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FEB 18 2010

OPINION COMMITTEE

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February 12, 2010

Hon. Greg Abbott
Attorney General of Texas
Attention: Opinion Committee
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

FILE # ML-46344-10

I.D. # 46344

RQ-0867-GA

Re: Sale of Phone Cards
Potter County Detention Center Commissary

Dear General Abbott:

On behalf of the Potter County Sheriff, we request your opinion on the following matter.

Background

The Texas Administrative Code, in provisions regarding the Texas Commission on Jail Standards, requires jails to "provide for telephone provide for reasonable access, both local and long distance, between an inmate and his or her attorney, family, and friends" and further provides that this telephone access "may be on a *prepaid or collect basis*." 37 TEX. ADMIN. CODE § 291.1(2) (emphasis added). Potter County contracts with Global Tel*Link (GTL) for phone service for Potter County inmates. This phone service allows inmates to make calls to outside numbers, with the recipient of the calls paying GTL's fee for the call.

As a method of providing telephone access on a prepaid basis, the Potter County Sheriff is considering selling phone cards for this system to inmates through the jail commissary. The cards would most likely be obtained from GTL, but this arrangement, if it occurs, would be separate from the telephone service contract. The cards, purchased from whatever source by the Sheriff at a discount, and be sold in denominations of \$10 or \$20.

Since commissary services and inmate telephone services are treated distinctly in past opinions of your office, we have a question regarding the division of revenue from the sale of the phone cards.

Question Presented

Is revenue from the sale of a phone card to be credited to the commissary account or to the general fund of the county?

Discussion

As a general rule, the county commissioners court wields the authority to enter into contracts on behalf of the county. *Anderson v. Wood*, 137 Tex. 201, 203, 152 S.W.2d 1084

(Tex. 1941). All purchases in this situation must be made through the county's purchasing agent, subject to the requirement of competitive bidding. TEX. LOC. GOV'T CODE ANN. § 262.011 (d) (Vernon 2005). This general rule does not apply to the operation of the jail commissary, which is under the authority of the sheriff:

The sheriff of a county . . . may operate, or contract with another person to operate, a commissary for the use of the inmates committed to the county jail or to a detention facility operated by the private vendor, as appropriate. The commissary must be operated in accordance with rules adopted by the Commission on Jail Standards.

--TEX. LOC. GOV'T CODE ANN. § 351.0415 (a) (Vernon 2005).

The authority of section 351.0415 allows the Sheriff to purchase items for the commissary without consulting the purchasing agent. Op. Tex. Att'y Gen. No. JM-1121 (1989).

The Texas Administrative Code also addresses commissary service, in a provision immediately following, but separate from, that of telephone services:

Each facility shall have and implement a written plan, approved by the commission, governing the availability and use of an inmate commissary which allows for the purchase of hygiene items and sundries. The plan shall:

(5) provide that all expenditures from commissary proceeds be made in accordance with the Local Government Code, §351.0415.

--37 TEX. ADMIN. CODE § 291.3.

The revenue from the sale of a commissary item must be deposited back into the commissary account and used solely for the benefit of the inmates. TEX. LOC. GOV'T CODE ANN. § 351.0415 (c) (Vernon 2005); Op. Tex. Att'y Gen. No. DM-19 (2001); Tex. Att'y Gen. LO-97-071 (1997). The sale of phone cards as a commissary item would be no different from any other item -- any revenue from such a sale would have to be deposited into the commissary account and used for the benefit of the inmates in the manner specified in section 351.0415.

On the other hand, a line of opinions from your office holds that the commissary proceeds and phone service proceeds are to be handled separately. Op. Tex. Att'y Gen. No. DM-19 (1991); Op. Tex. Att'y Gen. No. GA-0059 (2003). The former are in the control of the sheriff pursuant to § 351.0415 while the latter are deposited in the general fund of the county. ~~Id. The distinction lies in the separate treatment of commissary operation as opposed to inmate telephone service in the Texas Administrative Code provisions regarding the Texas Commission on Jail Standards. As summarized in GA-0059:~~

. . . [S]ection 351.0415 [Local Government Code] specifies that "a jail commissary is to be operated in accordance with rules adopted by the Commission on Jail Standards." Id. In those rules, "[t]elephone privileges and commissary privileges are treated as separate categories." Id. (citing 37 Tex. Admin. Code § 291.1). On the basis that "the commission did not understand the term 'commissary' to include pay telephones," Attorney General Opinion DM-19 concluded that proceeds from pay telephones in county jails are not part of the commissary fund and should be paid to the county treasurer. Id. at 2-3. The legislature has not amended section 351.0415 or enacted any other law that would change that conclusion. The rules of the Commission on Jail Standards ("the Commission") that distinguish between the "inmate telephone plan" and the "inmate

commissary plan” are precisely the same as they were when Attorney General Opinion DM-19 was issued in 1991. The latter rule requires the inmate commissary plan to “provide that all expenditures from commissary proceeds be made in accordance with the Local Government Code, § 351.0415.” 37 Tex. Admin. Code § 291.3(5) (2002). The former rule makes no provision as to the disposition of proceeds from the “inmate telephone plan.” See id. § 291.1.

--Op. Tex. Att’y Gen. No. GA-0059 (2003) at 1-2.

The phone card represents a pre-payment for the use of the phone system, and consequently is revenue derived from the telephone service. As noted in the Administrative Code, telephone service may be provided on a prepaid basis. 37 TEX. ADMIN. CODE § 291.1(2). The revenue from the sale of the phone card would therefore seem to be subject to deposit in the general fund of the county instead of the commissary fund.¹

On the other hand, if the phone cards are obtained with commissary funds, the revenue from the sale of the cards is used only for the authorized purposes of the commissary fund. TEX. LOC. GOV’T CODE ANN. § 351.0415 (Vernon 2005). To do otherwise violates the requirement that commissary expenses be made solely for the benefit of inmates.

As stated in the Texas Government Code, “[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.” TEX GOV CODE ANN. § 311.026 (a) (Vernon 2005). Applying this principle, we can reconcile the commissary provisions with the telephone service provisions by holding that the scope of the latter is broad enough to include phone cards. Interestingly, we reach the same result by applying the next subsection of section 311.026. Subsection (b) of that section directs that phone cards are covered by the more specific provision regarding telephone service rather than the more general provisions of the commissary provisions. *Id at (b)*. Under this reasoning, revenue from the sale of phone cards should be deposited in the general fund.

However, we note that another arguable interpretation that allows the coexistence of the commissary provision and the telephone service provision is that if phone cards are obtained with commissary funds, the revenue from the sale of the cards remains with the commissary, while if they are obtained by the county out of the general fund, the revenue should return to the general fund. We further note that there would be no barrier to the commissioners court agreeing to dedicate as a budgetary matter all revenue from the sale of phone cards to the commissary fund. Nor would the commissioners court be prevented from using general funds to purchase the phone cards, knowing that the purchase of the card is no more than an advance of revenue to be received from the telephone service contract.

Conclusion

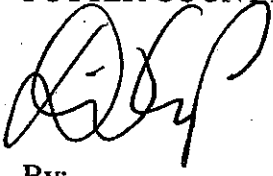
Revenue from the sale of phone cards should be allocated to the county’s general fund rather than the commissary fund if such cards are obtained with general funds.

We look forward to your opinion.

¹ If phone card revenue is subject to deposit in the general fund of the county, then the procurement of the phone cards must be done through the commissioners court and the county purchasing agent. *Anderson v. Wood*, 137 Tex. 201, 203, 152 S.W.2d 1084 (Tex. 1941); TEX. LOC. GOV’T CODE ANN. § 262.011 (d) (Vernon 2005).

Sincerely,

Scott Brumley
POTTER COUNTY ATTORNEY

A handwritten signature in black ink, appearing to read 'DK', written over the printed name of David Kemp.

By:
David Kemp
First Assistant County Attorney

c: Sheriff Brian Thomas