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COMMITTEE ON HOUSE ADMINISTRATION

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RQ-0604-JC

September 4, 2002

FILE # ML-42779-02
I.D. # 42779

The Honorable John Cornyn
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Cornyn:

Please accept this letter of request for an opinion from the Office of the Attorney General requesting clarification of the Texas Local Government Code.

I am making this request on behalf of the City of Plano whose legal brief is attached for your review. If you have further questions from their office, please feel free to contact Thomas H. Muehlenbeck, City Manager, at (972) 941-7000.

Thank you for your consideration of this request. If my staff and I can be of assistance, please do not hesitate to contact my Capitol office. It is a pleasure working with you on behalf of the citizens of Texans.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Goolsby".

Tony Goolsby
State Representative
District 102

TG/as

TONY GOOLSBY, CHAIRMAN, VILMA LUNA, VICE-CHAIR
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BRIEF TO ACCOMPANY REQUEST FOR ATTORNEY GENERAL'S OPINION

FACTS

For many years Article 1269M and its successor, Chapter 143 of the Texas Local Government Code provided definition of what constituted a "Firefighter". Prior to the 77th Session of the Texas Legislature, Section 143.003 of the Texas Local Government Code (DEFINITIONS) read in pertinent part:

(4) "Fire fighter" means a member of a fire department who was appointed in substantial compliance with this chapter or who is entitled to civil service status under Section 143.005 [Status of Employees if Chapter Adopted] or 143.084 [Civil Service Status and Pension Benefits for Certain Fire Fighters and Police Officers]. The term includes fire fighters who perform:

- (a) fire suppression;*
- (b) fire prevention;*
- (c) fire training;*
- (d) fire safety education;*
- (e) fire maintenance;*
- (f) fire communications;*
- (g) fire medical emergency technology;*
- (h) fire photography; or*
- (i) fire administration.*

[Bracketed text added for clarification]

In the 77th Session of the Texas Legislature, Section 143.003 of the Code was modified by HB 1388 to read in pertinent part:

(4) "Fire fighter" means a member of a fire department who was appointed in substantial compliance with this Chapter or who is entitled to civil service status under Section 143.005 or 143.084. The term includes employees who perform:

- (A) fire suppression;*
- (B) fire prevention;*
- (C) fire training;*
- (D) fire safety education;*
- (E) fire maintenance;*
- (F) fire communications;*

(G) fire medical emergency technology;

(H) fire photography;

(I) fire administration; or

(J) fire arson investigation.

The City of Plano has employed auxiliary personnel to provide certain program functions in the area of EMS, fire safety education, and fire prevention as non-civil service personnel. These appointments were made to secure the best-qualified candidate for the positions based on prerequisite skills, knowledge and abilities unique to these positions, however they were not appointed in substantial compliance with Chapter 143. We also believe they are not required to be civil service status under Section 143.005 or 143.084. The City has not adopted collective bargaining under Chapter 174 of the Texas Local Government Code.

Additional information for the positions in question is provided as follows:

Fire Inspector/Investigators

In 1972 the City of Plano ("City") adopted Civil Service for its fire and police. The position of Fire Marshal was initially classified as a civil service position in 1972, but was removed from civil service classification in 1974 when the Fire Marshal's office was removed from control of the Fire Chief and established as a separate City department answering directly to the City Manager and providing fire investigative services not only to the City of Plano, but to all of Collin County under contract.

Approximately 14 years ago, the Fire Marshal's Office was placed under the supervision of the Fire Chief, but was retained as separate Departmental division with a separate budget code. The Fire Marshal, who serves as head of the Fire Prevention Division reports directly to the Fire Chief and all positions within that division were filled using standard City employment methodologies based on the essential skills, knowledge, and abilities required for the various positions. Several of the positions require college degrees as opposed to the basic requirements of Chapter 143 of a high school education. At present, the Fire Marshal's office has individuals performing a variety of duties including fire inspection, fire investigation, plans review, and systems testing. Each of these employees serves as a civilian, non-classified member of the Department. At no time were any of these personnel appointed in substantial compliance with Chapter 143 nor are they entitled to civil service status under the provisions of Section 143.005 or 143.084.

A fire and arson investigator position, formerly occupied by a non-civil service employee, is now vacant. The city wishes to fill the position with another non-civil service employee, but representatives of the local Firefighters Association have requested that the position be filled in accordance with Chapter 143.

Communications Personnel

The City of Plano provides Fire Dispatch services through a separate and independent city department known as Public Safety Communications (PSC) which provides emergency call handling (911), Police dispatch and Fire dispatch services with

civilian personnel. The PSC has its own director, independent of the Fire Department, who reports to a totally separate Executive Director (Assistant City Manager). The PSC Department provides its own hiring, promotion, and training functions and operates totally independently of the Plano Fire Department. Services provided to the Plano Fire Department include dispatch services, radio maintenance, and emergency warning capabilities for the Fire Department. PSC employees have not been appointed in substantial compliance with Chapter 143, nor are they entitled to civil service status under Section 143.005 or 143.084.

EMS Coordinator

Following difficulty in filling the position of EMS Coordinator using line fire fighters, the City of Plano employed a civilian EMS Coordinator. The EMS Coordinator is responsible for the overall coordination of our EMS training and quality assurance programs and is currently a registered nurse (RN). This individual is an overall program coordinator and is responsible for EMS education and EMS quality assurance activities administered by our local hospital. This position does not directly supervise civil service personnel. The EMS Coordinator was not appointed in substantial compliance with Chapter 143 nor do we believe he is entitled to civil service status under Section 143.005 or 143.084.

Safety Education Coordinators

In the late 1980's the City of Plano Fire Department employed a civilian coordinator with teaching credentials to design and develop our efforts to implement effective Fire Safety Education programs in our public schools. An assistant coordinator was later added due to workload increases.

Because of the integration of our accident/injury prevention programs into the curriculum of local schools, civilians with degrees in education were selected for these positions. The Safety Education Coordinators are responsible for the overall coordination of our EMS training and quality assurance programs. These individuals are program coordinators and do not supervise or direct shift Civil Service personnel. The Safety Education Coordinators were not appointed in substantial compliance with Chapter 143, nor are they entitled to civil service status under Section 143.005 or 143.084.

Analysis

HB 1388, effective September 1, 2001, amended the second sentence of Chapter 143.003 to substitute "employees" for the words "fire fighters" and added "fire arson investigation" to the list. It is the City's position that this amendment has no effect on persons currently serving any of the positions defined as "firefighter" unless the city: (1) voluntarily classified such position and the person has taken a competitive examine in accordance with Chapter 143; or (2) the City was initially adopting civil service. The Fire Fighters Association contends that this minor change now requires that all of these positions be filled by civil service personnel.

Prior AG Opinion - However, in 1986 the Attorney General, in Opinion No. JM-515, addressed the question of whether a city may hire non-civil service personnel in positions which are supervised by the Fire Chief. In interpreting section 2 of article 1269m (now Section 143.003) the Attorney General concluded that a city was not required to create civil service positions for all the activities of a fire department that are enumerated in that section. The conclusion was based in part on a finding that the legislature used the term "firemen" and not "personnel" when describing those who perform the enumerated functions in section 2 of article 1269m and therefore their intent was not to include all personnel. Equally emphasized by the Attorney General was that a person cannot be a "fireman" unless that person earned civil service status as provided by sections 9, 10, and 11 (i.e., selected from an eligibility list resulting from an examination) or is entitled to it under the original grandfather clause of Section 24.

Legislative Intent - While it could be argued that the legislative intent was to make all employees who perform the functions enumerated in the section be civil service employees, it should be noted that there is no definition provided for the individual job tasks identified in Chapter 143.003 (A-J, inclusive). The definition of an employee performing these duties is subjective and subject to individual municipal interpretation which we believe was the long standing legislative intent. As an example, a strict reading of 143.003(4)(I) could be construed so as to require even secretaries, clerk typists, records clerks, and receptionists to be made subject to the provisions of Chapter 143 which runs contrary to the concept of a classified service designed to provide for efficient fire fighters and police officers. Other than the single word change in Chapter 143.003, there is nothing in the legislation that would indicate such a drastic intent. Since 1957 the law has consistently allowed non-civil service positions in fire and police departments.

Lack of Provisions for Incumbents - It is noteworthy that there are no provisions for grandfathering or protecting current (incumbent) non-civil service employees that hold these positions such as is found at section 143.005 or 143.084 for persons existing at the time of Chapter 143 adoption by a municipality. Many of these people are over the age for Fire Protection Personnel Standards and Education regulations and thus would not be eligible to compete under Civil Service law for the positions they now hold. The statute is silent on the fate of incumbent employees and guidance is needed on the correct way of dealing with incumbents if, in fact, they now must be placed in civil service status.

Mechanism of Appointment - Finally, while it could appear from reading this section that the referenced positions should be filled with a civil service employee, the first portion of the section defines a fire fighter as a member of a fire department who was appointed in substantial compliance with this section, i.e., appointment from an eligibility list created as a result of a written examination. As indicated earlier, the Fire Marshal, his investigators and other individuals in fire safety education, fire communications, and fire medical emergency disciplines were not appointed in substantial compliance with Chapter 143 and are, therefore, not fire fighters. Also, the Attorney General opined in Opinion No. JM 515, that Section 143.003 (and its predecessor under Article 1269m) does not require a city to create civil service positions for all the activities of a fire department that are enumerated in that section.

Contention

It is the contention of the City of Plano that the purpose and effect of HB 1388 is for cities that initially adopt civil service after September 1, 2002, must provide civil service protection to all employees of the department until such time that the city enacts a classification ordinance for specific positions that become vacant and for which civil service classification should apply. The City strongly urges that this minor change to the statute in the definition of fire fighter coupled with a complete absence of any meaningful legislative history with regard to this change requires an interpretation in the most narrow context so that the substantive provisions of the remainder of the statute can be recognized for their intended purposes.

The City's position is that HB 1388 is limited to a city that adopts civil service after September 1, 2002 and requires them to grandfather all persons employed in the capacities described in the statute's definition statute, HB 1388 and has no effect or meaning on civil service cities that existed prior to September 1, 2002. Any other interpretation such as that all existing fire department employees in a civil service city, which existed prior to September 1, 2002, are now given civil service protection will nullify many of the key provisions of the statute including the entry qualifications for competitive examination, promotions, as well as the right of a city to classify positions as appropriate.

In sum, the one innocuous change of a term from "firefighter" to "employee" in the definition under §143.003, does not result in virtually all persons working in a fire department (that had adopted civil service prior to September 1, 2002) and who were not employed through competitive civil service testing or been rightfully grandfathered under §143.005 or 143.084 to receive the benefits of this statute without undergoing the requirements of same. Further, the lack of any meaningful legislative history further supports that on this particular bill a one word change should not cause a result that eliminates the long recognized and still current methods to obtain civil service protection.

The conclusions and rationale as expressed in Attorney General Opinion No. 515 JM-515 remains valid under the current language of Section 143.003 of the Texas Local Government Code. In JM-515, the Attorney General rightfully recognized that when a city initially adopts civil service, the members of the department that fulfill duties are entitled to civil service protection but that a city also retains the right to classify the positions by ordinance in order to fulfill the intent of the statute which is to create a fire service that is efficient and free from political influence. Thus, the term "employee" in the latest amendment to §143.003 cannot be divorced from the remainder of the paragraph in that section and is a member of a fire department who was appointed in substantial compliance with Chapter 143 or who is entitled to civil service status under Section 143.005 or 143.084 (Emphasis added). It therefore follows that those positions

enumerated in Section 143.003 (4) (A) through (J) that have not been classified as civil service positions; have not been occupied by employees appointed in substantial compliance with Chapter 143; and have not been occupied by employees who are entitled to civil service status under Section 143.005 or Section 143.084 may continue to be filled by non-civil service employees.

The changes effected by H.B. 1388 were not intended to drastically alter the long-standing interpretation that article 1269m, section 2 (now section 143.003) did "not mandate that all the activities of a fire department enumerated in section 2 be performed by civil service positions." (AG Opinion No. JM-515). To hold otherwise will compel many competent and senior employees to relinquish their jobs with no hope of regaining them through competitive testing because of the age requirements of Section 143.023. Nor will they be afforded the same protections that were provided to those civilian employees in the service of their cities for more than six months at the time their cities adopted Chapter 143.

Question(s)

1. Was it the intent of the Legislature to regulate (via the definition of "Fire fighter" as presented in 143.003 (4) all employees of a municipal Fire Department subject to the provisions of Chapter 143.003 (4) or only "Fire fighters" who perform the listed duties as per the historical interpretation and prior Attorney General opinion?

2. If the intent of the Texas Legislature was to place all "Employees" of the Fire Department who perform the duties as listed under 143.003 (4) under the control of Chapter 143, are incumbent "civilians" who currently occupy these positions "grandfathered" into those positions in a new "classification" plan?

3. Given the silence of Chapter 143 on any mechanism to convert a civilian position to a civil service position by any mechanism other than at the initial adoption of the Chapter by a municipality or by classification by the municipality, may the City continue to employ incumbents in their current positions until such time as Chapter 143.003 is amended to provide a mechanism for converting existing positions to civil service status?

4. If incumbent civilian employees are not grandfathered into these positions and the City cannot defer on converting the positions to civil service until legislative guidance is provided, must the incumbent employees be removed pending the development of a civil service classification plan, competitive test, and appointment per Chapter 143.023 through 143.030, inclusive?

SUMMARY

The City of Plano requests that you determine whether Chapter 143 of the Texas Local Government Code requires that all employees performing fire safety education, fire

medical emergency technology, fire communications or fire arson investigation duties be civil service employees by responding to the foregoing questions.