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RQ-0570-gc

June 26, 2002

FILE # ML-42685-02
I.D. # 42685

U.S. CERTIFIED MAIL: No. 7000 0520 0024 6294 1066

Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion

Dear General Cornyn:

Denton County is seeking guidance from your office regarding several issues involving amendments to the yearly budget. The first issue deals with the application of TEX. LOC. GOV'T CODE § 111.070, (Expenditure of Funds Under Budget; Emergency Expenditure; Budget Transfer), to mid-year budget amendments involving the creation of new salaried positions. More specifically, the question is, does the creation of a new salaried position that does not result in a new line item require the Commissioners Court to authorize the amendment as an emergency expenditure under § 111.070 (b), or can the budget be amended under § 111.070 (c), without the necessity of authorizing an emergency expenditure?

Secondly, after a position has been created mid-year, via a Commissioners Court Order, can the Commissioners Court refuse to approve a budget amendment to transfer funds to an elected official's budget if the source of the funding has been identified? Additionally, is the actual funding of positions a ministerial duty of the budget officer or must the court vote on a budget amendment, and pass an order approving the funding separate from the order creating the position?

On May 28, 2002, relying on TEX. LOC. GOV'T CODE § 111.070 (c), the Commissioners Court, by a voting margin of 3-2-0 under the direction of former County Judge Scott Arney, approved Orders Nos. 02-0289 and 290, copies attached, that stated, "Approval of a new Lieutenant-Homeland Security Coordinator position in the Sheriff's Office and Assistant Emergency Management Coordinator in the Office of the Emergency Management". The Order also provided that the funding was to come from the Unappropriated Contingency line item, but did not specify an amount for said funding. Subsequently, on June 11, 2002, current County Judge Mary Horn who assumed office due to Judge Arney's federal appointment, was faced with revisiting and funding the Homeland Security positions created by the May 28th Order.

During the June 11th Commissioners Court session, the Commissioners Court was faced with two issues. First, the budget amendment needed to fund the newly created positions. See attached copy. This action was required by the Commissioners Court's Budget Amendment Policy, a copy of which is attached. Second, an Order Making Appointment to hire a person into the new position of Lieutenant-Homeland Security Coordinator in the Sheriff's Office was presented the Commissioners Court. See attached copy. The Commissioners Court elected to take no action on either agenda item. The Court decided that the wisest course was to seek this opinion from your office. See attached Order No. 02-329.

The Homeland Security positions were created in response to the tragic events of September 11, 2001, and in anticipation of any additional terrorist activities that may arise in the future. As such, in this time of national and international crisis there can be no doubt that the circumstances leading to the creation of Homeland Security positions would meet the definition of an "emergency expenditure", as required by TEX. LOC. GOV'T CODE § 111.070 (b). Having said that, notwithstanding the Commissioner Court's purview to determine what constitutes an emergency expenditure, the crux of the inquiry is which subsection controls how the mid-year amendment is to be made under these facts, §111.070 (b) or (c)?

The key language in §111.070 (c) is, "to transfer an amount budgeted from one item to another budgeted item". This very language that has created some confusion over its interpretation. In the case at hand, various salary categories are designated as line items, such as, "Salary-Department Heads," "Salary-Assistants," "Part-time employees," and "Interns." Under each of the above listed line items, salaried employee positions are budgeted as "slots," see attached Personnel Budget, under their respective category, in lieu of having a separate line item for each slot. The Homeland Security positions created two new "slots" under the line item entitled, "Salary-Assistants," one slot in the Sheriff's Adopted Budget, copy attached, and one in the Fire Marshall's Office. Both new slots were to be funded from "Unappropriated Contingency" funds. The County asserts that such action constitutes *a transfer of an amount budgeted from one item to another budgeted item*. Thus the Commissioners Court action in creating the two mid-year slots is authorized under § 111.070 (c). As such, the Commissioners Court did not need to authorize an emergency expenditure in accordance with §111.070 (b).

In reviewing Op. Tex. Att'y Gen. No. DM-051 (1997), it appears this question has been partially answered for counties with a population of 225,000 or less, operating under Chapter 111, Subchapter A, of the TEX. LOC. GOV'T CODE. Under DM-051, the conclusion was that the

county may not transfer funds from a budgeted item to an unbudgeted item under TEX. LOC. GOV'T CODE. § 111.010 (d). The opinion went on to say that “[t]he ultimate resolution of whether the subsection (d) applies...depends upon the facts and is beyond the purview of this office”. *Id.* Further, footnote five (5) of the same opinion stated, “[i]f the creation of the new position does not require a new line item, however, then subsection (d) may apply”. *Id.* This language indicates that the only way to amend the budget, without the necessity of an emergency expenditure, is by transferring funds within the budget, without creating a new line item. This reasoning should apply to all counties, regardless of the Subchapter they are operating under.

Denton County operates under Subchapter C of the TEX. LOC. GOV'T CODE, and is seeking an opinion specifically tailored to such. Also, as previously stated, the implementation of the Homeland Security positions did not “create” a new line item, it merely created two slots under the existing line item entitled, Salary-Assistants, and is to be funded by unappropriated contingency funds, within this year’s budget. If the logic from footnote five is applied to Denton County’s situation, wherein no new line item was created, the mid-year budget amendment should be allowed to proceed under §111.070 (c), and the County should not be required to follow procedures outlined in § 111.070 (b).

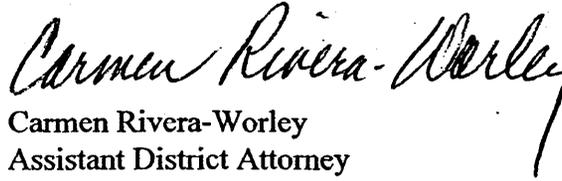
Once the issue of creating a position has been resolved, the second issue that must be answered is that of funding. Specifically, once a position has been created, does the Commissioners Court have a duty to fund the position, or is the act of funding a separate matter that must be voted on by the Court? In the past the County’s practice has been, once the Court has created a position, the funding of said position is placed on a future agenda, which subject to further discussion and approval. Although this procedure has proven effective in the past, the aforementioned set of facts has given rise to the following question: Can the Commissioners Court refuse to transfer funds to an elected official’s budget after creating new slots and identifying the source of funding, or is the act of transferring funds to the appropriate line item a ministerial duty that must follow the creation of the positions?

Budget decisions are policy-making determinations that should be left to the discretion of the Commissioners Court. *Weber v. City of Sachse*, 591 S.W.2d 563, at page 566. The approval of a budget amendment is a separate and distinct matter that should be left within the discretion of the Commissioners Court. “In carrying out the legislative function of budget-making the commissioners court has significant freedom of action.” Attorney General Opinion No. JC-0214 (2000).

In summary, Denton County is seeking your opinion on the following issues: 1). By following the mid-year budget amendment process as outlined above, should Denton County proceed under § 111.070 (c) without the need to authorize an emergency expenditure, or should the County act under §111.070 (b)? 2). After a position has been created, to which a funding source has been identified, does the court, or designated county personnel, have a ministerial duty to fund that position, or is the act of funding subject to further debate, which could ultimately result in the County creating a position without funding?

Thank you for your time and consideration in this matter. If you need any additional information to make a determination in this case, please do not hesitate to call. Best Regards.

Sincerely,


Carmen Rivera-Worley
Assistant District Attorney

Attachments

cc: Commissioners Court
Hon. Bruce Isaacks,
Hon. Sheriff Lucas
James Wells, County Auditor
Donna Stewart, Budget Director
Amy Phillips, Human Resources Director
Robert Schell, Assistant District Attorney, w/o attachments
Brody Shanklin, Assistant District Attorney, w/o attachments