



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 7, 2019

The Honorable Marco A. Montemayor
Webb County Attorney
1110 Washington Street, Suite 301
Laredo, Texas 78040

Opinion No. KP-0228

Re: Whether a member of an independent school district board of trustees may simultaneously serve as the county judge (RQ-0230-KP)

Dear Mr. Montemayor:

You ask whether a person serving on the board of trustees of an independent school district may simultaneously serve as the county judge.¹ You tell us that in March 2018, a trustee of the Jim Hogg County Independent School District was elected county judge for Jim Hogg County. *See* Request Letter at 1. Article XVI, section 40 of the Texas Constitution and the common-law doctrine of incompatibility restrict dual office holding, and we address each in turn.

Article XVI, section 40 of the Texas Constitution prohibits a person from simultaneously holding more than one “office of emolument.” TEX. CONST. art. XVI, § 40(a). This provision applies if both positions are offices entitled to an emolument, which is a “pecuniary profit, gain, or advantage.” *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) (orig. proceeding). A trustee serving on the school board of an independent school district receives no compensation and therefore does not occupy an office of emolument. TEX. EDUC. CODE § 11.061(d). Accordingly, article XVI, section 40(a) does not bar an individual from simultaneously holding the two offices about which you ask.

We next consider the common-law doctrine of incompatibility. This doctrine comprises three components: self-appointment, self-employment, and conflicting loyalties. *See* Tex. Att’y Gen. Op. No. KP-0125 (2017) at 1. You tell us that neither office employs nor appoints the other, and thus, the first two components do not apply. *See* Request Letter at 2; *see also* Tex. Att’y Gen. Op. No. KP-0114 (2016) at 1. We examine the conflicting-loyalties component under the analysis first described in *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152 (Tex. Comm’n App. 1927, judgm’t adopted). In its decision, the court stated

there are in the city council or board of aldermen various directory or supervisory powers exercisable in respect to school property

¹*See* Letter from Honorable Marco A. Montemayor, Webb Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (May 4, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

located within the city or town and in respect to the duties of school trustee performable within its limits—e.g., there might well arise a conflict of discretion or duty in respect to health, quarantine, sanitary, and fire prevention regulations. If the same person could be a school trustee and a member of the city council or board of aldermen at the same time, school policies, in many important respects, would be subject to direction of the council or aldermen instead of to that of the trustees.

Id. at 153 (holding the offices of school trustee and city alderman as incompatible (citations omitted)). When determining the incompatibility of two offices, the “crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.” *Pirtle*, 887 S.W.2d at 930. For the conflicting-loyalties analysis to apply, each position considered must be an “office.” *See* Tex. Att’y Gen. Op. No. KP-0125 (2017), at 2.

In this context, an officer is one upon whom “any sovereign function of the government” is conferred “to be exercised by him for the benefit of the public largely independent of the control of others.” *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955). The Education Code vests in trustees “the exclusive power and duty to govern and oversee the management of the public schools of the district.” TEX. EDUC. CODE § 11.151(b). Thus, a school board trustee holds an office under *Aldine*. *See* Tex. Att’y Gen. Op. No. KP-0114 (2016) at 2. The county judge is an elected position, and therefore an office. *See* TEX. CONST. art V, § 15 (providing that a county judge shall be elected in each county); Tex. Att’y Gen. Op. No. JM-1266 (1990) at 2 (stating “[e]lected officials are clearly officers” under the *Aldine* test).

Generally, where the geographical boundaries of two entities at issue overlap, “the potential for conflicting loyalties increases because the duties of the two offices are more likely to conflict.” Tex. Att’y Gen. Op. No. KP-0023 (2015) at 2. In particular, this office has consistently concluded that when “two districts with overlapping geographical jurisdictions each have the power of taxation, . . . the potential for conflict is insurmountable.” *Id.*; *see also* Tex. Att’y Gen. Op. Nos. KP-0125 (2017) at 2, GA-0786 (2010) at 3–4, GA-0032 (2003) at 5, JM-1266 (1990) at 4. Here, the geographic boundary of Jim Hogg County Independent School District as compared to that of Jim Hogg County reveals a substantial, if not identical, overlap.² In addition, both a commissioners court and a school district board have taxing authority within their respective boundaries. *See* TEX. CONST. art. VIII, § 9(b) (vesting the commissioners court with authority to levy the annual tax rate for the county); *see also* TEX. EDUC. CODE § 11.1511(b)(8) (authorizing school district board to adopt a tax rate each fiscal year). Because each entity about which you ask has taxing authority in territory that overlaps with the other, conflicting-loyalties

²*Compare* TEX. STATE HISTORICAL ASS’N., TEX. ALMANAC 338 (69th ed. 2018), <https://texasalmanac.com/sites/default/files/images/maps/JimHogg.pdf> (illustrating Jim Hogg County boundary lines), *with* Jim Hogg County ISD Boundary Map, MAPTECHNICA, <https://www.maptechnica.com/school-district-map/TX/Jim+Hogg+County+Independent+School+District/unsd/4824750> (providing a map of school district boundary lines).

incompatibility prohibits simultaneous service on the governing body of both entities. Thus, an individual may not serve as the Jim Hogg County Judge while simultaneously serving as a member of the board of trustees of the Jim Hogg County Independent School District.³

³You tell us the individual was a member of the Jim Hogg County Independent School District when he was elected county judge for Jim Hogg County for a term beginning in January 2019. When an officer accepts an incompatible office, “a vacancy in the first office occurs on the date the person qualifies for the other office.” TEX. ELEC. CODE § 201.025. A person elected to a regular term of office “shall qualify and assume the duties of office on, or soon as possible after, January 1 of the year following the person’s election.” TEX. GOV’T CODE § 601.003(b).

S U M M A R Y

A person may not serve as Jim Hogg County Judge while simultaneously serving as a member of the board of trustees of the Jim Hogg County Independent School District.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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