



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

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August 20, 1975

The Honorable M. L. Brockette
Commissioner of Education
Texas Education Agency
201 East Eleventh Street
Austin, Texas 78701

Letter Advisory No. 114

Re: A public school teacher as
a member of the board of trustees
of the same school district.

Dear Commissioner Brockette:

You have submitted the following question to us:

Legally may a person serve as a trustee (duly appointed or elected) of a [an independent] school district wherein s(he) is employed as a teacher, and thereafter continue and further be contracted and paid as a teacher of that district?

Article 16, § 40 of the Texas Constitution generally prohibits the dual occupancy of two civil offices "of emolument," but a sentence added to that section by amendment in 1972 provides:

State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies.

Public school teachers indirectly receive all or a part of their salary from the state. See e.g., Education Code §§ 16.301 et seq.

Trustees of an independent school district serve without compensation. Education Code § 23.19. Thus, the office is not one "of emolument" regulated by article 16, § 40 of the Constitution. See State v. Mycue, 481 S. W. 2d 476 (Tex. Civ. App. -- San Antonio 1972, no writ). Since the positions of teacher and school trustee are not two civil offices of emolument within the meaning of article 16, section 40, it is necessary to determine whether the 1972 proviso contained in that section eliminates other bars to dual office holding such as the one presented by the common law doctrine of incompatibility.

The trustees of an independent school district control the contractual terms and salaries of the public school teachers for the district, and have general supervisory power over them. Education Code §§ 23.25 et seq.; §§ 13101 et seq. These circumstances could cause the bar of legal incompatibility to apply unless the proviso has removed it. In Attorney General Opinion H-117 (1973) we said:

The common law doctrine of incompatibility protects the basic integrity of our institutions, cf. Thomas v. Abernathy County Line Independent School District, 290 S. W. 152 (Tex. Comm. 1927), and we think it must be considered infused into the provisions of the Constitution conferring powers and duties upon offices and officers. Article 16, § 48, Texas Constitution; Great Southern Life Insurance Co. v. City of Austin, 243 S. W. 778 (Tex. 1922); cf. Dickson v. Strickland, 265 S. W. 1012 (Tex. 1924).

In State v. Martin, 51 S. W. 2d 815 (Tex. Civ. App. -- San Antonio 1932, no writ) where one person's simultaneous occupancy of the posts of school trustee and city tax assessor was under attack, the court found no illegality because:

The duties of the two offices are wholly unrelated, are in no manner inconsistent, are never in conflict. Neither officer is accountable to the other, nor under his dominion. Neither is subordinate to the other, nor has any power or right to interfere with the other in the performance of any duty. The offices are therefore not inconsistent or incompatible, and, one of them not being a "civil office of emolument," both may be occupied and the duties thereof lawfully performed by the same person. Id. at 817.

But public school teachers, of course, are accountable to the school trustees, are under their dominion, and are subordinate to them; and trustees may interfere with the teacher's performance of duty. In Thomas v. Abernathy County Line Ind. Sch. Dist., 290 S. W. 152 (Tex. Comm. App. 1927), the positions of school trustee and city alderman were held to be incompatible because the board of alderman there exerted various directory and supervisory powers in respect to school property and the duties of school trustees in the city.

An Attorney General's Opinion dated February 2, 1933, found in volume 343 at page 109 of the Attorney General's Letter Opinion Collection, considered whether a teacher could fill the office of county school trustee. After determining that Article 16 § 40 of the Constitution as it then read did not apply, the opinion stated:

However . . . the office of county school trustee would be incompatible with the position of school teacher in the public school; because there might well arise a conflict in the discharge of the duties of county school trustee with the position of school teacher. . . . The result of this incompatibility . . . is that the position of the teacher of public schools in the county and the office of county school trustee cannot be held by the same person at the same time.

Also see the Opinion at page 302, vol. 367 (Sept. 17, 1935), Attorney General's Letter Opinion Collection; Attorney General's Conference Opinion 2267 (Jan. 4, 1921); and Attorney General Letter Advisories Nos. 111 (1975), 65 (1973), and 56 (1973).

Although Texas courts have not spoken directly to this issue, the Supreme Court of Wyoming did so in 1973. Haskins v. State, 516 P. 2d 1171 (Wyo. 1973) was an action challenging a schoolteacher's right to hold office as a member of the board of trustees of the school district by which the teacher was employed. The teacher claimed that no legal incompatibility resulted because his position as a teacher was not a public office and the common law doctrine applied only to incompatible offices. Cf. Attorney General Letter Advisory No. 87 (1974). After reviewing Visotcky v. City

Council of the City of Garfield, 273 A.2d 597 (N.J. Super., App. Div. 1971), and other cases, the Wyoming court rejected that argument and relied upon the public policy behind the doctrine of incompatibility to hold that "employment as teacher and office as member of the board of trustees of the school district are incompatible within the meaning and intent of the common-law rule." 516 P. 2d at 1178.

We think Texas courts would agree. In Ehlinger v. Clark, 8 S.W. 2d 666 (Tex. Sup. 1928), the Texas Supreme Court considered a situation where the Commissioners Court of Fayette County had employed its county judge as an attorney at law to conduct litigation for the county. The position of county judge was a public office but the position as an attorney representing the county was not. In holding the contract of employment void, the Court said:

It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint. Id. at 674.

And see Attorney General Opinion H-117 (1973).

We believe that the common law doctrine of incompatibility prevents a public school teacher in Texas from serving at the same time as a member of the board of trustees for the employing district unless the newly-adopted proviso in article 16, § 40 of the Constitution has abrogated the doctrine of incompatibility with respect to service on local governing bodies.

We have previously said that the added language did not disturb the common law doctrine. In Attorney General Letter Advisory No. 54 (1973) we observed:

This provision, in our opinion, was intended as an exception to the first provision of § 40 that 'no person shall hold or exercise at the same time, more than one civil office of emolument. . . .' Attorney General Opinion H-6 (1973).

It was not, however, intended as an exception to another impediment to office holding -- the common law doctrine of incompatibility applied in Thomas v. Abernathy County Line Independent School District, 290 S. W. 152 (Tex. Comm. App., 1927); and see Pruitt v. Glen Rose Independent School District No. 1, 84 S. W. 2d 1004 (Tex. 1935); 47 Tex. Jur. 2d, Public Officers, § 28, p. 42 and cases cited; Attorney General Opinion H-7 (1973).

Your question has caused us to re-examine that conclusion. In doing so, we have carefully reviewed again the history of the provision. Carpenter v. Sheppard, 145 S. W. 2d 562 (Tex. Sup. 1940); Attorney General Opinions H-217 (1974), H-88 (1973).

Article 16, § 40 has been in the Constitution since 1876 but originally was much less detailed, providing: "No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided herein." Numerous additions have been made to the section. For an explanation of the chronology, see Carpenter v. Sheppard, supra at 565, and Attorney General Letter Advisory No. 73 (1973).

The companion to section 40 was, and still is, section 33 of article 16. In 1967, section 33 was amended to permit non-elective state officers and employees to hold other non-elective offices or positions of honor, trust or profit if the other offices or positions were of benefit to the state or were required by state or federal law, and there was no conflict with the original office. See Attorney General Opinion H-5 (1973).

In 1971 the Austin Court of Civil Appeals decided the case of Boyette v. Calvert, 467 S. W. 2d 205 (Tex. Civ. App. -- Austin 1971, writ ref. n. r. e.), app. dismissed, 405 U.S. 1035 (1972), and held that a college professor who also occupied a position as a city councilman was an "agent or appointee" of the state who could not be paid by warrant while holding the city office. There was no legal incompatibility of offices indicated, but a practical conflict of interests existed because of time demands, etc., similar to the situation discussed in Attorney General Letter Advisory No. 62 (1973). Hence a "conflict" was found within the meaning of article 33 as it then read. The holding was broad enough so that all state employees would be considered "agents or appointees."

The Boyette case prompted the 1972 revision of sections 33 and 40. All references to "agents and appointees" and to "offices of honor, trust or profit" were dropped and the section 33 restrictions on the accounting officers were made entirely dependent upon a violation of section 40. Incorporated into section 40 was the exception previously found in section 33 which allowed non-elective officers to hold more than one office of emolument if no "conflict" resulted, and the language which had caused it to apply to employees was dropped.

A new exception for employees was inserted in section 40 which allowed them to serve as members of local governing bodies without salary, and the "conflict" language was omitted as to them. It seems apparent that this omission was meant to overcome the Boyette type "conflict" problem, i. e., practical conflict of time demands, etc., rather than legal incompatibility, and was not meant to abrogate the ban against holding legally incompatible offices. This is borne out by the bill analyses prepared by the Senate and House, and by the Legislative Counsel.

The Senate analysis of April 1, 1971 indicated the purpose of the bill was ". . . to allow state and local officers and employees to serve on the governing body of any school district or local government. . . if there would be no conflict between the jobs." The background information portion of the analysis specifically referred to the Boyette case as it had been decided by the district court.

The House bill analysis of May 13, 1971, also referred to the Boyette case in the district court and indicated the bill's purpose was "[t]o allow the holding of a position under the State of Texas by a person holding another position or an office under this state if the two are not in conflict." Although both analyses referred to "conflicts," the context suggests that the reference is to legal incompatibility rather than to the Boyette type conflict.

After it was enacted by the Legislature, the Legislative Council prepared an analysis for the proposed amendment to section 40 which stated: "It is an old common law principle that no person may hold two or more public offices if these offices are incompatible. In addition to this common law prohibition the state Constitution has, since its adoption in 1876, severely restricted or prohibited dual office holding and dual compensation. . . . The proposed amendment would

further broaden the exemptions from the prohibition against dual office holding and dual compensation." Tex. Legis. Council Constitutional Amendment Analysis No. 14, p. 39 (1972) (emphasis added). In listing the arguments "for" and "against" the adoption of the amendment, the analysis did not refer to any arguments concerning abrogation of the common law rule against the holding of incompatible offices.

The proposed amendment was submitted to the people under a for/against ballot proposition which read:

The constitutional amendment permitting State employees, who are not State officers, to serve as members of the governing bodies of school districts, cities, towns, or other local governmental districts, without forfeiting their State salary, and specifying exceptions to the constitutional prohibition against payment of State funds for compensation to any person who holds more than one civil office of emolument. Senate Joint Resolution No. 29. Acts 1971, 62nd Leg., R.S., p. 4134 (emphasis added).

It is apparent from this history that both the Legislature and the people who adopted the 1972 amendment to article 16, § 40 were not preventing the application of the common law doctrine of incompatibility to service on local governmental bodies, or removing all impediments to such service by state-paid people. The removal of all impediments could repeal our nepotism and pecuniary conflict of interest laws as to such people. See articles 988, 2340, 5996a, V. T. C. S. We do not think that result was intended.

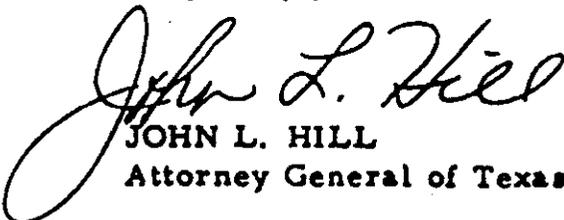
We are supported in our conclusion by Ramirez v. Flores, 505 S.W. 2d 406 (Tex. Civ. App. -- San Antonio 1973, writ ref. n. r. e.) where it was contended by a political candidate that the 1972 revision of article 16, § 40 worked a repeal of article 16, § 65 of the Constitution which makes announcements by some persons for other offices amount to automatic resignations of the positions already held. The candidate, who was a county commissioner, had announced for a school trustee post. The Court held that the 1972 revision did not have the effect the candidate suggested, that the exceptions contained in article 16, § 40 must be read in the light of the remainder of the Constitution, and that seeming conflicts must be harmonized and reconciled, if possible. The Commissioner's office was held to have been automatically vacated by the announcement.

In our opinion it remains the public policy of Texas, as noted in Attorney General Opinion H-638 (1975), that "[a] public official must avoid a position where his private pecuniary interest might conflict with his public duty." See Meyers v. Walker, 276 S. W. 305 (Tex. Civ. App. -- Eastland 1925, no writ). Cf. Attorney General Opinion H-624 (1975). Thus, if a teacher becomes a board member, he must relinquish the inconsistent and incompatible position as a teacher for the district. Pruitt v. Glen Rose Ind. Sch. Dist., 84 S. W. 2d 1004 (Tex. Sup. 1935); Centeno v. Inselmann, 519 S. W. 2d 889 (Tex. Civ. App. -- San Antonio, 1975, no writ); Attorney General Letter Advisory No. 4 (1973).

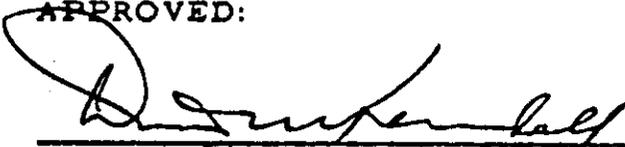
SUMMARY

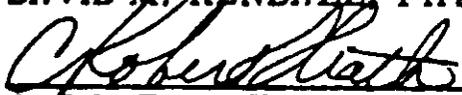
The positions of public school teacher for an independent school district and trustee for the same district are legally incompatible and cannot be simultaneously occupied by the same person. If a teacher is elected or appointed to the board of trustees for the school district by which he is employed, he must relinquish the incompatible teaching position.

Very truly yours,


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APPROVED:


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C. ROBERT HEATH, Chairman
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