



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 83

November 5, 1992

Whether the prohibition on the acceptance of honoraria set out in section 36.07 of the Penal Code applies to the acceptance of payment in 1992 for work performed in 1991. (AOR-80)

The Texas Ethics Commission has been asked whether the prohibition on the acceptance of honoraria set out in section 36.07 of the Penal Code applies to the acceptance of payment in 1992 for work performed in 1991. The request letter describes a situation in which a state employee entered into a written agreement to write a paper and to accept payment for writing the paper. The state employee wrote and delivered the paper in 1991. The state employee did not receive payment, however, until 1992.

Before January 1, 1991, a state employee could, in certain circumstances, accept an honorarium "in consideration for legitimate services rendered above and beyond official duties and responsibilities." *See* Penal Code § 36.10(3) (Vernon 1989) (effective until January 1, 1992). The following provision of the Penal Code took effect on January 1, 1992:

A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.

Penal Code § 36.07(a). Under that provision a state employee may not *accept* consideration for services that the public servant would not have been requested to provide but for his official position or duties.¹ Senate Bill 1, the bill enacting the new prohibition on honoraria, provides that the bill applies to an honorarium received or *accepted* on or after January 1, 1992. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 8.01, at 1337.² Thus the literal statutory language would prohibit a state employee from accepting payment in 1992 for services that the employee would not have been requested to provide but for his official position or duties, even if those services were rendered at a time when it would have been permissible to accept payment for the services.

Article I, section 16, of the Texas Constitution, however, must also be considered in interpreting section 36.07. Article I, section 16, prohibits both retroactive laws and laws impairing the obligation of contracts. Although neither of these prohibitions is absolute, both prohibitions limit the authority of the legislature to impair vested contractual rights. *See generally* 1 D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 58-62 (1977). In view of that limitation on legislative authority, we think section 36.07 of the Penal Code must be interpreted to permit payment for services rendered if a contract for such services was entered into and performed at a time when it was permissible for a state employee to accept payment for such services.³ *See Earle v. Program Centers of Grace Union Presbytery, Inc.*, 670 S.W.2d 777, 779-80 (Tex. App.--Fort Worth 1984, no writ) (statute is to be construed in a manner that renders it constitutional).

SUMMARY

Section 36.07 of the Penal Code permits payment for services if a contract for such services was entered into and performed at a time when it was permissible for a state employee to accept payment for such services.

- ¹ The request letter does not state whether the state employee in question would not have been requested to write the paper but for his official position or duties. Therefore, it is unclear whether the situation described would be covered by section 36.07 even if section 36.07 is applicable.
- ² Senate Bill 1 is the legislation that amended section 36.07 of the Penal Code as well as other "ethics" laws.
- ³ Whether the specific contract at issue here was permissible under the prior law is a fact question that the Ethics Commission cannot resolve.