



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

August 1, 1973

Honorable George W. McNiel
State Auditor
Sam Houston State Office Building
P. O. Box 12067
Austin, Texas 78711

Letter Advisory No. 56

Re: Dual employment -
whether a member of
the Texas Board of
Mental Health and
Mental Retardation
may simultaneously
serve as a member
of the State Board of
Education of the Cen-
tral Education Agency.

Dear Mr. McNiel:

You have inquired as to whether a member of the Texas Board of Mental Health and Mental Retardation may simultaneously serve as a member of the State Board of Education in view of the newly amended prohibitions contained in §§ 33 and 40 of Article 16 of the Texas Constitution, given that the former position is appointive and the latter elective.

Section 2.06 of Article 5547-202, V. T. C. S., provides that a member of the Board of Mental Health and Mental Retardation is to receive per diem compensation for each day of personal service plus reimbursement for expenses incurred. Item 12 of the Appropriation to the Department of Mental Health and Mental Retardation (Senate Bill 1, Acts 62nd Legislature, Third Called Session, Page II-8), provides \$25 per day as compensation to members of this Board.

Subsequent to his appointment to this Board, the individual in question was elected to the State Board of Education. As such, he receives no salary but is reimbursed for expenses incurred in fulfilling the duties of his office. Section 11.22(m), Texas Education Code.

Membership qualifications for the State Board of Education are established by § 11.22 of the Texas Education Code, which in Subsection 11.22(b), provides that:

"No person shall be eligible for election to or serve on the board if he holds an office with the State of Texas or any political subdivision thereof, or holds employment with or receives any compensation for services from the state or any political subdivision thereof (except retirement benefits paid by the State of Texas or the federal government) or engages in organized public educational activity."
(emphasis added)

There is no reason to assume that the per diem compensation, as provided by § 2.06 of Article 5547-202 to members of the Texas Board of Mental Health and Mental Retardation, is not included within the meaning of "compensation" as used in Subsection 11.22(b) of the Texas Education Code.

Black's Law Dictionary, 4th Edition, defines "compensation" as "the remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument." And "per diem" as "generally, as used in connection with compensation, wages or salary, means pay for a day's service." And see also Attorney General's Opinion WW-7 (1957) which cites Peay v. Nolan et al, 7 S. W. 2d 815 (Tenn. 1928), as stating that a per diem compensation provided for legislators by the Tennessee Constitution "is synonymous with 'salary'" and "that the term 'salary' imports the idea of compensation for personal service. . . ."

In Attorney General's Opinion M-1290 (1972), Subsection 11.22(m) was construed so as to preclude a teacher's serving on the State Board of Education, because, like a member of the Board of Mental Health and Mental Retardation, a teacher is compensated by the State for personal services rendered.

In our opinion subsection 11.22(b) of the Texas Education Code unequivocally deems an individual ineligible for membership on the State Board of Education if he or she is receiving any compensation for services to the State. This raises an Equal Protection question, under the Fourteenth Amendment of the U. S. Constitution and of Article 1, § 3 of the Texas Constitution.

The Texas legislature has plenary power to regulate any matter not expressly or by implication inhibited by the state or federal constitution [Government Services Insurance Underwriters v. Jones, 368 S.W. 2d 560 (Tex. 1963); Perkins v. State, 367 S. W. 2d 140 (Tex. 1963)] and also is empowered to enact provisions as to eligibility for statutory, as opposed to constitutional, offices. [Oser v. Cullen, 435 S. W. 2d 896 (Tex. Civ. App., Houston, 1969)]

Article 7, § 8 of the Texas Constitution authorizes the Legislature to "provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall provide not to exceed six years."

This immediately raises the question of whether the eligibility requirement of § 11.22(b) of the Texas Education Code is an unconstitutional exercise of legislative authority.

Where the Constitution stipulates qualifications for office, it is not within the power of the Legislature to alter those requirements unless the Constitution so allows. Dickson v. Strickland, 265 S. W. 1012 (Tex. 1924); State v. Court of Civil Appeals, 75 S. W. 2d 253 (Tex. 1934); Burrough v. Lyles, 181 S. W. 2d 570 (Tex. 1944); Luna v. Blanton, 478 S. W. 2d 76 (Tex. 1972).

Membership of the State Board of Education is a constitutionally created office. Article 7, § 8 states:

"The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such

authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law. As amended Nov. 6, 1928."

Although the Constitution contains no standards of eligibility specifically applicable to candidates for membership on the State Board of Education, it does contain restrictions imposed generally on all public office seekers. See Article 1, § 4; Article 3, § 20; Article 16, §§ 2, 5, and 14, Texas Constitution.

Although § 8 of Article 7 does not unambiguously authorize the Legislature to determine specific eligibility requirements governing this office, the constitutional grant of power is so broad that, in view of its history, we construe it to authorize the legislative prescription of qualifications such as those contained in § 11.22(b).

The Legislature, therefore, has power to regulate membership on the Board of Education, provided the classification which results is not clearly arbitrary and unreasonable and that the distinction has some relevance to the purpose for which the classification was made, in light of the equal protection standards established through the Texas and U.S. Constitutions. Ground Water Conservation District No. 2 v. Hawley, 304 S. W. 2d 764 (Tex. Civ. App., Amarillo, 1957) *err. ref'd.* 306 S. W. 2d 352 (Tex. 1957); Texas Water Rights Commission v. Wright, 464 S. W. 2d 642 (Tex. 1971); Carrington v. Rash, 380 U.S. 89 (1965); Rinaldi v. Yeager, 384 U.S. 305 (1966).

Only potential legislators are confronted with a constitutional eligibility provision similar to § 11.22(b):

"No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."
Article 3, § 19 of the Texas Constitution.

Statutory, as opposed to constitutional, qualifications exist only for the elective office of railroad commissioner, but, unlike § 11.22(b), they appear more obviously designed to eliminate conflicts of interest and address themselves to loss of office rather than initial eligibility.

"No railroad commissioner shall hold any other office of any character, while such commissioner, nor engage in any occupation or business inconsistent with his duties as such commissioner." Article 6447, V. T. C. S.

A random perusal of state boards and commissions, other than the Board of Education, reveals that eligibility for membership, if conditioned at all, is conditioned upon requirements clearly related to avoidance of conflicts of interest and insuring that applicants are well-qualified. For example, the Banking Commissioner, a member of the Banking Board, must have five years experience as a "practical banker" within ten years of his term of office. Article 342-115, V. T. C. S.

A similar examination of boards and commissions dealing with educational matters like the Board of Education disclose the same pattern as to eligibility requirements. No member of the Texas Commission of Higher Education may be engaged in "education work" while in office. Article 2919e-2, § 3, V. T. C. S. In order to be eligible for membership on the State Board of Examiners for Teacher Education, an individual must be a teacher. Section 13.031(a), Texas Education Code.

As to the particular type of sweeping eligibility requirement of § 11.22(b), therefore, it appears that those seeking membership on the State Board of Education are not treated, by the Constitution or by statute, like other elective officials, nor are other state board members and commissioners, whether concerned with matters of education or not, dealt with similarly. Consequently, the classification at issue here is, with the possible exception of those desiring to be state legislators, made up solely of prospective members of the Board of Education who are receiving any compensation from the State.

The question is, then, whether it is unreasonable or arbitrary for such individuals to be so singled out. If it is, it follows that as potential elective officials or members of boards and commissions who are receiving compensation from the State, they are being denied equal protection unconstitutionally.

Here, it may be useful, in assessing reasonableness, to compare the office of state legislator with that of membership on the Board of Education. Like the state legislator, a member of the Board of Education is a representative of a particular district as well as a state official whose decisions are felt statewide. Section 11.21, Texas Education Code. His duties, therefore, are already twofold, allowing less time for other public activities and offering more opportunities for conflicts of interest to arise.

In addition, the extensive and special duties of a member of the State Board of Education (See §§ 11.24 through 11.42, Texas Education Code), could very well create conflicts of interest if the member were functioning in some remunerative capacity for the State, even though 11.22(b) could more narrowly define such problem areas and other elective offices which may entail similar difficulties are not so inhibited as to eligibility. See, for example, § 11.26(a)(7) which provides a member of the Board of Education with the power to execute contracts for investment of the permanent school fund.

State supreme courts have been loathe to declare statutes regulating public offices in violation of the equal protection of the Fourteenth Amendment. Gallas v. Sanchez, 405 P 2d 772, 480 Haw. 370 (1965); Croft v. Lambert, 357 P 2d 513, 228 Or 76 (1960); Thompson v. Dickson, 275 P 2d 749, 202 Or 394 (1954). In view of the above and the presumption in favor of legislative classification in general, § 11.22(b) is probably not an unreasonable or arbitrary classification in violation of equal protection, and in our opinion is enforceable.

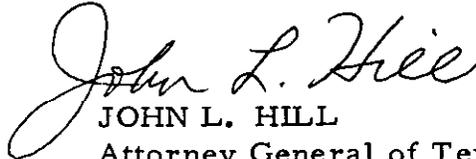
Since membership on the State Board of Education involved no emolument, §§ 33 and 40 of Article 16 of the Constitution, which prohibits holding two offices of emolument at the same time prevents no bar to holding these two offices. However, we do see the possibility that the

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two are incompatible and that one person could not occupy both without facing numerous conflicts. Thomas v. Abernathy County Line Ind. School Dist., 290 S. W. 152 (Tex. Comm. App., 1972).

It is our opinion, therefore, that because of the express provisions of § 11.22(b) of the Education Code, and/or the common law doctrine of incompatibility, one person may not serve at the same time as a member of the Board of Mental Health and Mental Retardation and the State Board of Education.

Very truly yours,


JOHN L. HILL

Attorney General of Texas

APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee