for by the two constables and the four justices of the peace.

On September 4, 2001, Constable, Precinct Four submitted a written request dated September 3, 2001 to the County Judge for a hearing before the salary grievance committee. Constable, Precinct Four indicated in his request that he had not received notice of his salary as required by Section 152.013. The request did not state the desired change in salary. Constable, Precinct One verbally requested a hearing before the committee on the same date. The County Judge promptly requested an opinion from the Van Zandt County Criminal District

Attorney regarding the requests of the two constables. The Criminal District Attorney's opinion was that Constable, Precinct One had not complied with the statutory requirement that a request be in writing and that Constable, Precinct Four had not stated a desired change in salary and had therefore, not complied with the statute. The Criminal District Attorney noted that there was an undetermined issue, with respect to the sufficiency of the written notice of salary provided to Constable, Precinct Four and the timeliness of his request for hearing, which was not controlling since the request did not otherwise comply with the statute. The County Judge did not call a meeting of the salary grievance committee to consider the requests of September 4, 2001. A copy of the County Judge's request for an opinion and the response of the Criminal District Attorney is attached as Appendix B.

On September 10, 2001, the Commissioners Court met in regular session. At the September 10th meeting, the constables of Precinct One and Four requested the Court to increase their respective salaries to \$30,649. No motion was made by a member of the Court, therefore no action was taken. At the same meeting of September 10, 2001, the Commissioners's Court amended the budget to include the increase in the salaries of the Constables of Precinct Two and Three as mandated by the vote of the salary grievance committee. The budget, as amended, for the fiscal year 2001-2002 was then approved at the meeting.

After the Commissioners Court meeting of September 10, 2001, the Constables of Precinct One and Four delivered written requests to the County Judge for hearings before the salary grievance committee. On September 11, 2001, the County Judge scheduled a meeting of the salary grievance committee for September 13, 2001. No notice of the hearing was posted. On September 11, 2001, the Criminal District Attorney received a written request dated September 10, 2001 for an opinion from the County Judge. A copy of this request and its

attachments, as well as the Criminal District Attorney's response is included as Appendix C. The salary grievance committee hearing that had been scheduled for September 13, 2001 was cancelled by the County Judge on September 12, 2001. The salary grievance committee has not heard the requests of the Constables of Precinct One and Four. The budget though approved has not been filed with the County Clerk.

QUESTIONS PRESENTED TO THE ATTORNEY GENERAL

QUESTION NUMBER ONE

IS TELEPHONIC DOCUMENT TRANSFER WITH TRANSMISSION VERIFICATION SUFFICIENT TO COMPLY WITH THE REQUIREMENTS OF SECTION 152.013 OF THE LOCAL GOVERNMENT CODE?

ARGUMENT AND AUTHORITIES

The time limit within which a county or precinct officer may request a hearing before the salary grievance committee is begun by the officer's receipt of notice under Section 152.013. This provision, in pertinent part, provides that: "... the Commissioners court shall give written notice to each elected county and precinct officer of the officer's salary and personal expenses to be included in the budget." An aggrieved officer may request a hearing before the salary grievance committee regarding his salary and expenses. However, the officer must deliver his request within five days after the date he receives notice of his salary.

Chapter 152 does not contain any provision specifying the method of service of the written notice to the elected officer. Chapter 311 of the Government Code provides the statutory method of computing the five day time limit and that "written" includes any representation of words, letters, symbols or figures but Chapter 311 does not contain any statutory method of

service of the written notice. A thorough search of existing Attorney General opinions and case law has not yielded any specific guidance on this issue as it relates to the salary grievance committee proceedings.

Telephonic document transfer is an acceptable method of service under the Rules of Civil Procedure. Rule 21a of the Texas Rules of Civil Procedure provides for service by telephonic document transfer to the recipient's current telecopier number. This rule of procedure creates a presumption that a properly faxed document was received. Unlike the situation where an elected officer aggrieves his salary, this rule of procedure applies in situations where an action is already pending in a court of law and if a party disputes the receipt of item served by fax, the issue may be presented to the court.

In American Paging of Tex., Inc. v. El Paso Paging, Inc., 9 S.W.3d 237 (Tex. App. -- El Paso 1999, pet. denied) it was held that a party may introduce the fax confirmation sheet to prove service by fax transfer. The presumption of receipt established by TRCP 21a and bolstered by the fax confirmation could be overcome when verified evidence was introduced that the document was not received. Thomas v. Ray, 889 S.W.2d 237 Tex. 1994). If proved that the notice or instrument was not received, the court could then extend the time limits or grant such other relief as the court deemed just.

The county budgeting process is not a judicial proceeding. Obviously the commissioners courts of our counties would like to complete and implement their budgets within the parameters of the law and without the need for judicial intervention. May our commissioners courts rely upon telephonic document transfer with transmission verification in fulfilling their mandatory duty to provide notice to elected officers of salaries to be included in the budget?

QUESTION NUMBER TWO

IF A COUNTY OR PRECINCT OFFICER DID NOT RECEIVE WRITTEN NOTICE OF THE OFFICER'S SALARY AND PERSONAL EXPENSES AS REQUIRED BY SECTION 152.013 OF THE LOCAL GOVERNMENT CODE, MAY THE TIME LIMIT OF SECTION 152.016 WHICH REQUIRES A REQUEST FOR A HEARING BEFORE THE SALARY GRIEVANCE COMMITTEE TO BE MADE PRIOR TO THE APPROVAL OF THE COUNTY'S BUDGET BE EXTENDED TO ALLOW THE REQUEST TO BE MADE AFTER THE APPROVAL OF THE BUDGET BUT BEFORE THE BUDGET IS FILED WITH THE COUNTY CLERK.

ARGUMENT AND AUTHORITIES

Section 152.016(a) provides that "an elected ... officer ... may request a hearing ... **before the approval** of the county's annual budget." In Attorney General's Opinion No. DM-405, the Attorney General pieced together, Chapters 111 and 152 of the Local Government Code to provide a chronology of a county's budgeting process. The Attorney General stated that "a county's salary grievance committee may operate only in a brief, specified window of time, after the county commissioners court adopts a budget for the succeeding fiscal year and prior to the time the county commissioners court files the final budget with the county clerk." Attorney General Opinion DM-405 at 4.

This opinion focused on the timing of the actual meeting of the salary grievance committee and not on the sufficiency or timeliness of the request for a hearing. The chronology provided in that opinion and the sequence of events in Van Zandt County as related to that chronology is as follows: "First, once the commissioners court has received the proposed budget from the county judge, the commissioners court sets the salary, expenses, and other allowances of elected county officers "at a regular meeting of the court during the regular budget hearing and adoption proceedings." Attorney General Opinion DM-405(1996) at 3. The Van Zandt County Judge filed his proposed budget on July 31, 2001. The commissioners court held a

public hearing on the budget on August 20, 2001. After the public hearing the commissioners court met in a regular meeting on August 20, 2001 and adopted the budget. "Second, after the commissioners court has adopted the budget, but before filing it with the county clerk, the commissioners court notifies each elected county officer in writing of the salary and personal expenses the officer is budgeted to receive in the succeeding fiscal year." Id. at 4. On August 21, 2001, the salary and expenses were provided to Van Zandt County elected officials by telephonic document transfer. "Third, within five days of receiving notice, an aggrieved county officer must deliver to the salary committee chair a request for a hearing before the salary grievance committee." Id at 4. Six elected Van Zandt County officers filed requests for hearings before the salary grievance committee within 5 days of the August 21, 2001 receipt of the salary structure. "Fourth, the salary grievance committee, within ten days of receiving the request for a hearing, must conduct a public hearing." Id at 4. The salary grievance committee held a public hearing on August 30, 2001 and considered the requests of the six officers that had requested a hearing. The vote to recommend an increase in all six officers' salaries was unanimous. On September 10, 2001, the commissioners court included the mandated salary increases in the budget and decreased other non salary items to maintain the budget at the originally approved amount. The Court then "finally approved" the budget. The budget has not been filed with the county clerk.

The Van Zandt County Commissioners Court has endeavored to develop and adopt a budget in complete compliance with the applicable provisions of the law. Must a salary grievance committee hearing be called when the request for the hearing is made after the final approval of the budget but before the filing of the budget with the County Clerk? May a salary grievance committee hearing be called under the facts as described?

Respectfully submitted,



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