



Office of the Attorney General
State of Texas

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October 5, 1998

The Honorable Fred Hill
Chair, Committee on Urban Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-090

Re: Retirement coverage for public safety
dispatchers employed by the City of Denton
(RQ-956)

Dear Representative Hill:

On behalf of the City of Denton, you ask whether persons employed by the city as public safety dispatchers may be designated to participate in the Texas Local Fire Fighters Retirement Act ("TLFFRA") system or the Texas Municipal Retirement System ("TMRS"). You state the facts giving rise to your question as follow:

The City of Denton uses a public safety dispatch system. Dispatchers spend one half of their shift working for the police department and one half of their shift working for the fire department. Dispatchers split their time equally between the two departments, however, the majority of calls handled are police related. About one third of the dispatchers are in the fire department budget. The other two thirds are in the police department budget. Fire department employees are covered under TLFFRA, all other city employees are under TMRS. The City feels the dispatchers should be under TMRS. The fire pension board feels the dispatchers should be under TLFFRA, since they spend a substantial amount of their time doing fire department related work.

As your question suggests, city employees who perform work for the city fire department might be eligible to participate in either the TLFFRA system or the TMRS. You ask under which system the Denton dispatchers fall, and which entity, the city or the local fire fighters pension board,¹ is entitled to make this determination. We begin by examining the two retirement plan statutes which, because they are *in pari materia*, we construe together.

The Texas Municipal Retirement System is established in title 8, subtitle G of the Government Code to provide a program of benefits for members, retirees, and their beneficiaries.

¹Each TLFFRA system is governed by a local board of trustees. V.T.C.S. art. 6243e, § 19. Local systems are overseen at the state level by the Office of the Fire Fighters' Pension Commissioner. *Id.* §§ 21, 21A.

See Gov't Code § 851.002. A city, by vote of its governing body, may elect to have one or more of its departments participate in the TMRS. *Id.* § 852.001. An employee of a city department participating in the retirement system is a member of the system. *Id.* § 852.101. An individual employee is not eligible for TMRS membership, however, if the employee is eligible for membership in another public retirement system. *Id.* § 852.106(a)(2).

The Texas Local Fire Fighters Retirement Act establishes a fire fighters' retirement system and trust fund in each city to which the act applies. V.T.C.S. art. 6243e, § 4. With certain exceptions, the act applies to every city in the state that has a paid fire department, as follows:

Sec. 3.(a) This Act applies to each municipality in the state that has a regularly organized fire department not consisting exclusively of volunteers, except:

(1) a municipality all of whose fire department personnel participate in the *Texas Municipal Retirement System*;

....

(c) If a municipality's fire department consists partly of employees participating in the *Texas Municipal Retirement System* and partly of employees or volunteers not participating in that retirement system, this Act applies to the persons who are not participating in the *Texas Municipal Retirement System*. In that circumstance, a provision of this Act that applies to members of a retirement system or to members of a fire department applies only to those members who are participating in a retirement system under this Act.

In short, the TLFFRA applies to those fire department employees who are not participating in the TMRS.

An "employee" covered by the TLFFRA is defined as

a person who regularly performs services for a fire department, who is a member of the retirement system that includes the fire department, and who regularly receives compensation for those services of at least \$200 a month. The term includes a person described by Subsection (d) of Section 9 of this Act who regularly receives compensation by the municipality or other political subdivision of at least \$200 a month.

V.T.C.S. art. 6243e, § 2. Except as otherwise provided in section 9 of the act, “a person who is an employee of a fire department included within the coverage of a retirement system is a member of the retirement system.” *Id.* § 9(a). Section 9 provides:

(c) A board of trustees established under this Act may, in accordance with Section 7² of this Act:

(1) require a waiting period before retirement system membership begins;

(2) include within the required membership of the retirement system categories of personnel, other than personnel performing services for the fire department, who perform emergency medical or fire department-related services; or

(3) exclude from membership categories of fire department personnel not regularly directly engaged in the fighting of fires.

(d) If a board of trustees, under Subdivision (2) of Subsection (c) of this section, includes categories of personnel within the membership of a retirement system, for purposes of this Act, the personnel are considered employees or volunteers, as applicable, of the fire department and their service is considered as if it were performed for the fire department included within the coverage of the retirement system.

Id. § 9(c), (d) (footnote added). You ask us to consider whether section 9 gives the Denton fire fighters pension board the authority to determine whether and which city employees will participate in the TLFFRA system rather than in the TMRS. You tell us that the fire fighters pension board wishes to include all dispatchers, some of whom are employees of the police department, in the TLFFRA system because they provide services to the fire department. *See id.* § 9(c)(2).

As your letter suggests, the authority of a fire fighters’ pension board to include fire department employees and certain other city employees in the TLFFRA system appears to conflict with a city’s authority to determine which of its departments, and the employees thereof, are within the TMRS. We believe that the statutes governing both systems can be applied in a way that avoids conflict. For this reason we do not answer your second question regarding a home-rule city’s authority to choose between conflicting statutes.

The history of these two statutes helps explain our construction of them. The Firemen’s Relief and Retirement Fund was enacted in 1937, and applied to “all incorporated cities and towns in this State having a regularly organized active fire department, whether wholly paid, part paid or

²Section 7 authorizes and sets out the procedure for modifying benefits and eligibility requirements. V.T.C.S. art. 6243e, § 7.

volunteer, with fire fighting apparatus and equipment of the value of one Thousand Dollars (\$1000) or more.” Act of April 6, 1937, 45th Leg., R.S., ch. 125, § 3, 1937 Tex. Gen. Laws 229, 230-31. The act was construed to apply only to those fire department employees actively engaged in the hazardous duties of the department. *See id.* § 26, 1937 Tex. Gen. Laws at 240 (defining “active firemen” and “active members” to include “all paid firemen who receive regular salaries as firemen”); *Attorney General Opinion H-1316 (1978)* at 1 (concluding that although employee need not be engaged in actual task of fighting fires to be “fireman” within article 6243e, employment must bear significant relationship to duties of fire department); *cf. Firemen’s and Policemen’s Civil Serv. Comm’n v. Wells*, 306 S.W.2d 895, 897 (Tex. 1957) (holding that police department janitor was not “policeman” within article 6243f because act applied only to those engaged in active duties of law enforcement or fire fighting).

The TMRS was created in 1947. Act of Mar. 19, 1947, 50th Leg., R.S., ch. 75, 1947 Tex. Gen. Laws 108, 108. Like the current version of the statute, the 1947 act allowed the governing body of a city to elect to have the employees of one or more of its departments, presumably including the fire department, participate in the system. *Id.* § 3, 1947 Tex. Gen. Laws at 110-11. However, a city could not include employees “[w]ho are or may be included within any pension fund or system now or hereafter operating in this State until and unless such pension fund has consolidated with this fund as hereafter provided.” *Id.* § 2, 1947 Tex. Gen. Laws at 110; *see also id.* § 10, 1947 Tex. Gen. Laws at 123 (providing for transfer of TLFFRA funds to TMRS upon consolidation and after election by fire department members and consent of department). Thus city firemen who were or could be included within a TLFFRA system could not participate in the TMRS unless the two funds were consolidated, while fire department employees who were not eligible to participate in TLFFRA could be included by a city in the TMRS without consolidation. It was a city’s decision whether to include any, all, or part of its departments in the TMRS. We assume because of this option that in some cities fire department personnel covered by the TLFFRA were consolidated into the TMRS, and in other cities they were not. We assume also that in some cities non-covered fire department personnel were included in the TMRS, while in other cities they were not.³

The TLFFRA was completely revised in 1989, and became effective on September 1, 1989. Act of May 2, 1989, 71st Leg., R.S., ch. 98, 1989 Tex. Gen. Laws 426, 426. The revision expanded the definition of “employee” to include all fire department personnel. *Id.* § 1 (codified at V.T.C.S. art. 6243e, § 2). Under the definition of employee adopted in 1989, the TLFFRA system covers those fire department employees who, prior to 1989, may have been excluded from the TLFFRA system because they were not performing hazardous duties, and who may have been excluded from the TMRS because the city did not elect to include them. All fire department employees hired after the effective date of the revision are members of the TLFFRA system unless they were already participating in the TMRS, since the TLFFRA does not apply to persons participating in the TMRS.

³A 1957 informational pamphlet prepared by the Texas Municipal Retirement System explained: “Each city electing to participate in the Texas Municipal Retirement System designates the department or departments it wishes to have retirement coverage. The department is the basic unit of coverage. Some cities may have all their departments covered, others just a few. A city may bring additional departments under TMRS coverage at any time.” Texas Municipal Retirement System, *The Texas Municipal Retirement System* 6 (Oct. 1957).

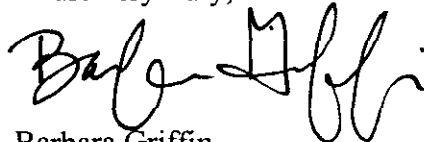
V.T.C.S. art. 6243e, § 3(c). Likewise, since September 1, 1989, such fire department employees have not been eligible to participate in TMRS unless they were already participating in TMRS or unless they have been excluded from the TLFFRA. Gov't Code § 852.106(a)(2); V.T.C.S. art. 6243e, § 9(c)(3). This is true even if the position in which the person is employed is within a department already elected to be within TMRS. A city may elect to include a department within TMRS, but an employee of the department is not eligible for membership in the TMRS if the employee is eligible for membership in another public retirement system. See Gov't Code § 852.106(a)(2).

The TLFFRA now also allows local fire fighters pension boards to include in the system "categories of personnel, other than personnel performing services for the fire department, who perform emergency medical or fire department-related services." V.T.C.S. art. 6243e, § 9(c). At the same time, however, it excludes from its scope those fire department employees who are participating in the TMRS. *Id.* § 3(c). Thus while section 9(c) authorizes a local pension board to expand the statutorily prescribed membership *categories*, it cannot be invoked to include within the system *individual employees* to whom the act does not apply in the first place. The act does not apply to individual city employees participating in the TMRS. *Id.* § 3(c). Accordingly, while a fire fighters pension board may include within the TLFFRA system certain categories of non-fire department employees, such as police department dispatchers, it may not require individual employees already participating in the TMRS to participate in the TLFFRA system.

S U M M A R Y

City employees who are eligible to participate in a fire fighters retirement system established pursuant to the Texas Local Fire Fighters Retirement Act, V.T.C.S. art. 6243e, are not eligible to participate in the Texas Municipal Retirement System. However, the board of trustees of a fire fighters retirement system may not elect to include within the retirement system city employees who are participating in the Texas Municipal Retirement System.

Yours very truly,



Barbara Griffin
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Opinion Committee