

MICHAEL A. STAFFORD
First Assistant County Attorney



1001 Preston, Suite 634
Houston, TX 77002-189
(713) 755-5101
Fax (713) 755-8924

MICHAEL P. FLEMING

County Attorney
Harris County, Texas

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Opinion Committee

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Dan Morales
Attorney General of Texas
Supreme Court Building
Post Office Box 12548
Austin, Texas 78711-2548

RQ-1103

FILE # MIL-40109-98
I.D.# 40109

Attention: Opinion Committee

Re: Dual office holding under Texas law

Ladies and Gentlemen:

We request advice regarding the following questions:

1. May one person simultaneously serve as a director of the Gulf Coast Waste Disposal Authority and a municipal court judge for the City of Houston?
2. Whether chapter 171 of the Local Government Code applies to the Gulf Coast Waste Disposal Authority?

Our memorandum brief is attached. Thank you for your consideration of this request.

Sincerely,

MICHAEL P. FLEMING
County Attorney

By NICHOLAS J. LYKOS
Assistant County Attorney

Enclosure

MEMORANDUM BRIEF

I. QUESTIONS PRESENTED

1. May one person simultaneously serve as a director of the Gulf Coast Waste Disposal Authority (the "Authority") and a municipal court judge for the City of Houston?
2. Whether chapter 171 of the Local Government Code applies to the Gulf Coast Waste Disposal Authority?

II. DISCUSSION

There are three general limitations on holding dual offices under Texas law: (1) the limitation on holding more than one **civil office of emolument** imposed by Tex. Const. art. XVI, § 40; (2) the **separation of powers** requirement of Tex. Const. art. II, § 1; and (3) the **common law doctrine of incompatibility**, prohibiting one person from simultaneously holding two incompatible offices. One person may simultaneously hold two offices only if none of the three limitations apply.

With limited exceptions, Tex. Const. art. XVI, § 40 prohibits one person from simultaneously holding or exercising *more than one civil office of emolument*. A *civil office* has been described as *something more than a public employment, and something less than a public office* [Tex. Att'y Gen. LA-63 (1973)]. *Emolument* has been defined as *profit or pecuniary gain from office, employment, or labor; compensation; fees or salary*.

In 1969 the 61st Texas Legislature created, pursuant to Tex. Const. art. XVI, § 59, a conservation and reclamation district, the Gulf Coast Waste Disposal Authority, a governmental agency and body politic and corporate of the State of Texas. The Authority was created to establish an instrumentality for developing and effectuating for Chambers, Galveston and Harris Counties a regional water quality management program, including provision of waste disposal systems and regulation of disposal of wastes. The management and control of the affairs of the Authority is vested in the board of directors. Various government powers are conferred upon the directors of the Authority, including eminent domain, use of public easements, authority to enter into cooperative agreements with other public entities and the issuance of bonds and other obligations secured by ad valorem taxes or revenues accruing to the Authority. In *Aldine Independent School District v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955), the court held that the determining factor which distinguishes a public officer from an employee is "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."

In an almost identical fact situation, where an individual simultaneously occupies the positions of assistant municipal judge and director of a river authority, the Attorney General opined in Tex. Att'y Gen. LO-97-027 that "[i]t is clear that such a position constitutes a *civil office of emolument*. Likewise, a compensated municipal judge, whose position is nonelected, holds a *civil*

office of emolument.” In this case, the board member was compensated at the rate of \$100.00 per diem for each day of service. The opinion concludes as follows: “We hold, therefore, that a member of the board of directors of the Brazos River Authority may not simultaneously serve as a municipal judge unless a court finds that the holding of the second office is ‘of benefit to the State of Texas.’”

A director of the Authority is entitled to receive an allowance of \$100 per day as well as reimbursement for actual and necessary expenses incurred for each day spent attending meetings of the board or for each day spent attending to the business of the Authority as authorized by a resolution of the board. In summary, directors of the Authority exercise sovereign functions of the government, largely independent of the control of others, and receive compensation for their service. Therefore, following the reasoning in Tex. Att’y Gen. LO-97-027, it appears that a director of the Authority occupies a civil office of emolument.

The general rule is that where the holder of one office accepts and qualifies for a second, he automatically relinquishes the first office. *Centeno v. Inselmann*, 519 S.W.2d 889 (Tex.Civ.App.--San Antonio 1975, no writ). In Op. Tex. Att’y Gen. No. JM-333 (1985), the Attorney General concluded that a municipal judge holds a civil office of emolument and is prohibited from continuing to serve when he qualifies for the position of county auditor.

As defined in Tex. Loc. Gov’t Code Ann. §171.001, *local public official* means “a member of the governing body or another officer, whether elected, appointed, paid or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local government entity who exercises responsibilities beyond those that are advisory in nature.” Certainly, the members of the Authority are members of the governing body of a district. In Op. Tex. Att’y Gen. No. DM-309 (1994), the Attorney General concluded that § 171.004(a)(1), which requires a local public official to abstain from voting and file an affidavit if he or she has a substantial interest in a business entity and the action on the matter will have a special economic effect on the business entity, “extends to an action of a zoning commission that will have a special economic effect on a business entity that represents an entity or person with an interest in a matter before the commission.”

Business entity, as defined in §171.001(2) means “a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.”

A *substantial interest in a business entity*, as the term is defined in § 171.002, includes “the person [who] owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$5,000 or more of the fair market value of the business entity. . .”

As is the case on most boards, the members of the Authority’s board include professional engineers, architects, accountants and lawyers. Those members who are partners and shareholders of professional corporations, associations or limited liability partnerships have a *substantial interest in a business entity*--their respective firms. While they are not disqualified per se from serving as

members of the board of directors, they may have a conflict of interest requiring recusal and disclosure under chapter 171, in those limited situations where their respective firms are employed as consultants by municipalities, counties and other governmental or quasi-governmental entities or retained by private sector corporations and the firm's client may receive an economic benefit from the board's action.