



LEGISLATIVE APPOINTMENTS:

CHAIRMAN:
SUNSET ADVISORY COMMISSION

MEMBER:
ENERGY COUNCIL
SOUTHERN STATES ENERGY BOARD
INTERSTATE OIL & GAS COMMISSION
WESTERN STATES WATER COUNCIL

J.E. "BUSTER" BROWN
STATE SENATOR

SENATE COMMITTEES

CHAIRMAN:
NATURAL RESOURCES

VICE CHAIRMAN:
LEGISLATIVE & CONGRESSIONAL
REDISTRICTING

MEMBER:
FINANCE
ADMINISTRATION
NOMINATIONS
VETERANS AFFAIRS &
MILITARY INSTALLATIONS

January 19, 1999

RQ-0015-JC

RECEIVED

JAN 28 1999

The Honorable John Cornyn
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-40636-99 Opinion Committee
I.D. # 40636

Re: Letter Opinion No. 98-124. Whether an individual may simultaneously serve as municipal judge and as director of the Gulf Coast Waste Disposal Authority.

Dear General Cornyn:

This letter is to request that you reconsider Letter Opinion No. 98-124, issued December 22, 1998. Letter Opinion No. 98-124 was issued without notice to the City of Houston or the Gulf Coast Waste Disposal Authority ("Authority"). The apparent subject of Letter Opinion 98-124, Judge John Wildenthal, has served for over 20 years as a Municipal Judge and a Director of the Authority.

Article XVI, §40 of the Texas Constitution prevents any person from holding or exercising "at the same time, more than one civil office of emolument." There is no legal dispute that both of the positions held are constitutional offices, nor is there a factual dispute that both carry compensation, and accordingly, are dual civil offices of emolument. However, the Constitution contains a list of positions that are expressly exempted from the operation of Article XVI, §40, including officers of soil and water conservation districts. TEX. CONST. art. XVI, §40. The City of Houston and the Authority believe this exemption covers Judge Wildenthal. TEX. CONST. art. XVI, §40.

The Texas Constitution authorizes the creation of districts to conserve water and natural resources. TEX. CONST. art. XVI, §59. They carry a wide range of names and may be created by general law under either the Agriculture Code, the Water Code, or by specific statute. As the Attorney General noted in the letter opinion, the Authority is a special act conservation and reclamation district created under authority of Article XVI, §59. Act of May 23, 1969, 61st Leg., R.S. ch.409, 1969 Tex.Gen.Laws 1336 (codified as art. 7621d-2, Tex. Rev. Civ. Stat.--Water Auxiliary Laws.) One Article XVI, §59 district is specifically called a "soil and water conservation district." TEX. AGRIC. CODE ANN. ch. 201. The issue in question is whether a district, like the Authority, having water and/or soil protection duties is included within the Article XVI, §40 exemption or whether the

P.O. BOX 12068
AUSTIN, TEXAS 78711-2068
512/463-0117 • FAX 512/463-0639
TDD 1-800-735-2989

P.O. BOX 888
LAKE JACKSON, TEXAS 77566-0888
409/297-5261 • FAX 409/297-7996

12603 SOUTHWEST FREEWAY
SUITE 621
STAFFORD, TEXAS 77477
281/494-7799 • FAX 281/494-7810

1350 NASA ROAD ONE
SUITE 212
HOUSTON, TEXAS 77058
281/333-0117 • FAX 281/335-9101



exemption applies only to those districts that are specifically called "soil and water conservation districts." In other words, is the exemption generic to Article XVI §59 boards with soil and/or water conservation district authority or does it extend only to those with the right words in their names.

The Attorney General's prior writings on the issue of whether the subject exemption is specific or generic are inconsistent. In 1973, just one year following the adoption of the exemption, the Attorney General advised that river authority directors may be exempt on the apparent basis that river authorities generally have the same classifications of duties under former Title 128 of the Revised Civil Statutes (now the Water Code) as soil and water conservation districts. Op. Tex. Atty Gen. No. LA-31 (1973). Judge Wildenthal assumed both positions in the late 1970s, and relied on the 1973 opinion. The issue was subsequently addressed by the Attorney General in 1990, when he advised that only the directors of soil and water conservation districts created pursuant to Chapter 201 of the Agriculture Code, which is derived from Title 4 of the Revised Civil Statutes, could qualify for the exemption. Op. Tex. Atty Gen. No. LO-90-18 (1990). The 1990 opinion clearly cannot be reconciled with and contains no reference to the 1973 opinion.

It stands to reason that the 1973 opinion, which is essentially contemporaneous with the Constitutional amendment, may be the correct interpretation of the exemption in question. Constitutional restrictions on office holding are not favored. "Any constitutional or statutory provision which restricts the right to hold public office should be strictly construed against ineligibility." *Willis v. Potts* 377 S.W.2d 622, 623 (Tex.1964). Therefore any reasonable doubt regarding the construction of the soil and water district exemption should be resolved in Judge Wildenthal's favor. The Authority generally has the powers "conferred by general law upon any conservation and reclamation district created pursuant to Article XVI, §59, of the Texas Constitution." Act of May 23, 1959, *supra* at 1341. This extends to the powers of a soil and water conservation district created under the Agricultural Code because chapter 201 of that Code is intended to carry out Article XVI, §59. TEX.AGRIC.CODE ANN. §201.001(d) (Vernon Supp. 1999).

Additionally, there is reason to believe a number of river authorities and other such districts have been relying on the original 1973 interpretation.

A second exception to the dual office holding prohibition is provided in Article XVI, §40 that "a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation." Judge Wildenthal's nonelective offices as municipal judge and director of the Authority are each clearly state offices as contemplated by the quoted provision of Art. XVI, §40. Op. Tex. Atty Gen. DM-428 (1996) and Letter Opinion No. 98-124. Two questions are presented: (1) whether the other office "is of benefit to the State of Texas: and (2) is there a "conflict" between the two offices.

Possibly some federal offices may not be of benefit to the State, but the legislature found that creation of the Authority would advance the state's policy of maintaining the quality of the waters in the State. (Act of May 23, 1969, 61st Leg., R.S., ch. 409, 1969 Tex. Gen. Laws 1336). Certainly, the office of director of the Authority is of benefit to the State of Texas, as is the office of municipal judge. As to the holding of those offices by the same person, the facts and circumstances of this case will support the conclusion that Judge Wildenthal's holding of both offices provides a clear benefit to the State of Texas. His unique knowledge, experience and contribution to both offices are unquestionable. In any

event, the Attorney General has opined that the determination of this question requires a factual inquiry, which cannot and will not be made by the Attorney General. Op. Tex. Atty Gen. DM-428.

The question of "conflict" is determined by examination of the three branches of incompatibility: self-employment, self-appointment, and conflicting loyalties. (DM-428). Neither office is responsible for the employment in or appointment to the other office. The Authority's role is to develop and effectuate for "Chambers, Galveston, and Harris Counties a regional water quality management program including provision of waste disposal systems and regulation of disposal of wastes." (Act of May 23, 1969, 61st Leg., R.S. ch.409, 1969 Tex. Gen. Laws 1336. These duties do not in any way present "conflicting loyalties" with Judge Wildenthal's duties as a municipal judge. Therefore, the question remains whether serving both roles is a benefit to the state. As stated above, this is a fact question which cannot be answered by the Attorney General.

Conclusion

Letter Opinion No. 98-124 should be reconsidered. Judge Wildenthal is not prohibited to serve as a municipal judge and board member of the Gulf Coast Waste Disposal Authority because of the exemption available to members of soil and water conservation districts. The Gulf Coast Waste Disposal Authority is the equivalent of a soil and water conservation district. Further, Judge Wildenthal should be permitted to hold both offices because such are of benefit to the State of Texas and there is no conflict between the offices. Both of these, exceptions, each one standing alone, justifies your reconsideration.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Minter Mow" with a long horizontal flourish extending to the right.