



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

February 29, 1988

Honorable Terral Smith  
Chairman  
Committee on Natural Resources  
P. O. Box 2910  
Austin, Texas 78769

IO-88-19

Dear Representative Smith:

You request clarification of Letter Advisory No. 55 (1973) which said that article II, section 1, of the Texas Constitution barred a state university professor from serving as an assistant district attorney. You ask whether an assistant district attorney holds a "civil office of emolument" as defined by article XVI, section 40, of the Texas Constitution.

Letter Advisory No. 55 based its conclusion in part on an understanding that "an Assistant District Attorney . . . exercises governmental power in his judicial office." However, this decision was based on an interpretation of article II, section 1 of the Texas Constitution which has been overruled. See Letter Advisory No. 137 (1977). Moreover, Letter Advisory No. 55 did not state a definition of "civil officer of emolument" or explain its assumption that an assistant district attorney holds an office. See generally Attorney General Opinion MW-415 (1981).

An individual's status as an officer is determined by "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." Green v. Stewart, 516 S.W.2d 133 (Tex. 1974); Aldine Independent School District v. Standley, 280 S.W.2d 578 (Tex. 1955); Attorney General Opinion MW-415 (1981). In Green v. Stewart, the Texas Supreme Court determined that the deputies of a county tax collector-assessor were not officers. The decision relied in part on statutes providing that the assessor-collector of taxes could appoint deputies to assist him and that the assessor-collector could require a bond from his appointed deputies. Similar provisions apply to the assistants

appointed by a district attorney. See Gov't Code §§41.102-41.105. Section 41.102 of the Government Code states as follows:

A prosecuting attorney may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel. . . . (Emphasis added.)

The emphasized language points out that the attorneys hired by the prosecuting attorney are employees whose job is to assist him in carrying out his duties, and not officers who may exercise sovereign powers in their own right. See also Attorney General Opinion MW-80 (1979) (discussing differences in authority of district attorney and assistant district attorney). Thus, an assistant district attorney is not a civil officer of emolument.

You next ask whether an assistant district attorney may serve as an elected director of a municipal utility district created pursuant to article XVI, section 59 of the Texas Constitution, either with or without compensation from the district. Article XVI, section 40, of the Texas Constitution does not prohibit this dual service. It does include a provision which would be relevant to your question if the assistant district attorney receives any of his compensation from the state of Texas. This provision is as follows:

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.

Tex. Const. art. XVI, §40. Thus, if the assistant district attorney receives any compensation from the state of Texas he may not receive compensation for serving on the governing body of a local governmental district such as a municipal utility district. As a general matter, the funding for the district attorney's office is provided by the county. Gov't Code §§41.106, 41.107. In Harris County and counties with a criminal district attorney or a

Honorable Terral Smith  
February 29, 1988  
Page 3

county attorney performing the duties of a district attorney, the county receives state funds to support the prosecutor's office. Gov't Code §§41.201-41.204.

To summarize the answers to your questions, article XVI, section 40, of the Texas Constitution does not bar an assistant district attorney from serving as an elected director of a municipal utility district, although he may not receive compensation for that office if he receives compensation from the state for serving as an assistant district attorney.

Yours very truly,

*Susan L. Garrison*

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Assistant Attorney General  
Opinion Committee

SLG/er