



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 4, 1994

Honorable Senfronia Thompson
Chair
Committee on Judicial Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-045

Re: Whether an investigator for the Harris County district attorney is eligible to serve as a trustee of the North Forest Independent School District (ID# 26083)

Dear Representative Thompson:

You ask whether an investigator for the Harris County district attorney is eligible to serve as a trustee of the North Forest Independent School District. You inform us that the investigator is certified as a peace officer by the State of Texas. You ask if "there may be a conflict of interest regarding the two positions, (1) pertaining to the reimbursement of funds and (2) whether the investigator, if elected, must resign his position to hold the other." A letter submitted with your request states that the investigator would not be paid for serving as a trustee.

We first consider whether the investigator would run afoul of the Texas Constitution's prohibitions against dual-office holding by serving as both a Harris County district attorney investigator and a trustee. Article XVI, section 40 of the Texas Constitution generally provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." First, we consider whether the investigator holds a "civil office" under this provision. You have not provided us with any details about the investigator's duties and responsibilities. By law, however, a district attorney investigator has the following authority:

(a) An investigator appointed by a prosecuting attorney has the same authority as the sheriff of the county to make arrests anywhere in the county and to serve anywhere in the state warrants, capiases, subpoenas in criminal cases, and all other processes in criminal cases issued by a district court, county court, or justice court of this state.

(b) *An investigator is under the exclusive authority and direction of the prosecuting attorney and is not under the authority and direction of the sheriff. The prosecuting attorney is responsible for the official acts of his investigators and has the same remedies*

against his investigators and their sureties as any person has against a prosecuting attorney and his sureties.

(c) An investigator may not draw a fee of any character for performing a duty described in this section.

See Gov't Code § 41.109 (emphasis added). It is clear from the language italicized above that such investigators work under the supervision and control of the district attorney, despite their extensive authority to make arrests and serve warrants. Therefore, we conclude that the investigator is merely an employee of the district attorney. Furthermore, we note that the fact that the investigator is a licensed peace officer does not mean he or she holds a "civil office." *See Attorney General Opinion DM-212 (1993)* (police officers and sheriff's deputies do not hold "civil offices" as a matter of law). Because an investigator does not hold an *office*, but is rather an employee of the district attorney, we conclude that the language in article XVI, section 40 of the Texas Constitution which provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument" is inapplicable to the situation you describe. *See generally Attorney General Opinion JM-1266 (1990)* at 2.¹ In addition, the common-law doctrine of incompatibility of office is inapplicable for the same reason. *Attorney General Opinion JM-1266* at 4 (the doctrine of incompatibility of office has never been applied where one position is an office and the other is mere employment).

Article XVI, section 40 of the Texas Constitution also provides in pertinent part:

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.

This language bars an individual who receives part of his or her compensation from the State from serving as a member of the governing body of a school district if he or she receives a salary for doing so. We note that the Harris County district attorney receives funds appropriated by the legislature, including funds for the salaries of investigators. *See Gov't Code §§ 41.201 - .204, 43.180; 1993 General Appropriations Act, Acts 1993, 73d Leg., ch. 1051, art. IV-25-26, items 9 and 11.* Thus, the investigator receives at least part of his or her compensation from the State.

¹Furthermore, the position of independent school district trustee is unpaid, *see Educ. Code § 23.19(e)*, and is therefore not a civil office of *emolument*.

In Attorney General Opinion JM-1266, this office considered whether this language would preclude employees of school districts and other special districts, all of whom received some compensation from state funds, from serving as city council members, thereby receiving a monthly expense allowance from the city in the amount of \$40.00. This office concluded that this provision permitted such individuals to serve as city council members "only if they receive no salary for such service." Attorney General Opinion JM-1266 at 3. This office then considered whether the \$40.00 expense allowance constituted a salary:

"[S]alary" does not include legitimate reimbursement of expenses. . . . In the examples you cite, we do not believe that the [state employees] may receive compensation for serving as . . . city council member merely by denominating a \$40 . . . monthly payment an "expense allowance" rather than a "salary." At the very least, the official should submit an affidavit that the actual expenses he incurs each month equal or exceed the allowance payment. The better practice is for the official to itemize his expenses each month in order to demonstrate that the allowance does not exceed expenses incurred.

Id. (citations omitted).

Thus, article XVI, section 40 of the Texas Constitution does not preclude the investigator from serving as a trustee unless he or she receives a salary for doing so. Section 23.19(e) of the Education Code provides that trustees of independent school districts serve without compensation. In addition, we caution that to conform with the constitution, the amount the investigator receives as *expenses* for serving as a trustee may not exceed the actual expenses he or she incurs. See Attorney General Opinion JM-1266 at 3.² For the reasons stated above, and with the foregoing caveats, we conclude that an investigator who is elected trustee of an independent school district does not automatically forfeit his or her position and may continue in both positions.

²We note that article XVI, section 40 of the Texas Constitution does not affect the compensation the investigator receives from the state. Attorney General Opinion MW-230 (1980) at 2.

S U M M A R Y

An investigator for the Harris County district attorney is eligible to serve as a trustee of the North Forest Independent School District provided that he or she receives no compensation for doing so.

Yours very truly,

A handwritten signature in black ink that reads "Mary R. Crouter". The signature is written in a cursive style with a large initial "M".

Mary R. Crouter
Assistant Attorney General
Opinion Committee