



**THE ATTORNEY GENERAL
OF TEXAS**

October 11, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Al Luna
Chairman
Science and Technology Committee
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78769

LO-89-82

Dear Representative Luna:

You ask the following question:

May an assistant district attorney serve on the board of trustees of a school district located within the county employing the assistant district attorney?

You state that service in both positions appears to raise issues of dual office holding, separation of powers, and incompatibility of positions. In addressing these three issues, we will first consider whether this individual seeks to hold two offices or an office and an employment.

It is well established that a school trustee is a public officer, although not a civil officer of emolument, since section 23.19(e) of the Education Code provides that trustees shall serve without compensation. Thomas v. Abernathy County Line Indep. School Dist., 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted). A district attorney is an officer in the judicial branch of government. State v. Moore, 57 Tex. 307 (1882). An assistant district attorney is, in our opinion, an employee and not an officer. An individual's status as an officer depends upon "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, 135 (Tex. 1974); Aldine Indep. School Dist. v. Standley, 280 S.W.2d 578, 583 (Tex. 1955). It is apparent from the Government Code provisions concerning an assistant district attorney that he does not hold an office.

Subchapter B of chapter 41 of the Government Code deals with the prosecuting attorney's staff. "Prosecuting attorney" refers to a district attorney, a county attorney

or a criminal district attorney. Gov't Code § 41.101. A prosecuting attorney "may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel . . . required for the proper and efficient operation and administration of the office." Gov't Code § 41.102 (emphasis added). The language of this statute indicates that the assistant district attorney is an employee.

Other provisions, if read in isolation, might be taken to indicate that an assistant district attorney holds an office. He "shall take the constitutional oath of office," and "may perform all duties imposed by law on the prosecuting attorney." Gov't Code § 41.103. He is, however, "subject to removal at the will of the prosecuting attorney." Gov't Code § 41.105. See State v. May, 270 S.W.2d 682 (Tex. Civ. App. - San Antonio 1954, no writ) (assistant district attorney is appointed by and serves at the will and pleasure of the district attorney). Because the assistant district attorney acts only under the authority of the district attorney, he does not exercise "any sovereign function of the government . . . largely independent of the control of others." Green v. Stewart, supra; Aldine Indep. School Dist. v. Standley, supra. As the assistant district attorney's title indicates, his function is to assist the district attorney. See Green v. Stewart, supra.

We turn to the three issues relating to dual office holding that you have raised. Article XVI, section 40, of the Texas Constitution provides in part:

No person shall hold or exercise at the same time, more than one civil office of emolument, except [exceptions not relevant]

Tex. Const. art. XVI, § 40. Since the assistant district attorney is not an officer, this provision does not bar him from serving as school trustee. See also Attorney General Opinion JM-519 (1986) (school trustee is not a civil officer of emolument because he serves without compensation).

Neither does the separation of powers provision of the Texas Constitution prevent an officer from holding an employment in another branch of government. See Letter Advisory No. 137 (1977); see also Turner v. Trinity Indep. School Dist., 700 S.W.2d 1 (Tex. App. - Houston [14th Dist.] 1983, no writ); Ruiz v. State, 540 S.W.2d 809 (Tex. Civ. App. - Corpus Christi 1976, no writ); Attorney General

Opinion JM-519 (1986); JM-213 (1984). Accordingly, it does not prevent the assistant district attorney from serving as trustee of a school district.

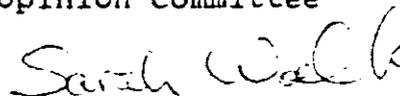
The common law doctrine of incompatibility bars one person from holding two offices if the duties of the offices are inconsistent or in conflict, or if one office is subordinate to the other. Thomas v. Abernathy County Line Indep. School Dist., *supra*. The doctrine of incompatibility has on occasion been applied to find an office and an employment incompatible, where the office had power to appoint or supervise the employee, or where the particular duties of the two positions and the relationship between them gave rise to a great risk that one would impose its policies on the other. See, e.g., Ehlinger v. Clark, 8 S.W.2d 666 (Tex. 1928); Attorney General Opinion JM-1047 (1989); Letter Advisory No. 114 (1975). In this case, we see no relationship between the duties of the assistant district attorney and the school trustee such that the doctrine of incompatibility would prevent one person from holding both positions. Accordingly, none of the prohibitions against dual office holding prevent the assistant district attorney from serving as school trustee in the county that employs him. We note, however, that the district attorney should not assign this individual any cases involving the school district.

An assistant district attorney does not hold a civil office of emolument within article XVI, section 40, of the Texas Constitution. Accordingly he is not barred by that provision from serving as a trustee of a school district located in the county that employs him as assistant district attorney. Neither article II, section 1, of the Texas Constitution, which provides for separation of powers, nor the common law doctrine of incompatibility prevents him from serving in both capacities.

Very truly yours,



Rick Gilpin, Chairman
Opinion Committee



Sarah Woelk, Chief
Letter Opinion Section