



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 20, 1997

Mr. Steve Robinson
Executive Director
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

Letter Opinion No. 97-010

Re: Whether longevity pay and benefit replacement pay are included within the capped salary rate for Texas Youth Commission teachers (ID# 37379)

Dear Mr. Robinson:

You ask whether the state employee longevity pay and benefit replacement pay provided by subchapters D and H, respectively, of chapter 659 of the Government Code, are included in the capped salary rate for Texas Youth Commission ("commission") teachers under section 30.102(b) of the Education Code and section 7(b), of article V of the General Appropriations Act adopted by the Seventy-fourth Legislature.

Section 30.102(b) of the Education Code, enacted by the legislature in 1995,¹ provides as follows:

A classroom teacher or full-time librarian employed by the commission is entitled to receive as a minimum salary the monthly salary rate specified by Section 21.402.² A classroom teacher or full-time librarian may be paid, from funds appropriated to the commission, a salary in excess of the minimum specified by that section, but the salary may not exceed the rate of pay for a similar position in the public schools of an adjacent school district.

Educ. Code § 30.102(b) (footnote added).

¹See Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 1, 1995 Tex. Gen. Laws 2207, 2335.

²This section provides for the minimum monthly salary a school district must pay to each classroom teacher or full-time librarian and the formula determining such amount. See Educ. Code § 21.402.

Article V, section 7, of the General Appropriations Act, states the following:

- a. Each principal, supervisor, and classroom teacher employed in an institution operated by the Texas Youth Commission shall receive a monthly salary to be computed as follows: The applicable monthly salary rate plus increments specified in Section 16.056,³ Texas Education Code, as amended, shall be multiplied by twelve to arrive at an annual salary rate. Such rate shall be divided by the number of days required in Section 16.055,⁴ Texas Education Code, for pay grades 1-11 twelve-month employees, and the resulting daily rate shall be multiplied by the number of on-duty days required of Texas Youth Commission educators, resulting in the adjusted annual salary. The adjusted annual salary is to be divided by twelve to arrive at the monthly rate
- b. The Texas Youth Commission may authorize salary rates at amounts above the adjusted annual salary determined in the preceding formula, but such rates, including longevity for persons commencing employment on September 1, 1983, or thereafter, and excluding hazardous duty pay, shall never exceed the rates of pay for like positions paid in the public schools of the city in which the Texas Youth Commission institution is located. Any authorized local increments will be in addition to adjusted annual salaries.

General Appropriations Act, Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. V, § 7, 1995 Tex. Gen. Laws 5242, 5807 (footnotes added).

You advise us that it has been the commission's practice at all institutions to pay a salary rate above the adjusted minimum salary to match higher salary rates paid to teachers in adjacent school districts (the "local increment"), and that when a commission teacher becomes eligible for longevity pay the commission has reduced the amount of the local increment paid by the amount of the longevity pay in order not to exceed the rate of pay for a similar position in the local public schools (the "capped rate"). Beginning September 1, 1995, however, there are institutions adjacent to school districts which do not pay the local increment so there is no local increment from which the longevity pay can be deducted. By this, we understand, that the adjacent school district is paying the minimum salary for a similar position so a commission teacher at such an institution is paid the adjusted minimum salary. You advise us that a similar problem occurs with respect to benefit replacement pay payable to eligible teachers. Pending an opinion from this office, the commission has elected to

³Such section is now codified in sections 21.402 and 21.403 of the Education Code. See Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 1, 1995 Tex. Gen. Laws 2207, 2278-79.

⁴Such section is now codified at section 21.401 of the Education Code. *Id.*, 1995 Tex. Gen. Laws at 2277.

deduct the longevity and benefit replacement payments from the adjusted minimum salary. The commission, however, is concerned that it may be denying its teachers the benefits they are entitled to as state employees under the Government Code or the full minimum salary they are entitled to under the Education Code.

We first examine the longevity pay. Subchapter D of chapter 659 of the Government Code, authorizes longevity pay. A full-time state employee⁵ is generally entitled to receive a "longevity pay" of four dollars in the employee's "monthly compensation" for each year of "lifetime service credit" after five years of service.⁶ Gov't Code §§ 659.043, .044. Section 659.042 of subchapter D lists persons that are not entitled to longevity pay; commission teachers are not included in this list.⁷

In Attorney General Opinion MW-334, this office determined that commission teachers are state employees for the purposes of receiving longevity pay. See Attorney General Opinion MW-334 (1981) at 3. See also Attorney General Opinions H-775 (1976) (commission teachers are state employees for purposes of receiving pay for accrued vacation time), H-829 (1976) (commission teachers are state employees for purposes of receiving pay for sick leave). The office in such opinion also concluded that commission teachers may receive longevity pay without violating the capped rate set forth in the article II, section 2a(5) of the General Appropriations Act adopted by the Sixty-sixth Legislature. Attorney General Opinion MW-334 (1981) at 3. Such conclusion was based on a determination that the "salary rate" as used in article II, section 2a of the General Appropriations Act, Act of May 28, 1979, 66th Leg., R.S., ch. 843, 1979 Tex. Gen. Laws 2445, 2544, was "computed on the basis of the base salary paid the teacher. Longevity pay which a TYC teacher receives . . . is not part of that base salary, and, therefore, is not to be considered when calculating the teacher's 'salary rate.'" MW-334 (1981) at 3 (emphasis in original). In contrast to the appropriations language considered in MW-334,⁸ the current appropriations act specifically provides that longevity pay is to

⁵A "state employee" is defined as an individual who: (1) is covered by the Position Classification Act, chapter 654 of the Government Code, (2) holds a line item or exempt position, (3) works at least 20 hours a week for at least 4.5 consecutive months in a non-academic position at a state institution of higher education, or (4) is employed by the state on a hourly basis. Gov't Code § 659.041(3).

⁶Payment of longevity pay begins after five years of service. The amount paid increases "when the 10th, 15th, 20th, and 25th years of lifetime service credit are accrued." *Id.* § 659.044(c).

⁷The list includes (1) a member of the legislature, (2) a person holding a statewide office that is normally filled by an election, (3) an independent contractor or its employee, (4) a temporary employee, (5) a public junior college officer or employee, or (6) an academic employee of a state institution of higher education. *Id.* § 659.042.

⁸Article II, section 2(5) of the General Appropriations Act, Act of May 28, 1979, 66th Leg., R.S., ch. 843, 1979 Tex. Gen. Laws 2445, 2544, provided as follows:

Salary rates in excess of the minimum amounts specified in Senate Bill No. 116, as amended, and the salaries of coaches and teachers of exceptional children, may be paid; but such approved rates shall never exceed the rates of pay for like positions paid in the public schools

(continued...)

be included within the capped rate for persons commencing employment on and after September 1, 1983. *See* General Appropriations Act, Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. V, § 7b, 1995 Tex. Gen. Laws 5242, 5807 (commission may “authorize salary rates at amount above the adjusted annual salary determined in the preceding formula, but such rates, *including longevity for persons commencing employment on September 1, 1983, or thereafter*, and excluding hazardous duty pay, shall never exceed the rates of pay for like positions . . .”). Such language regarding longevity, in fact, has been included in every appropriations bill adopted after 1981. *See* General Appropriations Acts, Act of May 29, 1983, 68th Leg., R.S., ch. 1095, art. II, § 16(b), 1983 Tex. Gen. Laws 5729, 6017; Act of May 27, 1985, 69th Leg., R.S., ch. 980, art. II, § 16(b), 1985 Tex. Gen. Laws 3349, 292 (budget); Act of July 21, 1987, 70th Leg., R.S., ch. 78, art. II, § 2(a), (5)(b), 1987 Tex. Gen. Laws 253, 609, 612; Act of May 28, 1989, 71st Leg., R.S., ch. 1263, art. II, § 2(1)(d), 1989 Tex. Gen. Laws 5093, 5517; Act of May 27, 1993, 73d Leg., R.S., ch. 1051, art. II, § 12b, 1993 Tex. Gen. Laws 4518, 4971. This, in our view, is strong evidence of the legislature’s intent to change the result of Attorney General Opinion MW-334. We, therefore, conclude that longevity pay is included in the capped rate for teachers commencing employment with the commission on or after September 1, 1983.

We next examine the benefit replacement pay. Subchapter H of chapter 659 of the Government Code authorizes payment of benefit replacement pay to “eligible state employees.” Before looking at the nature of such pay, we must first ascertain whether commission teachers are “eligible state employees” for the purposes of receiving such benefit replacement pay. “Eligible state employee” under the act includes a person who on August 31, 1995, was employed by a state agency as defined by section 606.061 of the Government Code and was eligible under former Government Code section 606.064 for state contributions towards taxes paid by the employee for social security coverage under the Federal Insurance Contribution Act (“FICA”). *See* Gov’t Code § 659.121(2)(A), (B)(7). Under section 606.061, definition of “state agency” includes “a department, commission, board, office, or other agency in the executive or legislative branch created by the constitution or a statute of this state.” *See id.* § 606.061(3)(A). The commission is clearly a state agency within such definition. *See* Hum. Res. Code § 61.011. State employees eligible for the state contributions under former section 606.064 of the Government Code generally included employees of state agencies other than those compensated on a fee⁹ basis. *See* Gov’t Code § 606.064 *amended by* Act of May 22, 1995, 74th Leg., R.S., ch. 417, § 1, 1995 Tex. Gen. Laws 3029, 3030-31 (providing state payment of state employees’ contribution for social security coverage (FICA)), .061(4) (definition of “state employees”). Commission teachers as state employees were eligible under former section 606.064 for state contributions toward taxes paid by the employee for social security coverage. *See* Attorney General Opinion MW-332 (1981) at 3 (state’s contribution for social security coverage for

⁹(...continued)

of the city in which the State School or Home is located.

⁹We note that commission teachers are paid a monthly salary. *See* Educ. Code § 30.102(b); General Appropriations Act, Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. V, § 7, 1995 Tex. Gen. Laws 5242, 5807.

commission teachers a benefit). *See also* Attorney General Opinions H-775 (1976), H-829 (1976). Thus, a teacher employed by the commission on August 31, 1995, and not compensated on a fee basis is an "eligible state employee" for the purposes of benefit replacement pay.

We proceed to look at the nature of the benefit replacement pay. As a way of background, we note that the legislature authorized the benefit replacement pay to compensate state employees for the reduction in net pay resulting from the elimination of the state contributions towards the employees' FICA taxes. *See* Act of May 22, 1995, 74th Leg., R.S. ch. 417, 1995 Tex. Gen. Laws 3029 (eliminating state's payment of employee contribution, enacting authorization for benefit replacement pay); General Appropriations Act, Act of May 25, 1995, 74th Leg., R. S., ch. 1063, art. IX, § 154, 1995 Tex. Gen. Laws 5242, 6130 (purpose of appropriation to compensate for reduction in pay from elimination of state contribution to be implemented under chapter 1063). The prior state contributions constituted a "benefit" rather than "compensation" to an employee. *See* Gov't Code § 606.063 (contribution for FICA taxes under this section is not considered compensation to an employee under any state law); Attorney General Opinion MW-332 (1981) at 3 (state's contribution for social security coverage for commission employee a benefit and not part of base salary).

Benefit replacement pay, however, is part of the "salary" paid to state employees: Subchapter H provides that "salaries or wages" paid after December 1995 to eligible state employees include "benefit replacement pay."¹⁰ *See* Gov't Code § 659.122. Characterization of benefit replacement pay as salary is further supported by the fact that payment of such amount increases the state's contribution to the federal government for social security taxes and the employee's contribution to a retirement system.¹¹ *See id.* § 659.123(2) (benefit replacement pay includes additional amount equal to payment required to be paid to retirement system by employee because of benefit replacement pay); General Appropriations Act, Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. IX, § 154(2), 1995 Tex. Gen. Laws 5242, 6130 (appropriations sufficient to pay increase in state's matching contributions to FICA and retirement system resulting from benefit replacement pay). Accordingly, we conclude that the benefit replacement pay as the designation indicates, is "pay" and replaces the contributions formerly made by the state for FICA taxes owed by the employee characterized as a "benefit" rather than "compensation." Therefore, based on the foregoing, as well as the legislative treatment of longevity pay discussed above, we believe that the benefit replacement pay would be included in a commission's teacher "salary" for purposes of determining whether such salary exceeds the capped rate.

¹⁰The benefit replacement pay authorized is in an amount equal to 5.85 percent of the compensation earned by the employee for that period not to exceed \$965.25 in a calendar year plus an additional amount equal to the retirement contribution required to be paid by the employee because of the benefit replacement pay. Gov't Code § 659.123.

¹¹A "retirement system" is defined as the Teacher Retirement System of Texas, the Employees Retirement System of Texas, the optional retirement program governed by Chapter 830 of the Government Code, the Judicial Retirement System of Texas Plan One, or the Judicial Retirement System of Texas Plan Two. *Id.* § 659.121(6).

Although it is our opinion that both longevity and benefit replacement pay are included within the capped rate, we do not believe that the minimum adjusted salary may be reduced by the longevity and benefit replacement payments. Section 30.102(b) of the Education Code provides that commission teachers are *entitled* to receive a certain minimum salary and that the commission *may* pay a salary in excess of such minimum but not above the capped rate. Under this section, there is no discretion as to the payment of the minimum salary but only as to amounts above it. Amounts above the minimum salary and subject to the capped rate, based on our conclusion above, include longevity and benefit replacement pay as well as any local increment. Thus, the only amounts subject to reduction are the longevity, benefit replacement or local increment payments.

Our conclusions above would appear to be a harsh result that does not take into account the circumstances of commission teachers but which we are constrained to reach based on the language of section 30.102(b) and the legislative treatment of longevity pay and benefit replacement pay.

S U M M A R Y

Longevity pay and benefit replacement pay are included in the capped rate of salary for teachers employed by the Texas Youth Commission. The minimum salary paid to such teachers, however, may not be reduced by the longevity and benefit replacement payments in order not to exceed the capped salary rate.

Yours very truly,



Sheela Rai
Assistant Attorney General
Opinion Committee