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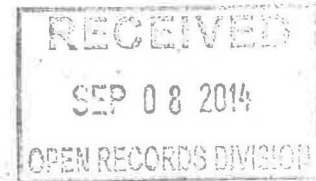
September 3, 2014

The Office of the Attorney General
Open Records Division
P. O. Box 12548
Austin, TX 78711-2548

CM RRR - _____

Re: Request for Attorney General Decision

Dear General Abbott:



Pursuant to the authority to issue advisory opinions given to the Attorney General in §22 of Article IV of the Texas Constitution and §402.041, et seq, Texas Government Code, this letter is being sent to you to request an opinion regarding whether an elected Justice of the Peace, who retired from his position and declines to perform his duties, is entitled to be paid his salary, his vehicle allowance, and his cell phone allowance.

BACKGROUND FACTS

In 2006, Kirby Hill was elected Justice of Peace for Precinct 2, Navarro County. He was reelected in 2010 and had filed for reelection in 2014. He was not opposed in the Republican Primary and no Democratic candidate filed for office. On June 19, 2014, Justice Hill tendered a letter (a copy of which is attached) announcing that he was "retiring" effective July 1, 2014, to go into private business. The business is in another county, located approximately 150 miles away.

Since "retiring," he has declined to discharge his duties as Justice of the Peace for Precinct 2, including holding court or being "on call." The other three elected Justices of the Peace for Navarro County have agreed to provide coverage for the Precinct 2 court until a successor is appointed.

The Commissioners Court of Navarro County has accepted Justice Hill's retirement. In addition the Commissioners Court declined to compel Justice Hill to "hold over" and perform his

duties as Justice of the Peace. At the time of his "retirement," in addition to his salary, Justice Hill received a monthly vehicle allowance that did not fluctuate depending upon the number of miles he drove. Navarro County also paid for Justice Hill's cell phone and his health insurance (although not his family's health insurance).

LEGAL AUTHORITIES

The County is aware of Opinion #H-161 (November 20, 1972) wherein your predecessor's office opined that a *de jure* Justice of the Peace may receive his salary during the period during which he was holding over awaiting the appointment of his successor. In that situation, an individual who was elected as Justice of the Peace for a four year term filed as a candidate for the office of Tax Assessor Collector before his four year term was up. Pursuant to Article XVI, §65 of the Texas Constitution, the Justice of the Peace was deemed to have resigned his position as JP when he filed for Tax Assessor Collector. The Justice of the Peace lost the primary election for Tax Assessor, but continued to perform the duties of JP from the date he filed as a candidate for the office of Tax Assessor Collector (February 7, 1972) up until his successor was appointed on February 12, 1973. But, Opinion H-161 does not address the present fact situation where the Justice of the Peace declines to do his duties.

We are also aware of older cases that touch upon the issue, although they only do so in passing. For example, in *Jones v. City of Uvalde*, 79 S.W.2d 341 (Tex.App.—San Antonio 1935, err. ref'd) the court implied that an officer *de jure* who was prepared to perform his duties, and was properly qualified, may be entitled to compensation. Similarly, in *City of San Antonio v. Micklejohn*, 33 S.W. 735, 736 (Tex. 1895) the court held that a person who held an elected office that was subsequently abolished by ordinance was nonetheless entitled to be paid if he was willing to perform those duties. *Id.* at 737. On the other hand, in *Steingruber v. City of San Antonio*, 220 S.W. 77 (Tex.Com.App.—1920), the court noted that abandonment of office is different than a resignation from office. Abandonment results from non-use with the actual or imputed intention on the part of the officer to abandon or relinquish the office. *Id.*

Article XVI, §17 of the Texas Constitution does not directly or by implication require a county to pay the salary of an officer who retires but who declines to perform the duties of his office. Furthermore, the scant case law that exists suggests that officers *de jure* are entitled to be paid, if their office is properly authorized, and if they are willing to perform the duties of the office. Here we have the opposite question where the officer wants to be paid but declines to do any work.

The County is also mindful of those Texas Constitution provisions which prohibit it from simply giving away public funds. See TEX.CONST. Art. III, §52(a); Article XVI, §6.

In addition, the County is also aware of an obscure provision in our Constitution which provides:

DEDUCTION FROM SALARY FOR NEGLECT OF DUTY. The Legislature shall provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned them by law.

TEX.CONST. Art. XVI, §10. At the outset, it is important to note that although Article XVI, §10 provides that the Legislature shall provide for deductions for neglect of duty, the Legislature has not elected to do so in the last 138 years. This provision has been cited in four cases and one Attorney General Opinion in the last 138 years. In one case, *Miller v. James*, 366 S.W.2d 118 (Tex.Civ.App. – Austin, no writ) the court cited this provision in connection with a suit filed to enjoin the State Treasurer from paying the wages or salaries of the members of Legislative Redistricting Board. The plaintiff complained that the Legislative Redistricting Board of Texas was not complying with its mandatory duties and was effectively denying the plaintiff equality of representation and proportionate representation. *Id.* at 119. The Court of Appeals noted that Article XVI, §10 reserved powers relating to deductions from salaries of public officers to the Legislature and, therefore, under the separation of powers doctrine, that duty was reserved to the Legislature. Therefore the court declined to order relief. No court since *Miller* has elaborated on Article XVI, §10. Article XVI, §10 was mentioned in passing in a dissent in *Neely v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746, 806 (Tex. 2005). The provision was also mentioned in *Carpenter v. Shepherd*, 145 S.W.2d 562, 424 (Tex. 1940) where the case dealt with whether the chairman and executive director of the Texas Unemployment Compensation Commission could simultaneously hold that office and serve as a Major in the United States Army. Other than noting that the Legislature had the power to adjust salaries, there was no substantive discussion of Article XVI, §10 in that Opinion. The final case in which Article XVI, §10 was mentioned is *Marquart v. Harris County*, 117 S.W.2d 494, 502 (Tex.Civ.App.–Galveston 1938, dismissed) where the court was dealing with a contract entered into by the commissioners court to employ skilled experts to value all taxable property in Harris County and effectively take over the duties of the tax assessor and collector, and his office. Other than a citation in passing, no substantive discussion of Article XVI, §10 occurred

Article XVI, §10 was also mentioned in Attorney General Opinion, JM-182, issued in 1984. In that case, this office was asked whether the Commissioners Court had the authority to dictate office hours to be observed by elected county officials. This office answered that question in the negative, citing Article XVI, §10 and the previous Attorney General Opinion that dealt with whether a commissioners court could establish six day 48 hour work weeks for all county offices. That Opinion, O-6679 (1945) dealt with the Commissioners Court attempting to adopt a six day, 48 hour work week for all county offices and further sought to deduct amounts from the salaries of other officers who did not maintain office hours ordered by the Commissioners Court.

Common sense suggests that the Commissioners Court should have some recourse in reducing or withholding pay (and the payment of benefits) from a county officer who has

resigned his position and announced his intention not to perform the duties to which he was elected. This view is further buttressed by Article III, §52(a) and Article XVI, §6 of the Texas Constitution which prohibits government generally from giving away public funds for no purpose.

Article XVI, §10 does not prohibit a Commissioners Court from adjusting salaries to be consistent with the duties that might be performed. It simply authorizes the Legislature to adopt laws which do so. And, the Commissioners Court sitting in its legislative capacity certainly has some discretion in setting reasonable salaries for elected officials. *See* TEX.CONST. Art. XVI, §61; *Vondy v. Commissioners Court of Uvalde County*, 620 S.W.2d 104, 108 (Tex. 1981).

The County believes that the holdover provision of the Texas Constitution does not obligate the County to pay Justice of the Peace Hill's salary and attendant expenses in the absence of his willingness to the job for which he was elected. The County acknowledges its obligation to pay if he does the work, but questions whether paying public funds for no work is the proper thing to do.

QUESTIONS PRESENTED

1. Is the Commissioners Court of Navarro County required to pay Justice of the Peace Hill a salary even though he has retired (resigned) from his position and evidenced an intention to abandon the office?
2. Is the Commissioners Court of Navarro County required to pay Justice of the Peace Hill's cell phone expenses even though he has retired (resigned?) from his position and evidenced an intention to abandon the office?
3. Is the Commissioners Court of Navarro County required to pay Justice of the Peace Hill a vehicle allowance even though he has retired (resigned?) from his position and evidenced an intention to abandon the office?
4. Is the Commissioners Court of Navarro County required to pay Justice of the Peace Hill's health insurance even though he has retired (resigned?) from his position and evidenced an intention to abandon the office?
5. Whether the Commissioners Court of Navarro County may adjust the salary of the Justice of the Peace for neglect of office, in the absence of the Legislature having failed to adopt such a law over the past 138 years?
6. Whether the Commissioners Court of Navarro County, in its legislative capacity, may adjust a Justice of the Peace Salary for a neglect of duty?

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Lowell Thompson', written over a horizontal line.

Lowell Thompson, District Attorney
Navarro County, Texas