



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 3, 2021

The Honorable Susan Deski
Burleson County Attorney
100 West Buck Street, Suite 402
Caldwell, Texas 77836

Opinion No. KP-0369

Re: Whether simultaneous service as county sheriff and municipal fire marshal violates article XVI, section 40 of the Texas Constitution or the common-law doctrine of incompatibility (RQ-0386-KP)

Dear Ms. Deski:

On behalf of the Burleson County Sheriff, you ask whether article XVI, section 40 of the Texas Constitution or the common-law doctrine of incompatibility prohibits the Burleson County Sheriff from assuming and simultaneously holding the position of fire marshal for the City of Caldwell (“Caldwell”).¹

Constitutional Prohibition on Dual Office Holding

Article XVI, section 40(a) of the Texas Constitution provides that “[n]o person shall hold or exercise at the same time, more than one civil office of emolument[.]” TEX. CONST. art. XVI, § 40(a). An emolument 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). This dual-officeholding prohibition applies if both positions are civil offices entitled to an emolument. *Id.*

A sheriff is a constitutional officer who receives a salary. *See* TEX. CONST. arts. V, § 23 (establishing the office of sheriff), XVI, § 61(a), (c) (requiring the compensation of sheriffs on a salary basis). Accordingly, as this office previously concluded, a sheriff holds an office of emolument under article XVI, section 40. *See* Tex. Att’y Gen. Op. Nos. GA-0328 (2005) at 1, GA-0393 (2006) at 4 n.5. You tell us the Caldwell fire marshal receives a salary. Request Letter at 2. Thus, the issue for purposes of the constitutional prohibition on dual officeholding is whether the position of municipal fire marshal constitutes an “office.”

¹*See* Letter from Honorable Susan Deski, Burleson Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Nov. 13, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0386KP.pdf> (“Request Letter”).

Under article XVI, section 40, an “officer,” as distinguished from a public employee, is an individual 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) (quoting *Dunbar v. Brazoria Cnty.*, 224 S.W.2d 738, 740–41 (Tex. App.—Galveston 1949, writ ref’d), *disapproved on other grounds*, *Nat’l Sur. Corp. v. Friendswood Indep. Sch. Dist.*, 433 S.W.2d 690, 693–94 (Tex. 1968)). As one court explained,

a public ‘officer’ is authorized by law to independently exercise functions of either an executive, legislative, or judicial character, and the exercise of this power by the officer is subject to revision and correction only according to the standing laws of this state. A public employee, in contrast, is a person in public service whose duties are generally routine, subordinate, advisory, and as directed.

Pirtle, 887 S.W.2d at 931. Thus, we must consider various aspects of a municipal fire marshal’s duties to determine their nature and the degree to which they are exercised in an independent manner.

The position of municipal fire marshal is a municipal creation.² See Tex. Att’y Gen. Op. No. H-1056 (1977) at 2 (affirming a general-law city’s authority to create a municipal fire marshal); see also CALDWELL, TEX., CODE OF ORDINANCES ch. 1, art. 1.02, § 1.02.001 (2011)³ (establishing Caldwell as a Type A general-law city). As such, we turn to article 5.02 of Caldwell’s Code of Ordinances, which governs the fire marshal.⁴ See *id.* ch. 5, art. 5.02, §§ 5.02.001–.012.

The Caldwell fire marshal’s main duty is to investigate the cause, origin, and circumstances of any fire in the city that damages or destroys property. *Id.* § 5.02.002. In the exercise of that duty, the fire marshal may summon and swear in witnesses and compel the production of evidence on “any matter” requiring inquiry and investigation. *Id.* § 5.02.004. The fire marshal conducts fire investigations, takes testimony, and, if he or she believes the evidence points to arson or related criminal conduct, “shall cause such person to be lawfully arrested and charged.” *Id.* § 5.02.003. The fire marshal also conducts regular fire inspections, formulates and conducts plan reviews of all nonresidential construction, and complies with the rules and regulations of the Texas Commission on Fire Protection. *Id.* § 5.02.010(a)–(c).

Although these duties may possess some attributes of an executive, legislative, or judicial nature, they are not without limits. Notably, while article 5.02 of Caldwell’s Code of Ordinances

²State law does not create the position of municipal fire marshal, although several statutes acknowledge the existence of the position. See, e.g., TEX. GOV’T CODE §§ 417.0075(g) (recognizing the authority of a “municipal fire marshal” in the investigation of a firefighter fatality), 417.009(a) (authorizing the state fire marshal to delegate certain investigatory duties to “the fire marshal of the city”); TEX. HEALTH & SAFETY CODE § 791.006(b)(4) (providing for the inspection of certain fire escapes by “a municipal fire marshal”).

³Available at <https://www.caldwelltx.gov/departments/code-enforcement/>.

⁴Section 5.02.001 of Caldwell’s Code of Ordinances provides that “[t]he office of fire marshal is hereby created.” CALDWELL, TEX., CODE OF ORDINANCES ch. 5, art. 5.02, § 5.02.001 (2011) (emphasis added). But as previously noted, the *Aldine* test focuses on substance rather than form.

specifies that the fire marshal “shall be independent of other city departments,” the fire marshal reports to someone—namely, the city administrator. *Id.* § 5.02.001 (also providing that the mayor appoints the fire marshal with consent of the city council and that the city council may remove the fire marshal for failure to timely perform his or her duties). Further, certain actions of the fire marshal are subject to specific oversight. *See, e.g., id.* §§ 5.02.010(d) (providing that the fire marshal’s compliance with the rules and regulations of the state commission on fire protection shall be “under the supervision of the city council, mayor, and city administrator”); and 5.02.008 (authorizing the fire marshal to order the removal of hazardous heating elements or the remedy of dangerous fire conditions in a building, but subjecting the order to appeal and ultimate revocation by the mayor). Given these provisions, a court would likely conclude that the Caldwell fire marshal does not exercise his or her functions “largely independent of the control of others,” and therefore the position does not constitute an “office” under article XVI, section 40 of the Constitution. As such, the Constitution would not bar the Burleson County Sheriff from simultaneously serving as the fire marshal for Caldwell.

Common-Law Doctrine of Incompatibility

In addition to the constitutional analysis, we turn further to the common-law doctrine of incompatibility. The common-law doctrine of incompatibility prohibits certain conflicts that may arise from holding two positions that are public offices. *See* Tex. Att’y Gen. Op. No. KP-0054 (2015) at 1. Relevant here, conflicting loyalties incompatibility prohibits a person “from simultaneously holding two positions that would prevent the person from exercising independent and disinterested judgment in either or both positions.” Tex. Att’y Gen. Op. No. GA-0169 (2004) at 2; *see also Thomas v. Abernathy Cnty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm’n App. 1927, judgm’t adopted) (holding the positions of school trustee and municipal alderman as incompatible). But, like the constitutional provision, the common-law doctrine “applies only when both positions are public offices.” Tex. Att’y Gen. Op. No. KP-0172 (2017) at 2. Given that the position of fire marshal of Caldwell is likely not an “office,” a court would likely find that the common-law doctrine of incompatibility would not bar the Burleson County Sheriff from simultaneously serving as the fire marshal for Caldwell.

S U M M A R Y

A court would likely conclude that neither the dual-officeholding prohibition of article XVI, section 40 of the Texas Constitution nor the common-law doctrine of incompatibility would prohibit the Burleson County Sheriff from simultaneously serving as the fire marshal for the City of Caldwell.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive style with a large, prominent "K" and "P".

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

BECKY P. CASARES
Assistant Attorney General, Opinion Committee