

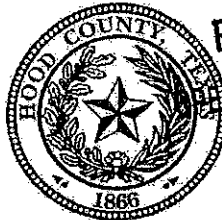
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RECEIVED

FEB 04 2010

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2/1/2010

Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear Attorney General Abbott,

RECEIVED

FEB 04 2010

OPINION COMMITTEE

FILE # ML-46331-10
I.D. # 46331

RD-0861-GA

At the request of the Hood County Commissioners Court, I seek your opinion regarding the determination of the amount of additional compensation to be paid to the Juvenile Board of Hood County. The judges of the 355th Judicial District Court, Hood County Court at Law and the Hood County Court sit on the Juvenile Board of Hood County. Historically the board has submitted a budget to the commissioners court that includes compensation for each member judge in a line item of the budget for the Juvenile Probation Department. For several years the question of who has authority to establish the amount of additional compensation to be paid to the juvenile board members has been at issue between the Commissioners and the Board. The Juvenile Board of Hood County is established under Chapter 152, Human Resources Code of Texas. Hood County does not have a Family District Court and no provisions for Hood County are set forth in Subchapter "D" of Chapter 152, Human Resources Code.

The question for which I seek your opinion is, "Who has the authority and responsibility to establish, increase, decrease or eliminate the amount of compensation to be paid to the judges serving on the Juvenile Board of Hood County?"

Attached to this letter is a brief detailing the facts and commissioner's position on these issues. If you need additional information, please do not hesitate to contact my office. An expedited response will allow the commissioners to use your opinion in this year's budgeting process.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Kelton Conner".

R. Kelton Conner
Hood County Attorney

Attorney General Opinion Request

Brief on behalf of Hood County

Facts:

The Hood County Juvenile Board, (hereinafter called the "Board") was created under Chapter 152, Human Resources Code Subchapters A and B. The Board historically has submitted a budget for the juvenile probation department to the Commissioners Court of Hood County, (hereinafter called the "Commissioners") that includes compensation for each member judge in a line item of that budget. During that time, for the sake of timely completing the county's budget, the Commissioners have compromised with the Board and have adopted a county budget which included the amounts submitted in the Board's budget. The disagreement concerning the authority to set the amount of county money to be used to pay the additional compensation for additional duties of the members of the Board has continued for many budgets and the Commissioners would like to resolve the question that still recurs annually at budget time. Particularly, the Commissioners want to know whether they have authority to establish, increase, decrease or eliminate additional compensation which is authorized for members of the Board.

Law:

The Commissioners believe that the provisions of several statutes support their position. The budget process begins with the Commissioners. The commissioners court in preparing the county budget "shall determine" the amount of county funds to be spent for the juvenile probation department in the county budget. Section 111.094, Local Government Code. Before the 14th day before the juvenile board or a community supervisions and corrections department has a meeting to finalize its budget, the board or department shall file with the commissioners

court: (1) a copy of the proposed budget; and (2) a statement containing the date of the board's or department's meeting to finalize its budget. Section 140.004, Local Government Code.

Because the disagreement was picked up by the press, a representative of each side of this disagreement has publicly explained their positions in the newspaper. See Exhibit 1 and Exhibit 2.

The disagreement still persists with the Board representative asserting and explaining that the Board as a specialized legal entity has presented for many years an "approved" budget to the commissioners for their consideration. Inasmuch as the Board's compensation for additional duties is a line item in the Board's budget which was approved by the Board before being presented to the commissioners, it has been argued that the approved budget is not subject to change because the commissioners court's role in the budgeting of the Juvenile Probation Department is limited to setting the dollar amount of county funds in the department's budget and reviewing that portion of the budget. See Tex. Atty. Gen. Op. No(s). JC-0085 (1999) at 2; DM-460 (1997) at 2-4; JC-0209 (2000) at 3. Those opinions, when considering the budget for the juvenile probation department as directed by Section 152.0038, Texas Human Resources Code leave little to question in describing the Commissioners limited role in establishing the county funds to be used in the operational budget of the juvenile probation department. The juvenile board shall pay the salaries of the juvenile probation department personnel and other expenses required to provide adequate services to children from the juvenile board fund to the extent of the state aid received in the fund. The county shall pay other salaries and expenses essential to provide adequate services to children in an amount set by the juvenile board with the advice and consent of the county commissioners court.

However, the commissioners court may reasonably compensate each member of the juvenile board for the members' additional duties. Section 152.0034(b) Human Resources Code. The Commissioners, in reliance on the plain language of said Section 152.0034 (b), believe that the intent of the statute is to authorize the commissioners court to determine how much is to be paid, if any, in county funds to the juvenile probation department's budget for the payment to the Board members for their additional duties. In Tex. Atty. Gen. Op. No. DM-103 (1992), the juvenile board discussed was created utilizing special legislation under Section 152.0411(c), Subchapter D of Chapter 152, Human Resources Code, wherein the minimum salary was established at \$1200.00 per year and the juvenile board by order purported to raise the salaries of its judge members. Your opinion stated, "the language of the statute regarding the compensation for members of the juvenile board at issue is unambiguous: these salaries are to be set by the commissioners. Neither section 152.0411, nor any other provisions of Chapter 152 of the Human Resources Code concerning juvenile boards, gives the juvenile board any authority to set the salaries of its members without commissioners court approval." Tex. Atty. Gen. Op. No's. DM-103 (1992) 2:GA-0717 (2009) 2.

The additional compensation paid juvenile board members is fixed by statute or by the commissioner's court within a specified range. 36 David B. Brooks, County and Special District Laws Section 24.3 Texas Practice Series 2009. The maximum amount of additional compensation for a district judge is set at \$5,000.00 less than the salary provided by the state for a justice of a court of appeals other than the chief justice. Section 152.0003 Texas Human Resources Code.

The county budget which shall be created annually by the Commissioners, who shall determine the amount of county funds to be included in the juvenile probation department's

budget as certified to the Commissioners by the Board, may include additional compensation for members of the Board to be added to the proposed budget of the juvenile probation department. Once added to the said proposed budget, the Commissioners do not control the Board's expenditures and may review only the amount of county funds in the budget using an abuse of discretion standard. The commissioners court does not have general supervisory authority over the juvenile board, a specialized local entity, and therefore does not have authority over the board's employment decisions or over individual line items in the budgets of programs under the board's jurisdiction, such as the juvenile probation department or juvenile detention departments. See Tex. Atty. Gen. Op. No(s). JC-0085 (1999) at 2; DM-460 (1997) at 2; JC-209 (2000) at 4.

The Commissioners believe that the language of section 152.0034 Human Resources Code grants to them the discretion to determine the amount of additional compensation to be paid to the members of the Board without violating the terms of section 152.0038 Human Resources Code or the opinions of the Attorney General herein cited. It seems outside of the normal checks and balances scheme of our government for a governmental body like the Board to be placed in a position to set its own salary. By applying the plain meaning of the words of the statute, the commissioners court may reasonably compensate each member of the juvenile board for the member's additional duties, without being required to give ministerial approval to what has been requested with regard to the compensation for the Board by the Board. If statutory language is clear and unambiguous, the statute should be given its common everyday meaning. *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (TEX 1997). The ordinary meaning of section 152.0034 Human Resources Code would allow the Commissioners to determine the reasonable compensation to be paid for the additional duties performed by members of the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Kelton Conner". The signature is written in a cursive style with a large, prominent "C" at the end.

R. Kelton Conner

County Attorney

1200 W. Pearl St.

Granbury, Texas 76048

SBN# 04690000

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Explanation of juvenile board fees

It is sometimes a surprise to read an article (or sometimes several) about an issue that directly affects you, and one that you are particularly knowledgeable, and never be approached by the reporter. So, while some have been talking around this issue, these are the facts.

Judges Walton, Messina and Rash are statutorily obligated to serve on the Juvenile Board: The duties of a board member are set out in the Human Resources Code. The Juvenile Board:

- Certifies no less than annually the detention center. If we don't, it cannot continue to operate.

- We interview, and hire the Juvenile Probation department's chief probation officer, and review and approve each and every probation officer's hiring or termination.

- We set the office policies and procedures.

- We review complaints filed by residents at the detention center.

- We review and decide whether to grant waivers regarding the state standards which regulate the center.

- We oversee and approve the annual budget of the department.

- We review and approve every new hire or termination in the entire department.

- We review and approve every single vendor invoice that is paid. In fact without the review and approval the invoice is not paid.

- We review and approve the issuance of payroll for the employees.

- We can sit, in executive session, and decide matters involving personnel, threatened litigation, proposed litigation and resolution of outstanding claims.

The Juvenile Board is a "specialized local entity" under Section 140.003 of the Texas Local Government Code according to John Cornyn, the former Texas Attorney General (J.C. 0209 4-12-2000). As a specialized local entity, a Commissioners Court's control of the department's expenditures is confined to the limited budget review of "setting the dollar amount of county funds in the departments budget and reviewing that portion of the budget on an abuse of discretion standard, Texas Human Resource Code Ann 152-0012 (1999).

The Juvenile Board and Juvenile Probation department are independent entities because in part the funds coming into the department are state funds

GUEST COLUMN



Vincent J. Messina
Hood County
Court at Law Judge

not local county funds; therefore, the individual line items in the budget cannot by law be affected by a Commissioners Court. This makes sense when you understand and apply the separation of powers doctrine contained in our U.S. and State constitution wherein each branch of government is separated into distinct and independent entities.

The current board fee paid to the members of the board is \$950 per month. This is the same monthly fee paid last year, and approved by a unanimous vote of the Commissioners Court. At the request of the County Judge and Commissioners, the board recently voted to maintain that fee at last year's levels. The current level of board fees are commensurate with the Juvenile Board fees paid to the Judges in our sister counties. Indeed, our direct neighbor Johnson County pays board fees of \$1,250 per month. The Hood County Juvenile Board meets twice per month. Our surrounding counties' boards meet once per month or sometimes once per quarter. It's important to understand the effect on each Judge for every decision that we make while on the board.

When we make decisions on the board we are engaging in what has been termed by the courts as an "extrajudicial function" and as such we are not protected by unqualified judicial immunity. By not having this immunity, each decision we make in the juvenile board subjects us to civil liability. Now, much has been made by prior reports relative to the indemnity that is provided. In order to accurately gauge the meaning you need to first understand the legal significance of immunity vs. indemnity.

Unqualified judicial immunity protects judges from civil suits involving money damage for acts performed in his or her judicial capacity. Simply put, if I am sued for something I do while on the bench, the case is subject to summary dismissal without the need for me to ever personally appear and answer the suit - meaning it's over before it gets started.

Indemnity on the other hand does not afford protection from suit. Indemnity is a legal

theory that shifts the responsibility for payment of a claim to another party who may or may not be a party to the suit. The difference is overwhelming. With indemnity the Judge is subject to making a general appearance, propounding and answering discovery (Request for Disclosure, Admissions, Interrogatories, Request for Production of Documents, and depositions). The judge is subject to having his or her appearance compelled at pretrial hearings, scheduling motions, pretrial conferences, and mediation. Additionally if a jury assesses damages in the underlying claim, the judge may be called upon to pay that judgment if indemnity is not triggered. The statute that some have relied upon specifically sets out:

ART: 152.0013 Indemnity for Liability

a) A member of a juvenile board is not liable for damages arising from an act or omission committed while performing duties as a board member.

b) This section does not apply if the act or omission is

- Reckless or intentional.

- Done willfully, wantonly or with gross negligence.

- Done with conscious indifference or reckless disregard for the safety of others.

The jury decides those above three facts. I am a huge believer in the jury trial system, but I have seen juries over the quarter of a century I have practiced law do some strange stuff. As you can no doubt determine, the statutory indemnity provisions don't give judges much comfort, and do not prevent what could be huge damage awards against the judges - awards they would be called upon to potentially pay personally.

Finally, some have continued to use the word "stipend" to describe the fee paid to the juvenile board. The use of that word is neither descriptive nor accurate. As far back as the 1970s the Texas Attorney General has defined and described the fee paid to the Juvenile boards across the state as "compensation received by a judge for his service on the juvenile board for services they render as a judge" (MW-87 11-21-79). The board fee is a part of the overall compensation paid to the judges who by statute are members of the Juvenile board.

I know this is a long discussion but as Thomas Edison said, "There is usually a very short and simple answer to a complex question...and that answer is usually wrong."

GUEST COLUMN

Richard L. Roan Ph.D.
Hood County Commissioner
Precinct #2

I am writing this in response to the Guest Column offered on Saturday August 15th by the Honorable Judge Vincent Messina, with which he attempted to both explain and justify an \$11,400.00 per year stipend paid he and Judge's Rash and Walton.

Judge Messina correctly states the statutory law which defines how a Juvenile Board is made up. He even states from a 1999 code in the Human Resources Manual of the State of Texas referencing former Attorney General John Cornyn. I will use that same set of Statutory Laws although I will use the updated 2001 edition, as referenced by an opinion given by the current Attorney General, the honorable Greg Abbott in 2009.

Let's go through the list Judge Messina provided. Each of these items are indeed as important as he made them out to be – first because they involve our youth, and secondly, because they are statutorily required.

- Certifies the detention center at least annually so that it can continue to operate. I agree, that is something the three of them do once per year. However, as to their needing to approve its operation before it can operate, I disagree as the Juvenile Detention Center is privately owned and therefore falls under the rules and regulations of the State of Texas, not Hood County
- Interview and hire the Juvenile probation chief officer and approve each and every officers hiring or termination. Again, I agree. The current chief has been there since the 16th of June in 2007 so no reviews have been done for that position for 2 years and 2 months. During that same time period, only 4 positions of probation officer have changed. Not overwhelmingly busy from a Board standpoint. Might even smack of good local management, which taxes a board even less. The Board should be commended for having chosen competent local management in this department.
- Setting office policies and procedures. I can't find any record of those having been changed since I've been in office. (2 years and 8 months)
- Review complaints by residents at the detention center. That would be for one of the 15 beds guaranteed to Hood County. Other Boards would obviously hear the complaints of their own juvenile prisoners assigned to this privately owned facility. I can only find reference to 3 complaints during the past year.
- Reviewing and deciding on whether to grant waivers regarding the State standards which regulate the privately owned center. I doubt that our Board would ever purposely take on the State regarding their standards, requesting that a local standard be honored instead. I may be wrong but I see no reference to waivers in their minutes.
- Oversee and approve the annual budget of the department. Again, I agree. The local management structures the budget, presents it to the Board for approval, and goes forward unless the Board questions some portion of that budget. Evidently, sometime during the past 6 ½ years, they had some question, because when presented with the budget during various times of that period, they made inclusions totaling just under \$4000.00 dollars which they recommended be paid to themselves over and above the \$7500.00 they were currently receiving. That made their total income for their Board responsibilities \$11,400 which is the current number we at a Court level first questioned relative to value received for effort given.

- Review and approve every new hire in the entire department. **Agree. Again, not a lot of turnover here as compared to many departments in the County. Additionally, local management does a good job as to stability and the Board routinely goes along with their recommendations thus requiring very little time spent on personnel issues.**
- Review and approve "every single vendor" invoice that is paid. **Like our court, these are reviewed in blocks and we follow the recommendation of staff to pay or not pay– unless and until we have reason not to.**
- Review and approve the issuance of payroll. **While I agree this is another responsibility, this is done by the local staff and our treasurer and more or less "blessed" by the Board. They do not actually sit and figure out the payroll every two weeks anymore than we do on the commissioners court.**
- Sitting in executive session. **Yes, they can. However, this is indeed a rarity and the number of times this has been used this calendar year can be counted on one hand.**

Next the Judge went on to explain that the juvenile Board is a "specialized local entity". He then correctly quoted the section of the Texas Human Resource Code – 152-0012 that controls what portion of the overall budget for the juvenile probation department the Commissioner's court has control over. He also correctly points out that a portion of the funds coming into that department are not from the County, but from the State. I should point out here that the "State" funds are still taxpayer funds from the citizens of Texas which we still qualify for as citizens of Hood County.

As Judge Messina reminded us, we need to understand the separation of powers within both our Federal and State constitutions. I believe most of us do. Under Title 10 of the Human Resource Code, Subtitle B, Juvenile Boards, Chapter 152, Subchapter A, Section 152.0034, 2001 says, and I quote "a: Service on a juvenile board by a judge is an additional duty of office. and b: The commissioner's court may reasonably compensate each member for the member's additional duties." It does not say "must", it says "may". This allowance saying the court "may" compensate the Board is again referred to in the "District" application of the same set of laws under Section 152.0053. Additionally, under Section 152.0038, paragraph b, it states, and I quote, "The county shall pay other salaries and expenses essential to provide adequate services to children in an amount set by the juvenile board with the advice and consent of the county commissioners court". Here it says "shall" not "may".

The point here is this. Regardless of the intent to show no financial control of the county over any monies paid the 3 judges in question, Judge Messina failed to mention that the money referred to in the courts initial inquiry – the \$11,400.00 annual stipend – or the \$950.00 per month fee or the \$475.00 per meeting fee that is paid to them, is indeed Hood County taxpayer money and is indeed under the complete control of the Hood County Commissioner's Court, from an approval standpoint as an individual part of the overall budget submitted to us for approval before the beginning of the new fiscal year. It is local money that is not coming from the portion of their income derived from the "State". I will emphasize again that I never personally questioned the approval process. I questioned the value vs. service vs. cost process, and I still do.

Judge Messina again brought up the "extrajudicial function" and has carefully and expertly explained the difference between the two terms of immunity and indemnity. He references the same law I have quoted above and refers specifically to Section 152.0013 of that Code which states that "A. A member of a juvenile board is not liable for damages arising from an act or omission committed while performing duties as a board member. B. This section does not apply if the act or omission is:

- Reckless or intentional.
- Done willfully, wantonly or with gross negligence.
- Done with conscious indifference or reckless disregard for the safety of others.

I guess my opinion here is simple. If you are doing your job and behaving yourself professionally, you have your assumed judicial immunity, indemnity or whatever the proper term is. If you are not and fall into one or more of the 3 items listed above, maybe you or anyone else involved with children, needs to be sued, or at least called to task. We are fortunate in Hood County to have three quality men serving in these positions, so the afore-referenced argument should be of no concern or consequence to us.

Finally, we were asked to consider, or ask, what those around us pay for this same service from their 3 local judges. On the court, we have done that. I have that information from 14 other Counties around or near us. I also have the names of all 14 of the respondents and their positions whether elected or appointed in their respective county. I can also tell you whether they meet monthly, semi-monthly, quarterly etc. We also know whether they consider what they pay, if anything, a part of the annual salary and publish it accordingly, or whether it is considered an extra "stipend" to the normal duties expected to be performed by the particular elected office. By the way, Webster says that a stipend is "a fixed sum of money paid periodically for services or to defray expenses". That is what we do, we pay it monthly for services rendered.

Please let it be well understood that I do not have any personal axe to grind with, or any ill personal feelings towards, any of the principals involved in this issue. Instead, I have the utmost respect for the jobs they are charged with doing, how they execute those jobs, and how they acquired them. My question is and always has been the same. Are we being completely fair with the taxpayers who put us here if we do NOT question something we feel might be financially inequitable when compared with all relative compensation plans? The facts are still the same. We DO pay these individuals \$11,400 per year, in addition to their salaries, for this statutorily directed appointment as an additional part of the job they were elected to do. They DO meet on County time for which they are already being paid a fair and equitable salary. I still believe I have both the right and obligation to ask questions concerning the value received for the service rendered without being made out to be either "grandstanding", "getting even for something" "being jealous of someone" or all three of which I have been accused. I enjoy what I do, am fairly compensated for it, and will continue to perform it, including asking questions. I do so without apology and for what I consider to be totally legitimate purposes having nothing to do with politics. If asking questions, probing, holding folks accountable for doing the jobs they were elected or hired to do, are faults, then perhaps my constituents need to find someone more passive and unconcerned than I.

The judge closed with a quote from Thomas Edison, an admirable choice. I will do the same except mine comes from our very first President of these wondrous United States, who said "Courage is the most important of all human qualities, because in the absence of courage, nothing of value follows." To me courage says to question the norm, in search of the true value behind the assumed commitment. Paying anyone because the law says we "may" is not good enough reason on its own merits. That's my opinion for what it is worth.