



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 20, 2022

Ms. Jackie Skinner
Tyler County Auditor
Post Office Box 2039
Woodville, Texas 75979

Opinion No. KP-0413

Re: Whether a payment to county officials from funds received under the American Rescue Plan Act required notice as set forth in section 152.013 of the Local Government Code (RQ-0446-KP)

Dear Ms. Skinner:

You ask about section 152.013 of the Local Government Code, which requires advance public notice to increase the salary, expenses, or allowances of an elected county or precinct official.¹ *See* TEX. LOC. GOV'T CODE § 152.013(b). You explain that Tyler County (the "County") received federal funding under the American Rescue Plan Act of 2021 ("ARPA"). *See* Request Letter at 1; *see also* 42 U.S.C. § 803(b)(3)(A) (authorizing the payment of State and Local Fiscal Recovery ("SLFR") funds directly to counties). The ARPA authorizes the use of SLFR funds for a variety of purposes, including "premium pay" to eligible workers performing essential work during the COVID-19 public health emergency. 42 U.S.C. § 803(c)(1)(B).

According to documents provided, the commissioners court voted on September 13, 2021, to provide a one-time payment to county employees and county officers using these premium-pay funds. *See* Babin Letter at 2. Meeting minutes indicate the approval occurred on the same day that the commissioners court approved the annual budget for 2022.² But you tell us the payments were not included in the 2022 budget and that the County did not provide advance notice under section 152.013. *See* Request Letter at 1; *see also* Babin Letter at 2 (stating the ARPA federal aid money was received by the County "[a]fter the current regular budget had already been adopted by the commissioners court").³ You explain the County's belief that the ARPA funds were

¹*See* Letter from Honorable Jackie Skinner, Tyler Cnty. Auditor, to Honorable Ken Paxton, Att'y Gen. of Tex. at 1 (Feb. 11, 2022), www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2022/pdf/RQ0446KP.pdf ("Request Letter"); *see also* Letter from Honorable Lucas Babin, Tyler Cnty. Crim. Dist. Att'y, to Honorable Jackie Skinner, Tyler Cnty. Auditor, at 1 (Oct. 15, 2021), on file with Op. Comm. ("Babin Letter").

²*See* Minutes of the September 13, 2021, Meeting of the Tyler County Commissioners Court, *available at* <http://tyler.easydocs.us/minutes/listDocs-new.asp?year=2021>.

³We understand Mr. Babin to refer to the 2021 budget as the "current budget."

governed not by section 152.013 but by Local Government Code section 111.0106, which governs the budgeting of grant or aid money. Request Letter at 1; *see also* TEX. LOC. GOV'T CODE § 111.0106. You ask whether the payment of ARPA funds to county officers violated section 152.013.⁴ *See* Request Letter at 1.

County budgeting statutes provide for both setting the salary, expenses, and allowances of elected county officers and spending grant or aid money.

Section 152.011 of the Local Government Code directs the commissioners court to “set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds.” TEX. LOC. GOV'T CODE § 152.011. Regarding elected county and precinct officers in particular, subsection 152.013(a) directs the commissioners court to “set the salary, expenses, and other allowances.” *Id.* § 152.013(a). Such action must occur “[e]ach year . . . at a regular meeting of the court during the regular budget hearing and adoption proceedings.” *Id.* Thus, the commissioners court may set salaries, expenses, and other allowances for elected county and precinct officers only once a year as part of the regular county budget process. *See* Tex. Att’y Gen. Op. No. KP-0012 (2015) at 3 (explaining that changes to an elected county officer’s salary cannot be made “at any other time”). Subsection 152.013(b) provides:

Before the 10th day before the date of the meeting, the commissioners court must publish in a newspaper of general circulation in the county a notice of:

- (1) any salaries, expenses, or allowances that are proposed to be increased; and
- (2) the amount of the proposed increases.

TEX. LOC. GOV'T CODE § 152.013(b); *see also id.* § 152.013(c) (requiring individual written notice to elected county and precinct officers regarding “the officer’s salary and personal expenses to be included in the budget”). The notice provision in subsection 152.013(b) allows “the public to

⁴Going forward, the question of ARPA funding and compliance with section 152.013 will be moot. On January 27, 2022, the U.S. Treasury Department (the “Department”) issued a final rule, effective April 1, 2022, clarifying that the conflict-of-interest policies all funding recipients must maintain as a condition of accepting the award prohibit “elected officials . . . from using their official position and control over [SLFR] funds for their own private gain,” and “using funds to pay themselves premium pay.” Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338, 4400 (Jan. 27, 2022) (to be codified at 35 C.F.R. Part 35). The County’s payments were made while an interim final rule was still in place, and that interim rule did not expressly prohibit the use of premium pay for elected officials. *See generally* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786–26824 (May 17, 2021) (to be codified at 31 C.F.R. part 35) (“Interim Final Rule”); *see also* U.S. Dep’t of the Treasury, Statement Regarding Compliance with the Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule and Final Rule (Jan. 7, 2022) at 2, *available at* <https://home.treasury.gov/system/files/136/SLFRF-Compliance-Statement.pdf> (“To the extent that a recipient has taken significant steps toward obligating [SLFR] funds in a manner consistent with the interim final rule prior to January 6, 2022, Treasury will generally not take action to enforce provisions contained in the final rule, to the extent that they are more restrictive than those in the interim final rule. Such significant steps include . . . appropriation of funds.”). We do not address whether the payments already made complied with federal regulations, as that is a matter for the Department to determine.

scrutinize proposed salary increases for elected county and precinct officers, including proposed increases for commissioners, who are in the awkward position of setting their own salaries.” Tex. Att’y Gen. Op. No. JC-0255 (2000) at 3.

Separate from this process, section 111.0106 of the Local Government Code requires counties like Tyler County to “adopt a special budget for the limited purpose of spending” public or private grant or aid money “that is available for disbursement in a fiscal year but not included in the budget for that fiscal year.”⁵ TEX. LOC. GOV’T CODE § 111.0106. State law generally authorizes expenditures beyond those made in strict compliance with the county budget only in the event of an emergency. *See id.* § 111.010(b)–(c). Thus, section 111.0106 prevents grant or aid money received after adoption of the current year’s annual budget from remaining frozen until the following fiscal year. *See* House Comm. on Cnty. Affairs, Bill Analysis, Tex. H.B. 1481, 68th Leg., R.S. (1983) (explaining the purpose of an identical provision for larger counties).

ARPA funds constitute grant or aid money as contemplated by section 111.0106. *See* 42 U.S.C. § 803(a) (appropriating over \$130 billion to local governments “to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)”). Your specific question asks whether the ARPA premium pay funds directed to county and precinct officers constitute “salary, expense, or other allowance” such that the commissioners court may award funds only once a year and with the notice required by section 152.013. We focus on whether they constitute a “salary.”⁶

A court could conclude that ARPA premium pay funds are not “salary” for purposes of section 152.013.

While section 152.011 directs the commissioners court generally to “set the amount of the *compensation*, office and travel expenses” of officers and employees, section 152.013 expressly encompasses only the setting of “*salary*, expenses, and other allowances” of the elected officers. TEX. LOC. GOV’T CODE §§ 152.011, .013(a) (emphasis added). Previous opinions of this office construe “compensation” in section 152.011 broadly to include benefits such as sick leave, vacation and holiday entitlement, and longevity pay in addition to salary. *See* Tex. Att’y Gen. Op. Nos. KP-0135 (2017) at 2, GA-0322 (2005) at 3. But no court or previous opinion of this office has determined whether the term “salary” in section 152.013 is similarly broad, nor has the Legislature defined “salary” for purposes of section 152.013.

When the Legislature leaves a term undefined in a statute, courts will “use the plain and ordinary meaning of the term and interpret it within the context of the statute.” *Hogan v.*

⁵*See* TEX. LOC. GOV’T CODE §§ 111.001–.014 (providing for budget preparation in counties with a population of 225,000 or less that do not operate under subchapter C); *see also* U.S. CENSUS BUREAU, DEP’T OF COMMERCE, <https://www.census.gov/quickfacts/fact/table/tylercountytexas,US/POP010220> (reporting the population of Tyler County in the 2020 census as 19,798). The county auditor or county judge, as applicable, must first certify the receipt of any such public or private grant or aid money to the commissioners court. *See* TEX. LOC. GOV’T CODE § 111.0106.

⁶This office previously construed the term “expense” in the context of section 152.013’s predecessor as encompassing expenditures related to performing an officer’s duties, and “allowance” as an amount that covers funds an officer pays out in performing his or her duties. Tex. Att’y Gen. Op. No. H-1251 (1978) at 2. ARPA premium pay funds likely do not fall within either of these categories.

Zoanni, 627 S.W.3d 163, 169 (Tex. 2021). “Salary” commonly means “fixed compensation paid regularly . . . for services.” WEBSTER’S THIRD NEW INT’L DICTIONARY 2003 (2002); *see also Wichita Cnty. v. Robinson*, 276 S.W.2d 509, 513 (Tex. 1954) (stating that “salary is a fixed compensation for regular work” and it “is fixed and certain, irrespective of work done, labor performed, or money collected”).

The ARPA defines “premium pay” as “an amount of up to \$13 per hour . . . *in addition to wages or remuneration* the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency.” 42 U.S.C. § 802(g)(3) (emphasis added); *see also id.* § 803(g)(6) (referring to definition in section 802(g)). Federal regulations limit the aggregate amount that any single eligible worker may receive during the COVID-19 public health emergency to \$25,000. *See* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338, 4400 (Jan. 27, 2022) (to be codified at 35 C.F.R. Part 35). Federal guidance explains that “[p]remium pay is designed to compensate workers that, by virtue of their employment, were forced to take on additional burdens and make great personal sacrifices as a result of the COVID-19 pandemic. Premium pay can be thought of as hazard pay by another name.”⁷ *Id.* at 4397.

Federal and state law generally recognize hazard pay as a form of compensation distinct from salary. *See* 29 C.F.R. § 778.114(a)(4) (implementing overtime provisions under the Fair Labor Standards Act and providing that “fixed salary is compensation [] apart from . . . hazard pay”); *see also* TEX. GOV’T CODE §§ 403.055(l)(1), 659.124(c), 666.001(1) (all defining compensation to include hazardous duty pay as a component distinct from base salary or wages). The ARPA premium pay funds are akin to hazard pay for the unique circumstances posed by the COVID-19 pandemic, as opposed to payment for the fulfillment of regular officeholding duties and responsibilities. Thus, a court could conclude that the ARPA premium pay funds given to elected county officials did not constitute “salary” for purposes of section 152.013.⁸

⁷“Hazard pay means additional pay for performing hazardous duty or work involving physical hardship. Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices is deemed to impose a physical hardship.” U.S. Dep’t of Labor, Hazard Pay, *available at* <https://www.dol.gov/general/topic/wages/hazardpay>.

⁸The Department’s Interim Final Rule authorized the award of premium pay retroactively. *See* Interim Final Rule at 26798–26799. But this does not mean that the federal regulations preempt the Texas Constitution, as the regulations themselves expressly provide that they “do not preempt state law within the meaning of [Executive Order 13132].” *Id.* at 26817; *see also* Executive Order No. 13132, 64 Fed. Reg. 43255, 43257 (Aug. 10, 1999) (prohibiting federal agencies from publishing any rule that has federalism implications, which includes preemption of state law, unless certain requirements are followed). Article III, section 53 of the Texas Constitution prohibits a county from “grant[ing] . . . any extra compensation, fee or allowance to a public officer, agent, servant, or contractor, after service has been rendered.” TEX. CONST. art. III, § 53. This office previously explained that article III, section 53 of the Texas Constitution prohibits a retroactive increase in benefits for work that has already been performed. *See* Tex. Att’y Gen. Op. No. KP-0361 (2021) at 2. But the constitutional prohibition applies only to the granting of “extra” compensation. *See City of Denton v. Rushing*, 521 S.W.3d 88, 96 (Tex. App.—Fort Worth 2017) (explaining that payment for the performance of services beyond the scope of work contracted for is not “extra” compensation because the governmental body has not already paid for those services), *rev’d on other grounds*, 570 S.W.3d 708, 709 (Tex.

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S U M M A R Y

A court could conclude that “premium pay” funds given to elected county officials by Tyler County in 2021 through the federal American Rescue Plan Act under an interim final rule were akin to hazard pay and thus did not constitute salary increases requiring advance public notice under section 152.013 of the Local Government Code.

Very truly yours,



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2019). And the constitutional prohibition does not apply to additional compensation or benefits granted on a prospective basis. *See* Tex. Att’y Gen. Op. No. KP-0361 (2021) at 2 (recognizing that a commissioners court could approve a bonus plan tying compensation to performance for services rendered after the approval of the plan). You do not tell us whether the County previously authorized pandemic-related hazard pay for county officers or employees, nor do we opine on whether the COVID-19 pandemic changed the scope of work for county officers or employees beyond that which originally defined their job descriptions and performance expectations.