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August 31, 1984

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Honorable Thomas H. Fowler
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Opinion No. JM-197

Re: Application of article
6252-26, V.T.C.S., to county
attorneys with felony responsi-
bility

Dear Mr. Fowler:

You have asked whether county attorneys having responsibility for felony prosecutions are "officers or employees of any agency, institution, or department of the state" within the meaning of article 6252-26, V.T.C.S.

Article 6252-26 reads in pertinent part:

Section 1. (a) The State of Texas is liable for and shall pay actual damages, court costs, and attorney fees adjudged against officers or employees of any agency, institution, or department of the state . . . where the damages are based on an act or omission by the person in the course and scope of his office, contractual performance, or employment for the institution, department, or agency and:

(1) the damages arise out of a cause of action for negligence, except a willful or wrongful act or an act of gross negligence; or

(2) the damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States, except when the court in its judgment or the jury in its verdict finds that the officer, contractor, or employee acted in bad faith.

(b) This Act shall not be construed as a waiver of any defense, immunity, or jurisdictional

bar available to the state or its officers,
contractors, or employees

. . . .

Sec. 5. A member of the commission, board, or other governing body of an agency, institution, or department is an officer of the agency, institution, or department for purposes of this Act.

The provision of section five that members of governing bodies are officers of their respective agencies, institutions, or departments for purposes of the act is not intended as an exclusion of other persons from the "officer" category, in our opinion. See Educ. Code §65.42. But we do not think county attorneys, whether or not they have responsibility for prosecuting felonies, are officers or employees of a state agency, institution or department of the state within the meaning of article 6252-26, V.T.C.S. See Attorney General Opinion H-1160 (1978).

This office found it unnecessary in Attorney General Opinion MW-252 (1980) to decide whether article 6252-26 would apply to a suit against a district attorney because required procedural steps had not been taken. But in Attorney General Opinion H-1160 (1978), after reviewing the history of the provision, it was noted that the caption of the act, as amended in 1977, stated that the act related to "defense of claims based on certain conduct of state officers or employees." See Acts 1977, 65th Leg., ch. 273 at 730. Consequently, federal technicians, even though supervised by an officer of a state agency, were concluded not to be within the statute.

The term "state officer" can be used in both a popular sense to mean an officer whose jurisdiction is coextensive with the state or, in a more enlarged sense, to mean one who receives his authority under the laws of the state. Ex parte Preston, 161 S.W. 115 (Tex. Crim. App. 1913). Cf. Harris County Commissioners Court v. Moore, 420 U.S. 77, 82 n.6 (1975). In our opinion, article 6252-26 was meant to apply only to officers and employees of state agencies, institutions and departments having statewide jurisdiction. We do not think it was meant to embrace everyone who might be considered to be within the legislative, executive or judicial departments of state government within the meaning of article II, section 1 of the Texas Constitution. Travis County v. Jourdan, 42 S.W. 543 (Tex. 1897); Jernigan v. Finley, 38 S.W. 24 (Tex. 1896); Fears v. Nacogdoches County, 9 S.W. 265 (Tex. 1888); cf. State v. Moore, 57 Tex. 307 (1882).

In Travis County v. Jourdan, *supra*, the state supreme court held that although county officers are state officers in a certain sense, a

statute that expressly applied to "any district judge or officer of the state government" did not apply to a county treasurer because the mention of district judges would have been unnecessary had the legislature meant for the statute to apply to all "state officers" in the broad sense. The mention of the district judge showed, the court said, that the statute did not mean to embrace any other officers on a district or county level. We believe the enactment of article 6252-19b, V.T.C.S., in 1979, coupled with the amendment and virtual reenactment of article 6252-26 in 1981, leads to a similar conclusion. See Acts 1979, 66th Leg., ch. 744 at 1830; Acts 1981, 67th Leg., ch. 553 at 2274.

Article 6252-19b, enacted four years after the original enactment of article 6252-26, expressly applies only to current and former officers and employees of "a county, city, town, special purpose district, or any other political subdivision of this state," and provides that such governmental units "may pay actual damages, court costs and attorney's fees" adjudged against their servants if damages are based on acts or omissions by them in the course and scope of their employment and arise out of a cause of action for negligence (other than one arising from gross negligence, a willful or wrongful act, or official misconduct). The pattern and effect of article 6252-19b closely resembles that of article 6252-26. See Attorney General Opinion MW-276 (1980) (purpose of article 6252-26). Cf. V.T.C.S. art. 332c; Attorney General Opinion MW-157 (1980).

Statutes dealing with the same general subject and having the same general purpose are considered to be in pari materia though they contain no reference to one another and were enacted at different times; they will be read and construed together as though they were parts of one law. See 53 Tex. Jur. 2d Statutes §186 at 280. When article 6252-19b and 6252-26 are read together, it seems apparent that article 6252-19b was intended to provide a means of indemnifying officers and employees not already protected by article 6252-26. Otherwise little reason for the enactment of article 6252-19b can be discerned, since article 6252-26 already provided that the state was "liable for and shall pay" damages, costs and fees adjudged against officers and employees of "any agency, institution or department of the state."

Article 6252-19b, it should be noted, unlike article 6252-26, does not say that a political subdivision shall be liable for and pay any damages, costs or fees; it says the political subdivision may do so. Article 6252-19b is also more restricted in its scope. See Attorney General Opinion MW-158 (1980). Article 6252-26 was subsequently amended in 1981 without any suggestion that it covered those persons subject to protection under article 6252-19b. Also, the legislature in 1983 was careful to provide that "the provisions of [article 6252-26, V.T.C.S.] do not apply to article 4399," Revised

Statutes (relating to the duty of the attorney general to respond to requests for legal opinions), but it made no such provision for article 6252-19b. We are led to conclude that the two statutes are not intended to, and do not, cover the same officers and employees. See Acts 1983, 68th Leg., ch. 735 at 4516.

We are aware that language in the federal case of Loftin v. Thomas, 681 F.2d 364 (5th Cir. 1982) could be read to mean that in the opinion of the court a suit against a county sheriff would be embraced by article 6252-26, V.T.C.S., as well as article 6252-19b. But we think the Loftin v. Thomas court meant to show merely that the plaintiff there had a state remedy under at least one of the existing Texas statutes.

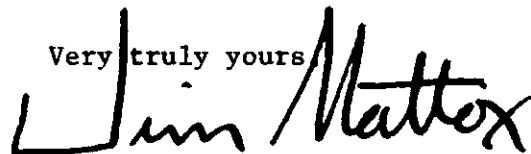
Although federal courts have concluded that prosecuting attorneys act as agents for the state rather than for the county in their prosecutorial functions, see Crane v. Texas, 534 F. Supp. 1237 (N.D. Tex. 1982), cf. V.T.C.S. art. 332b-4, the statutory language and history do not evince an intent that article 6252-26, V.T.C.S., apply to county officers acting for the state. On the contrary, the 64th, 65th, 66th and 68th Legislatures have all dealt with the statute in a manner suggesting that its scope is determined not by the function of an officer or employee, but by the relationship of the officer or employee to the various levels of state government. Cf. Bexar County v. Linden, 220 S.W. 761 (Tex. 1920).

It is our opinion, therefore, that county attorneys having responsibility for felony prosecutions are not "officers or employees of any agency, institution, or department of the state" within the meaning of article 6252-26, V.T.C.S.

S U M M A R Y

County attorneys having responsibility for felony prosecutions are not officers or employees of any agency, institution, or department of the state within the meaning of article 6252-26, V.T.C.S.

Very truly yours



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