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ATTORNEY GENERAL OF TEXAS

October 23, 2023

The Honorable Matthew E. Minick
Hardin County Attorney
Post Office Box 516
Kountze, Texas 77625

Opinion No. KP-0447

Re: Whether an elected constable may serve as a student resource officer, employed as an independent contractor, with a school district located in the constable's precinct (RQ-0506-KP)

Dear Mr. Minick:

You ask several questions about whether an elected constable may serve as a school resource officer with a school district in the constable's precinct.¹ You tell us that "[a] school district . . . has requested to hire the elected constable as a [school] resource officer" on one of the school district's campuses while also employing deputy constables to serve as school resource officers on other campuses.² Request Letter at 1. You do not explain the nature of your underlying concern, nor do you supply any additional information regarding the factual scenario. *See id.* Within this limited context, you first ask whether an elected constable may be retained "as an independent contractor" to serve as a school resource officer in a school district within the constable's precinct. *Id.*

A court would likely conclude that a school resource officer may not be retained as an independent contractor.

Education Code section 37.081 addresses the use of security personnel, school resource officers, and school district peace officers by an independent school district. *See* TEX. EDUC. CODE § 37.081. For the provision of school resource officers, subsection 37.081(a)(2) authorizes the board of trustees of any school district to "enter into a memorandum of understanding with a local

¹*See* Letter from Honorable Matthew E. Minick, Hardin Cnty. Att'y, to Off. of the Tex. Att'y Gen., Op. Comm. at 1 (Apr. 14, 2023), <https://www.texasattorneygeneral.gov/sites/default/files/request-files/request/2023/RQ0506KP.pdf> ("Request Letter"). Although you ask about a "student" resource officer, we assume you to ask about a *school* resource officer, defined by statute as a "peace officer who is assigned by the officer's employing political subdivision to provide a police presence at a public school, safety or drug education to students of a public school, or other similar services." TEX. OCC. CODE § 1701.601.

²We assume for purposes of your questions that the constable and the deputy constables at issue are from the same precinct.

law enforcement agency or a county or municipality that is the employing political subdivision of commissioned peace officers” *Id.* § 37.081(a)(2). Such a memorandum of understanding must “be in the form of an interlocal contract under Chapter 791, Government Code[.]” *Id.* § 37.081(a-2)(1); *see also generally* TEX. GOV’T CODE §§ 791.001–.037 (Interlocal Cooperation Act) (authorizing local governments to contract with each other to perform governmental functions and services and prescribing the requirements for such a contract). State law defines a school resource officer as a “peace officer who is assigned by the officer’s employing political subdivision” to provide certain services at a public school. TEX. OCC. CODE § 1701.601. Thus, the school district may retain the services of a school resource officer only by entering into an interlocal contract with the local law enforcement agency or county that employs the peace officer, and not directly with the peace officer that will serve as a school resource officer.

Education Code subsection 37.081(a)(2) and Occupations Code section 1701.601 both refer to the school resource officer’s “employing political subdivision.” TEX. EDUC. CODE § 37.081(a)(2); TEX. OCC. CODE § 1701.601. In contrast, Education Code subsection 37.081(a)(1) authorizes a school district to “employ *or contract with* security personnel[.]” TEX. EDUC. CODE § 37.081(a)(1) (emphasis added). This distinction suggests the Legislature is aware of the difference between an employment and an independent contractor arrangement but has chosen, with respect to school resource officers, to authorize services only through an officer’s employment with his employing political subdivision. Thus, a court would likely conclude that a school resource officer may not be retained by a school district as an independent contractor.³

The dual-officeholding prohibition of Texas Constitution article XVI, subsection 40(a) does not bar a constable from acting as a school resource officer under a memorandum of understanding that complies with Education Code section 37.081.

As an alternative, you ask whether the constable may serve as a school resource officer “under a contract to employ the constable and deputy constables with the school district to provide [school] resource officers to a school district[.]” Request Letter at 1. You do not specify the source for your concern but, assuming that such a contract is a memorandum of understanding that complies with the requirements of Education Code section 37.081, we consider whether the potential school resource officer’s status as an elected constable implicates either constitutional or common-law dual-officeholding prohibitions.

Article XVI, subsection 40(a) of the Texas Constitution provides, with certain exceptions not relevant here, that “[n]o person shall hold or exercise at the same time, more than one civil office of emolument[.]”⁴ TEX. CONST. art. XVI, § 40(a). The prohibition applies only if both positions are offices of emolument. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim.

³As your second question is premised on an affirmative answer to this question, we decline to address it. *See* Request Letter at 1 (asking about an elected constable serving as an independent contractor under a proposed scenario). Our conclusion is limited to retaining the services of a school resource officer pursuant to Education Code subsection 37.081(a)(2) and does not affect the ability of school districts and charter schools to secure the services of security personnel pursuant to subsections 37.081(a)(1), (3), or to commission their own peace officers pursuant to subsection 37.081(a)(4).

⁴*See Tilley v. Rogers*, 405 S.W.2d 220, 224 (Tex. Civ. App.—Beaumont 1966, writ ref’d n r.e.) (recognizing there is no distinction between the terms “civil office” and “public office”).

App. 1994) (orig. proceeding). An emolument is “a pecuniary profit, gain, or advantage.” *Id.* This office has consistently concluded that a constable holds an office of emolument for purposes of article XVI, subsection 40(a). *See, e.g.,* Tex. Att’y Gen. Op. Nos. KP-0122 (2016) at 1, GA-1036 (2014) at 1, GA-0540 (2007) at 2; *see also* TEX. CONST. arts. V, § 18(a) (providing for the office of constable), XVI, § 61(b) (providing for the compensation of constables on a salary basis). Thus, whether article XVI, subsection 40(a) prohibits the dual service at issue depends on whether a school resource officer likewise holds an office of emolument.

Section 791.004 of the Interlocal Cooperation Act (the “Act”) provides that “[a] person acting under an interlocal contract does not, because of that action, hold more than one civil office of emolument or more than one office of honor, trust, or profit.” TEX. GOV’T CODE § 791.004. Because a school resource officers’ services may be retained by a school district only through an interlocal contract under the Act, he or she is necessarily a person acting under an interlocal contract for purposes of section 791.004 and, therefore, does not hold an office of emolument. *See* TEX. EDUC. CODE § 37.081(a-2)(1). Thus, article XVI, subsection 40(a) of the Texas Constitution does not bar a constable from serving as a school resource officer. *See White v. Liberty Eylau Indep. Sch. Dist.*, 920 S.W.2d 809, 812 (Tex. App.—Texarkana 1996, writ denied) (stating that, by enacting section 791.004, the Legislature “quite clearly intended . . . to establish that a person acting in two or more official capacities pursuant to an interlocal contract does not violate article [XVI], section 40 of the constitution”).

The common-law doctrine of incompatibility does not bar a constable from acting as a school resource officer under a memorandum of understanding that complies with Education Code section 37.081.

The common-law doctrine of incompatibility of offices 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). First, self-appointment incompatibility precludes an officer from being appointed to a position over which the officer has appointment authority. *See id.* Second, 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. Third, 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 (quoting Tex. Att’y Gen. Op. No. GA-0169 (2004) at 2). In order for the first and third prongs—self-appointment and conflicting loyalties—to apply, both positions must be “offices.” *Id.* The Texas Supreme Court established a test for determining whether a person occupying a particular position is an officer for common-law incompatibility purposes in *Aldine Independent School District v. Standley*. 280 S.W.2d 578, 583 (Tex. 1955). The determinative inquiry under *Aldine* is whether the position exercises any sovereign function of government for the benefit of the public largely independent of the control of others. *Id.*

This office has previously determined that, as an elected constitutional officer, a constable exercises a sovereign function of government for the benefit of the public and holds his or her position largely independent of the control of others. *See* Tex. Att’y Gen. Op. No. GA-0402 (2006) at 1; TEX. CONST. art. V, § 18(a) (providing that a constable shall be elected from each precinct).

We next consider whether a school resource officer meets the *Aldine* test. A school resource officer's law enforcement duties are determined by the school district board of trustees. TEX. EDUC. CODE § 37.081(d); *see also id.* § 37.081(d)(3) (requiring the duties to be included in "any memorandum of understanding providing for a school resource officer"). Such duties "must include protecting: (1) the safety and welfare of any person in the jurisdiction of the . . . resource officer . . . ; and (2) the property of the school district" but may not include "routine student discipline or school administrative tasks" or other duties that, in the judgement of the school district board of trustees, are "better addressed by other district employees." *Id.* § 37.081(d-1), (d-2)(1), (d-4). In addition, an interlocal cooperation agreement, through which a school resource officer must be retained, authorizes the supervision of performance under the agreement by various methods. *See* TEX. GOV'T CODE § 791.013. Because the school resource officer's jurisdiction and job duties are determined by the school district and his or her performance is potentially subject to supervision, a court would likely conclude that a school resource officer does not act largely independent of the control of others and is likely not an "officer" for purposes of either self-appointment or conflicting-loyalties incompatibility. And because the two positions at issue are likely not both "offices," neither the self-appointment nor the conflicting-loyalties prongs of common-law incompatibility are implicated here.

We turn to the remaining common-law incompatibility prong—self-employment incompatibility. This incompatibility arises when an officer is employed in a position over which the officer has employment authority. *Tex. Att'y Gen. Op. No. KP-0434 (2023)* at 2. The primary consideration of this employment authority for purposes of self-employment incompatibility is the supervision of the subordinate by the officer. *Id.* Here, the concern is whether, as constable, the person would have any supervisory role over the school resource officer position he or she would be simultaneously holding. We briefly compare the duties of an elected constable and the duties of a school resource officer.

A constable's specific statutory powers and duties include serving process and attending justice court. *See generally* TEX. LOC. GOV'T CODE § 86.021. A constable is also a peace officer pursuant to article 2.12(2) of the Code of Criminal Procedure, which authorizes the constable to "preserve the peace . . . [by] all lawful means" and "prevent or suppress crime" according to law. TEX. CODE CRIM. PROC. arts. 2.12(2), 2.13(a), (b)(1). As previously discussed, a school resource officer performs certain law enforcement duties, including protecting the safety and welfare of any person within the school resource officer's jurisdiction and the property of the school district. TEX. EDUC. CODE § 37.081(d-1), (d-2)(1). While nothing in the statute suggests that a constable supervises school resource officers, the school district board is ultimately responsible for assigning the school resource officer's duties in a way that avoids this scenario. Assuming the school district board does so, the self-employment prong of the common-law doctrine of incompatibility does not bar a constable from serving as a school resource officer.

Other considerations may affect the ability of a constable to serve as a school resource officer.

That neither constitutional nor common law dual officeholding prohibitions necessarily bar the contemplated arrangement does not, however, address the practical difficulties of serving in the two positions simultaneously. *See Tex. Att'y Gen. Op. Nos. GA-0569 (2007)* at 2

(acknowledging that “[e]ven though no legal incompatibility exists, conflict may still arise between the duties of the two positions”), GA-0214 (2004) at 4 (noting that despite having no legal bar to the dual service, “individual peace officer[s] may be subject to statutes, rules, ordinances, or policies that limit additional employments”). For example, the constable must perform the statutory duties placed upon him or her as an elected officeholder. *See, e.g.*, TEX. LOC. GOV’T CODE § 86.021 (providing that the constable “shall execute and return as provided by law each process, warrant, and precept that is directed to the constable” and “shall attend each justice court held in the precinct”); *see also* Tex. Att’y Gen. Op. No. JC-0413 (2001) at 1–2 (discussing the mandatory nature of both these duties and noting that a constable who believes he “has insufficient time to fulfill both duties” may apply to the commissioners court for the appointment of a deputy); TEX. LOC. GOV’T CODE §§ 86.011(a) (authorizing the commissioners court to approve the hiring of a deputy constable), 86.012(a) (authorizing the commissioners court to approve the appointment of reserve deputy constables). Depending on the total number of deputy constables and reserve deputy constables in the precinct, an arrangement whereby the constable and some number of deputy constables serve as school resource officers may not leave sufficient resources to ensure that the constable’s statutory duties remain fulfilled.

S U M M A R Y

Education Code section 37.081 authorizes a school district to retain the services of a school resource officer. A court would likely conclude that a school resource officer may not be retained as an independent contractor. Neither Texas Constitution article XVI, subsection 40(a) nor the common-law doctrine of incompatibility prohibit a constable from acting as a school resource officer under a memorandum of understanding to retain the constable that complies with Education Code section 37.081.

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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