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OPINION COMMITTEE



DAPHNE SESSION
Houston County Attorney

RQ-0127-KP

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September 7, 2016

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

Re: Request for Attorney General Opinion

Dear Attorney General Abbott:

In my position as County Attorney for Houston County, I am seeking an opinion from your office regarding longevity pay for elected officials who were formerly county employees, and whether that would constitute retroactive pay.

BACKGROUND LAW AND FACTS

Houston County adopted an employee handbook in October 2002. The employee handbook does not define "employee," but states the policies contained therein are applicable to all employees and public officials in the service of Houston County. *See* Exhibit 1. Since the adoption of the employee handbook, county policies have been amended, supplemented, revised, updated, and created to address the ongoing personnel matters of employees and public officials.

On August 26, 2008, the Commissioners Court of Houston County adopted the policy on longevity pay ("longevity policy") effective October 1, 2008. *See* Exhibit 2. The longevity policy applies to all regular full-time employees and those appointed by Commissioners Court after one (1) year of continuous service. *See* Exhibit 3. In December 2008, longevity pay was distributed to fulltime employees, those appointed by Commissioners Court, and elected officials that had achieved one year continuous service to Houston County.

The longevity pay policy has remained in effect with few changes. Changes have included increasing the maximum number of months for eligibility from 240 months or 20 years of service to 360 months or 36 years of service, setting the amount per month at \$8, and the day in which longevity pay will be paid. *See* Exhibit 4.

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Longevity pay is provided to employees, those appointed by Commissioners Court, and elected officials (on 8/9/16, the policy was amended to codify the ongoing practice of paying longevity pay to elected officials. *See Exhibit 5*). The longevity pay began for some employees and continued with the person after becoming an elected official for Houston County. Currently there are six elected officials that were Houston County employees prior to being elected to public office. Those elected officials include the following:

- a justice of the peace – a county employee for 10 years prior to election;
- a constable – a county employee for 7 years prior to election;
- the county clerk – county employee for 14 years prior to election;
- the district clerk – county employee for 10 years prior to election;
- the tax assessor-collector – county employee for 12 years prior to election; and
- the district attorney – county attorney for 12 years prior to election.

These officials have continuous, uninterrupted service with Houston County. The years of continuous service as an employee are included in the calculation of their longevity pay as an elected official. Additionally, each of the above elected officials began receiving longevity pay in December 2008 and each year after, including the current fiscal year, 2016-2017. *See Exhibit 6*. There has not been an interruption in longevity pay for the above elected officials.

QUESTION PRESENTED

When a county employee becomes an elected official with Houston County without interruption in service, can the time the official was an employee be considered in determining the longevity pay for that employee?

DISCUSSION

The term employee is not defined in the Houston County longevity policy. For all intents and purposes, the term employee included the elected officials serving Houston County including, but not limited to, county officers, precinct officers, district officers, and appointed officials. (Local Government Code §§159.032, 159.002). Additionally, based on the practices of Houston County, Commissioners Court viewed elected officials as employees for the purpose of the longevity policy. *See, e.g.* Exhibits 6 - 11, Local Government Code §152.013, and Government Code §32.001.

The longevity pay of Houston County at inception applied to employees and to county officials. Houston County continues the practice of providing longevity pay to employees and elected officials.

In Letter Opinion No. KP-0060 (2016), the Attorney General's Office examined the issue of the continuation of longevity pay after a county employee is elected to a county office. In that opinion, your office considered whether an order granting longevity pay to an individual as a county employee continues in effect for the individual if he or she becomes an elected official. For purposes of the opinion, it was assumed that Webb County does not provide longevity pay for county officers. In the opinion, your office concluded that, as the county clerk was no longer

an employee but an officer, the county clerk was no longer entitled to the longevity pay rate. The opinion went on to note that the county could adopt a longevity pay policy for officers, but that it could not be granted retroactively, only prospectively. In reaching that conclusion, the opinion cited to Letter Opinion No. JC-0026 (1999), which dealt with the question of whether the commissioners court must pay the sheriff the same amount of longevity pay per month to which he was entitled to as a deputy. The sheriff had been a deputy for 23 years, and had been serving as the elected sheriff for several years since. As a deputy sheriff, he had been entitled to longevity pay of \$100 a month, but elected officials were paid a maximum of \$60 per month. The commissioners were considering changing the sheriff's compensation rate to \$100 per month and paying him "arrearages with interest." Your office found that the court could prospectively compensate the sheriff at the rate in question, but could not increase the pay retroactively. The opinion states, "[w]hile the court may at its discretion increase the sheriff's rate of longevity pay, it may not pay him more for services already rendered." The opinion continues on to state, "there is a distinction between retroactive compensation for work already performed and back-pay to which an employee is entitled, but which has not been paid."

Letter Opinion No. KP-0060 (2016) appears to differentiate from the Houston County policy in that Houston County provides longevity for county officers, and has since the inception of the longevity policy. A county officer in Houston County is entitled to longevity at the same rate as a county employee.

Other opinions have likewise considered similar situations, without addressing the specific issue presented here. In Letter Opinion No. JC-0123 (1999), your office considered whether a county officer may be credited or compensated for unused vacation time he earned while a county employee. It was held that the commissioners court was not prohibited from adopting a policy that would allowed unused vacation time to follow an employee if he becomes a county officer, but that policy would have to operate prospectively, not retroactively. Otherwise, the officer would receive "extra compensation" for the work he performed as a county officer. Likewise, in Letter Opinion No. JC-0370 (2001), it was found that a county may not pay accrued vacation time to two sheriff's deputies if, at the time the vacation was accrued, the county did not permit such payments. *See also* Letter Opinion No. JC-0376 (2001)("a retroactive increase in compensation is constitutionally impermissible, but a prospective one is not").

In Houston County, it has been the standard procedure since the longevity policy was created to give officials credit toward longevity for time earned as an employee. In light of this office's decision in KP-0016 (2016), I am seeking guidance as to whether Houston County may continue to give credit toward longevity for the time an official served as an employee.

Thank you for your time and consideration with regard to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,


Daphne Session

Encl.