



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 6, 2022

The Honorable Jenny P. Dorsey  
Nueces County Attorney  
901 Leopard Street, Room 207  
Corpus Christi, Texas 78401-3689

**Opinion No. KP-0407**

Re: Whether the doctrine of incompatibility or conflict-of-interest laws prevent simultaneous service as a county commissioner and general manager of a water authority (RQ-0433-KP)

Dear Ms. Dorsey:

You ask several questions about a county commissioner simultaneously serving as the general manager of the South Texas Water Authority (“Authority”).<sup>1</sup> You explain that the Authority is a conservation and reclamation district governed by its enabling legislation and chapter 49 of the Water Code. *See* Request Letter at 1–2. You tell us the commissioners courts of Kleberg and Nueces counties appoint directors of the Authority. *See id.* at 2. You inform us that the Authority executed a management service agreement with a corporation. *See id.* at 3. You further explain that a county commissioner of Nueces County is the president of the corporation and, under the management service agreement, serves as the general manager of the Authority.<sup>2</sup> *See id.* at 3–4, 6–7. Your questions generally relate to the doctrine of incompatibility and conflicts of interest, and we address related questions together.

**Incompatibility Doctrine**

Your first set of questions concern whether the common-law doctrine of incompatibility prohibits a person from simultaneously serving as a county commissioner of Nueces County and

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<sup>1</sup>*See* Letter from Honorable Jenny P. Dorsey, Nueces Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 1, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0433KP.pdf> (“Request Letter”).

<sup>2</sup>A brief submitted in response to your request asserts the county commissioner is the president of the corporation, but not the general manager of the Authority. *See* Brief from John D. Bell, Wood, Boykin & Wolter, P.C., to Op. Comm. at 1 (Nov. 3, 2021) (on file with the Op. Comm.). This office does not resolve disputed issues of fact. *See, e.g.*, Tex. Att’y Gen. Op. No. KP-0205 (2018) at 1. Therefore, this opinion is limited to the facts as you present them.

a general manager of the Authority.<sup>3</sup> *See id.* at 1, 4–7. The incompatibility doctrine prohibits dual public service in cases of self-appointment, self-employment, and conflicting loyalties. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). Self-appointment incompatibility precludes an officer from being appointed to a position over which the officer has appointment authority. *See id.* Self-employment incompatibility prohibits one person from holding an office and an employment that the office supervises. *See id.*; Tex. Att’y Gen. Op. No. KP-0265 (2019) at 2. Conflicting-loyalties incompatibility prohibits a person “from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions.” Tex. Att’y Gen. Op. No. KP-0265 (2019) at 2; *see also Thomas v. Abernathy Cnty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm’n App. 1927, judgment adopted) (holding incompatible the positions of school trustee and municipal alderman).

Self-appointment and self-employment incompatibility do not prevent the dual service at issue. The Authority’s board, not the county commissioner or commissioners court, appoints or employs the Authority’s general manager. *See* TEX. SPEC. DIST. CODE § 11006.151(13) (providing that the Authority has power to “appoint and determine the duties, tenure, qualifications, and compensation of officers, employees, agents, professional advisors, and counselors . . . considered necessary or advisable by the board”); TEX. WATER CODE § 49.056(a) (providing a district board may employ or contract with a person to serve as general manager); Request Letter at 3–4 (describing the process used to enter the management service agreement and the terms of the agreement).

Conflicting-loyalties incompatibility applies only when both positions are public offices. *See* Tex. Att’y Gen. Op. No. KP-0369 (2021) at 3. This office previously concluded the general manager of a water district does not occupy a public office. *See* Tex. Att’y Gen. Op. No. GA-0849 (2011) at 2; *cf. also, City of Groves v. Ponder*, 303 S.W.2d 485, 488 (Tex. App.—Beaumont 1957, writ ref’d n.r.e.) (concluding the general manager of a water control and improvement district was not a public officer). Accordingly, the conflicting-loyalties incompatibility doctrine does not prohibit a county commissioner from also serving as the general manager of the Authority.<sup>4</sup> In sum, a court would likely conclude the common-law doctrine of incompatibility does not prohibit a person from simultaneously serving as a county commissioner of Nueces County and a general manager of the Authority.

### **Conflict of Interest**

Your next set of questions concern whether the management service agreement between the Authority and the corporation constitutes a conflict of interest under section 81.002 of the Local

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<sup>3</sup>You also mention the state constitutional limitation on dual-officeholding. *See* Request Letter at 4. By its express terms, the constitutional limitation is inapplicable. *See* TEX. CONST. art. XVI, § 40(a) (excluding a county commissioner from the prohibition against an individual simultaneously holding “more than one civil office of emolument”).

<sup>4</sup>Because we conclude no aspect of the incompatibility doctrine applies, we need not address your question regarding automatic resignation. *See* Request Letter at 1, 6–7.

Government Code, chapter 171 of the Local Government Code, or common law.<sup>5</sup> See Request Letter at 1, 7. Section 81.002(a) requires a county commissioner to take an “official oath and swear in writing that the person will not be interested, directly or indirectly, in a contract with or claim against the county.” TEX. LOC. GOV’T CODE § 81.002(a). Without addressing the interplay between this section and chapter 171, by its terms, section 81.002 is inapplicable because the management service agreement between the Authority and the corporation is not a “contract with or claim against the county.” *Id.*

As relevant to your questions, chapter 171 prohibits a “local public official” from participating in a vote or decision involving a “business entity” in which the official has a substantial interest:

- (a) If a local public official has a substantial interest in a business entity . . . , the official shall file, before a vote or decision on any matter involving the business entity . . . , an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:
  - (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; . . . .

*Id.* § 171.004(a)(1). This office has determined the prohibition “‘applies only to a local public official who may participate in a vote or decision of the governmental entity that will result in a special economic effect’ on the official’s business.” See Tex. Att’y Gen. Op. No. KP-0244 (2019) at 2.

While the individual at issue is a local public official,<sup>6</sup> neither state statute nor the facts you describe provide that the individual, as county commissioner or general manager, participates in the vote or decision of the Authority to approve the management service agreement—that is the responsibility of the Authority’s board. See TEX. SPEC. DIST. CODE § 11006.151 (providing that the Authority has power to “appoint and determine the duties, tenure, qualifications, and compensation of officers, employees, agents, professional advisors, and counselors . . . considered necessary or advisable by the board”); TEX. WATER CODE § 49.056(a) (providing a district board may employ or contract with a person to serve as general manager); Request Letter at 3, nn.22 & 26 (explaining the Authority’s board ratified and confirmed the board president’s approval and execution of the management service agreement with the corporation). Thus, a court would likely

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<sup>5</sup>Our analysis and conclusions apply only to the management service agreement, not other agreements the Authority may enter.

<sup>6</sup>A county commissioner is a local public official subject to chapter 171. See TEX. LOC. GOV’T CODE § 171.001 (defining “local public official” to include a member of the governing body of a county). The Thirteenth Court of Appeals concluded that an individual who performed the duties of general manager of a drainage district under a management consulting agreement was a local public official subject to chapter 171. See *Integ Corp. v. Hidalgo Cnty. Drainage Dist. No. 1*, No. 13-18-00123-CV, 2019 WL 6205474 at \*8–9 (Tex. App.—Corpus Christi Nov. 21, 2019, no pet.) (mem. op.).

conclude that the Authority's vote to approve the management service agreement with the corporation does not constitute a vote or decision requiring the individual, as county commissioner or general manager, to comply with the conflict-of-interest procedures under subsection 171.004(a). *Cf.* Tex. Att'y Gen. Op. Nos. KP-0376 (2021) at 5 (concluding that because a county attorney did not vote or decide whether to award a contract, the county attorney did not have to comply with the conflict-of-interest procedures under subsection 171.004), KP-0244 (2019) at 4 (concluding that because a city attorney and a city administrator did not possess authority to vote or make a decision on a proposed agreement, they were not subject to section 171.004), DM-0244 (1993) at 3 (concluding there is no conflict of interest where a person serves simultaneously as a county commissioner and manager of a corporation with which a community center created by that county has entered into a contract).<sup>7</sup>

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<sup>7</sup>Any common-law conflicts-of-interest principles that might apply to the vote to approve the management service agreement are preempted by chapter 171. *See* TEX. LOC. GOV'T CODE § 171.007(a) ("This chapter preempts the common law of conflict of interests as applied to local public officials."); *see also* TEX. WATER CODE § 49.214 ("The provisions of Chapter 171, Local Government Code, shall apply to the award of district contracts.").

S U M M A R Y

A court would likely conclude that the common-law incompatibility doctrine does not bar a Nueces County commissioner from simultaneously serving as the general manager of the South Texas Water Authority.

A court would likely conclude that the management service agreement between the South Texas Water Authority and a corporation for which a Nueces County commissioner serves as president does not constitute a conflict of interest under section 81.002 or chapter 171 of the Local Government Code.

Very truly yours,

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

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

CHRISTY DRAKE-ADAMS  
Assistant Attorney General, Opinion Committee