



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 14, 1994

Ms. Jen Ripley
Chair
Guadalupe-Blanco River Authority
P.O. Box 271
Seguin, Texas 78156-0271

Letter Opinion No. 94-021

Re: Whether a member of the Guadalupe-Blanco River Authority Board of Directors may serve simultaneously as a member of the South Central Texas Water Advisory Committee (ID# 22324)

Dear Ms. Ripley:

You have asked us to determine whether a member of the Guadalupe-Blanco River Authority (the "GBRA") Board of Directors may serve simultaneously as a member of the South Central Texas Water Advisory Committee (the "advisory committee"). Apparently, the Refugio County commissioners court has nominated or proposes to nominate to the advisory committee a GBRA director from that county. We must analyze your question in light of the constitutional prohibition against dual office holding and the common-law doctrine of incompatibility of offices. We conclude that neither doctrine precludes a member of the GBRA from serving simultaneously as a member of the advisory committee.

The legislature created the organization that is currently denominated the GBRA in 1933, *see* Acts 1933, 43d Leg., 1st C.S., ch. 75, at 198; *see also* Acts 1935, 44th Leg., 1st C.S., ch. 410, § 1, at 1615-16; Acts 1975, 64th Leg., ch. 433, § 1, at 1149-50, for the purposes of

the control, storing, preservation and distribution of storm and flood waters, the waters of rivers and streams, including the Guadalupe and Blanco Rivers and their tributaries for irrigation, power, and all other useful purposes, the reclamation and irrigation of arid, semiarid and other lands needing irrigation, the reclamation and drainage of overflowed lands, and other lands needing drainage (but not to reclaim or drain coastal wetlands or inland marshes), the conservation and development of the forests, water and hydro-electric power of the State of Texas and the navigation of inland waters, and the preservation and conservation of all such natural resources of the State.

Acts 1975, 64th Leg., ch. 433, § 1, at 1149-50. All of the GBRA's powers promote the accomplishment of the purposes for which it was created: for example, the GBRA may control, store, preserve, use, and sell the waters of any rivers and streams within the boundaries of the district; conserve, preserve, and develop underground waters within the boundaries of the district; prevent damage to persons or property from the waters of the Guadalupe and Blanco Rivers; and conserve and develop waters and lands for recreational purposes. *Id.* at 1150-53. The GBRA lacks the authority to levy or collect taxes or assessments, *id.* at 1150, although the statute requires it to "establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or all other services." *Id.* at 1153.

A board of nine directors, each appointed by the governor, governs the activities of the GBRA. Acts 1969, 61st Leg., ch. 432, at 1465. Each member of the board resides in one of the counties included within the district, with no county having more than one representative on the board. *Id.* Each director holds the position for a term of six years unless the governor removes the person for inefficiency, neglect of duty, or misconduct in office. *Id.* In addition to receiving actual travelling and other expenses, each director receives twenty-five dollars per day, "or such amount as may hereafter be prescribed by general law," for each day spent attending board meetings or conducting other necessary business of the board. *Id.*

The legislature created South Central Texas Water Advisory Committee in 1993 by the passage of Senate Bill 1477. *See* Acts 1993, 73d Leg., ch. 626, § 1.10(a), at 2353, 2360-61. The primary purpose of the advisory committee is to advise the board of directors of the Edwards Aquifer Authority (the "EAA"), which Senate Bill 1477 also created, *see id.* § 1.02, at 2353, on downstream water rights and issues. *See id.* § 1.10(a), at 2360. The duties of the advisory committee include:

- (1) assisting the [EAA] in developing the [EAA's] demand management plan for the county that the representative represents;
- (2) assisting the [EAA] to implement the demand management plan; and
- (3) performing other duties requested by the board that the representative may practicably perform.

Id. § 1.10(i), at 2361.

The advisory committee "by resolution may request the [EAA board of directors] to reconsider any board action that is considered prejudicial to downstream water interests. If the board review does not result in a resolution satisfactory to the advisory committee, the advisory committee by resolution may request the [Texas Natural Resource Conservation Commission] to review the action." *Id.* § 1.10(f), at 2361. In

addition, the members of the advisory committee are to assist the EAA in the development of a twenty-year comprehensive management plan for providing alternative supplies of water to the region included within the boundaries of the EAA. *See id.* § 1.25(b), at 2366.

The governing body of each of twenty listed counties and municipalities is to appoint one representative to the advisory committee. *Id.* § 1.10(a), at 2360. An advisory committee member is not compensated for his or her services, although the advisory committee member may receive reimbursement for actual and necessary expenses that the member incurs in the performance of advisory committee duties. *Id.* § 1.10(c), at 2360; *see also id.* § 1.09(f), at 2360. Finally, a member of the advisory committee holds the position until the appropriate governing body that appointed the member appoints a successor. *Id.* § 1.10(d).

We conclude initially that the constitutional prohibition against dual office holding does not preclude a member of the GBRA from simultaneously holding a position on the advisory committee. Article XVI, section 40 of the Texas Constitution provides that, with various exceptions, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." Section 40 applies only to persons who profit monetarily from their office. 2 D. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 777 (1977) (citing *Irwin v. State*, 177 S.W.2d 970 (1944)); *see also* Attorney General Opinion MW-450 (1982) at 1 (defining "emolument"). While a member of the GBRA receives compensation in addition to actual travelling and other expenses, a member of the advisory committee is not entitled to compensation. Thus, a member of the GBRA would not violate the constitutional prohibition against dual office holding if the member simultaneously holds a position on the advisory committee. *But see* Attorney General Opinion JM-1266 (1990) at 3 (and authorities cited therein) (indicating that "reimbursement" in excess of actual expenses constitutes compensation for purposes of article XVI, section 40 of Texas Constitution).

Next, we conclude that the doctrine of incompatibility does not preclude a member of the GBRA from simultaneously holding a position on the advisory committee. The common-law doctrine of incompatibility has multiple facets. First, the common-law doctrine of incompatibility disqualifies all officers who have the appointing power from appointing themselves to a different position. *Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); *St. Louis Southwestern Ry. Co. of Texas v. Naples Indep. Sch. Dist.*, 30 S.W.2d 703, 706 (Tex. Civ. App.--Texarkana 1930, no writ); Attorney General Opinions JM-934 (1988) at 3; C-452 (1965) at 3; O-410 (1939) at 5-9. You indicate that the commissioners court of Refugio County, not the GBRA, has nominated or proposes to nominate to the advisory committee a member of the GBRA from Refugio County. Indeed, the GBRA has no power to appoint a member to the advisory committee. *See* Acts 1993, 73d Leg., ch. 626, § 1.10(a), at 2360. Thus, the situation about which you inquire does not implicate this facet of the common-law doctrine of incompatibility.

Second, the common-law doctrine of incompatibility prevents one person from holding two offices if the duties are inconsistent or in conflict. See Attorney General Opinion JM-203 (1984) at 3 (and sources cited therein). To determine whether a position is an "office," we apply the test the Texas Supreme Court adopted in *Aldine Independent School District v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955). Under the test, a public officer is one upon whom the legislature has devolved any sovereign function of the government to be exercised by the officer for the benefit of the public largely independent of the control of others. *Aldine*, 280 S.W.2d at 583 (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740-41 (Tex. Civ. App.--Galveston 1949, writ refd)). An individual who serves in a merely advisory capacity does not exercise sovereign powers independent of the control of others and thus is not an officer. Attorney General Opinion DM-218 (1993) at 4; see Attorney General Opinions DM-149 (1992) at 3-4; DM-49 (1991) at 5. Upon examining the authority and duties the legislature has conferred upon the advisory committee, we conclude that its members serve merely in an advisory capacity; they are not officers.

Furthermore, under state law, a public officer generally serves for a fixed term and may be removed from office only in accordance with law. Attorney General Opinions DM-218 at 4 (citing *Aldine*, 280 S.W.2d at 578); DM-149 at 3 (citing *Aldine*, 280 S.W.2d at 578). As we have indicated above, a member of the advisory committee serves at the pleasure of the governing board that appointed the member. See *supra* at (4). Consequently, this facet of the common-law doctrine of incompatibility does not preclude a member of the GBRA from simultaneously serving as a member of the advisory committee.

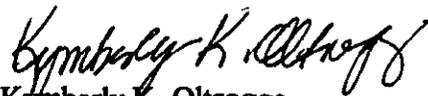
Finally, the common-law doctrine of incompatibility prevents one person from holding an office and a position of public employment if one is subordinate to the other. See Attorney General Opinion JM-203 (1984) at 3 (and sources cited therein). Membership on the advisory committee is neither an office nor a position of public employment.¹ Accordingly, the situation about which you ask does not implicate this facet of the common-law doctrine of incompatibility.

¹Thus, we need not consider whether membership on the GBRA board of directors is an office or employment.

S U M M A R Y

Neither the constitutional prohibition against dual office holding nor the common-law doctrine of incompatibility precludes a member of the Guadalupe-Blanco River Authority Board of Directors from serving simultaneously as a member of the South Central Texas Water Advisory Committee.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee