



TEXAS EDUCATION AGENCY

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Jim Nelson
Commissioner of Education

November 29, 2000

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Building
P.O. Box 12548
Austin, Texas 78711

ATTENTION: Opinion Committee

Re: Request for Attorney General Opinion regarding member of a school district's board of trustees serving as a volunteer teacher in that district.

Dear General Cornyn:

Please find enclosed a copy of a letter from legal counsel for the Pearland Independent School District presenting questions relating to service as a volunteer teacher by a member of the district's board of trustees. I respectfully request your opinion of the questions presented in the letter.

In addition to the information included by the district's legal counsel, please consider the impact on the questions presented of the provisions in the Education Code regarding the duties of school administrators and the appraisal of teachers. Education Code provisions that warrant consideration include §11.201(d) relating to the superintendent's duties related to personnel, §11.202(b) relating to a principal's duties related to personnel, and §21.352(c) requiring appraisal of a teacher at least once during each school year.

If you have questions regarding this request, please contact David Anderson, General Counsel, at 463-9720.

Sincerely yours,

Jim Nelson
Commissioner of Education

cc: Christopher B. Gilbert, Legal Counsel
Bracewell & Patterson L.L.P.

Dr. Bonny Cain, Superintendent
Pearland Independent School District

RECEIVED

DEC 01 2000

OPINION COMMITTEE

FILE # ML-41770-00

I.D. # 41770

RQ-0318-JC



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LEGAL SERVICES

ENTERED

Handwritten notes and signatures

711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
Phone: 713.223.2900
Fax: 713.221.1212

November 2, 2000

Mr. Jim Nelson
Texas Commissioner of Education
1701 North Congress Avenue
Travis Building
Austin, Texas 78701

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NOV -6 PM 1:58
TEXAS EDUCATION AGENCY
OFFICE OF THE COMMISSIONER

Re: Inquiry to Attorney General re Whether School Board Trustee May Serve as a Volunteer Teacher in School District

Dear Commissioner Nelson:

We represent the Pearland Independent School District ("Pearland ISD" or "PISD"). A member of the PISD Board of Trustees has requested permission to serve as a volunteer, unpaid, part-time history teacher at Pearland High School for one period a day (or, more appropriately, for ninety minutes every other day on a block schedule) for a single semester in the Fall of 2001. In researching whether this might represent a conflict of interest, we found an old decision of the Attorney General (described more fully below) that arguably would prohibit a school board member from serving as a teacher in the same district. Because of the age of the decision, factual differences between the old Attorney General decision and Pearland ISD's situation, and the results reached in more recent decisions, we seek your assistance in requesting an opinion from the Attorney General as to whether what PISD proposes to do would be prohibited as a conflict of interest.

Generally speaking, the courts and the Attorney General have used three different tests in determining whether one person may hold two different public offices:

1. Does one person hold two civil offices of emolument in violation of Article XVI, sec. 40 of the Texas Constitution? (the "dual emolument" test)
2. Does one person hold two offices in different branches of the government in violation of Article II, sec. 1 of the Texas Constitution? (the "separation of powers" test)
3. Does one person hold two offices with conflicting duties in violation of the common law doctrine of incompatibility? (the "incompatibility" test)



Mr. Jim Nelson
November 2, 2000
Page 2

Att. Gen. Op. No. JM-213 (1984). The dual emolument test is not applicable in school board situations, because since school board members are not paid, the position is not considered one "of emolument." The "separation of powers" test is mentioned frequently by the Attorney General but is rarely used at the level of local officials, because many local officials exercise powers that could be considered "executive," "legislative," and "judicial." See Att. Gen. Op. No. JM-213 (1984). Because of the difficulty in assigning easy labels to local officials, the Attorney General has traditionally shied away from relying on the separation of powers doctrine in considering dual office situations.

The test that is most applicable to Pearland ISD's situation would be the "incompatibility" test, which states as follows:

The common-law doctrine of incompatibility prohibits an individual from accepting two positions of public office if the officer will thereby be in a position to promote the interests of one constituency at the expense of another. In essence, the doctrine prohibits one office from improperly imposing its policies on the other or subjecting it to control in some way.

Att. Gen. Ltr. Op. No. 95-029 (1995).¹ The common-law doctrine of incompatibility has three aspects: (1) self-appointment; (2) self-employment; and (3) conflicting loyalties. Att. Gen. Ltr. Op. No. 98-094, at 2.

The Attorney General opinion that at least facially appears most similar to Pearland ISD's situation – and the decision that initially concerned us – is Letter Advisory No. 114 (1975), which presented the issue of whether the same person could serve as a school board trustee in a school district where that person was also employed as a school teacher. Attorney General John Hill concluded that serving in both positions would violate the common-law doctrine of incompatibility. However, in doing so he relied on the fact that the teacher/trustee was a full-time paid employee of the school district and the fact that the trustees control the "contractual terms and salaries" of the teachers in the district. The Attorney General concluded that "a public official must avoid a position where his private pecuniary interest might conflict with his public duty." *Id.* at 8.

¹ See also 60 Tex. Jur. 3d § 39 (1988) ("Offices are incompatible where their duties are or may be inconsistent or conflict, but not where their duties are wholly unrelated, are in no manner inconsistent, and are never in conflict, and where neither office is accountable or under the dominion of, or subordinate to, the other, or has any right or power to interfere with the other in the performance of any duty.")



Mr. Jim Nelson
November 2, 2000
Page 3

In our opinion, L.A. No. 114 does not foreclose the ability of a school board trustee to *volunteer* as an *unpaid*, part-time teacher, because the trustee would lack the "private pecuniary interest" in his teaching position that created the incompatibility found in L.A. No. 114. As such, the Pearland ISD situation is more similar to that faced by the Attorney General in Letter Opinion No. 98-036 (1998), in which he considered the question of whether a member of the Board of Regents of Texas Southern University could serve as a volunteer, unpaid coach. Although, consistent with L.A. No. 114, the Attorney General noted that the common-law doctrine of incompatibility would have prevented the regent from being an employee of the university, the Attorney General ruled that an unpaid volunteer is not an "employee" for purposes of the incompatibility test. The Attorney General found that part-time volunteers, who do not receive compensation and are not subject to a contract with the entity, do not "provide sufficient occasion for conflict with the office of regent to invoke the common-law doctrine of incompatibility." *Id.* at 4.

Like in L.O. No. 98-036, we believe that the Pearland ISD trustee's limited role as a volunteer, part-time teacher for a single class for a single semester does not conflict with his role as a trustee to a sufficient enough degree that the positions could legally be considered incompatible. Because the trustee will not be paid for his teaching duties, he does not have any pecuniary conflict, *i.e.* he would not be forced to vote on his own salary. The District has agreed that the trustee will not be required to perform some of the traditional "non-classroom" duties that teachers are assigned, such as lunch duty or hall duty, so his supervisory relationship with his principal would be minimal and limited solely to the classroom. In many ways, he would be treated more like a guest lecturer, which we believe would clearly be permissible, than a full-time teacher.

Volunteers are an extremely common sight in most Texas school districts. Parents volunteer to help out in their children's classes and serve as members of booster clubs for various school activities. Community members volunteer to tutor and read to students. Local business owners volunteer to serve as business partners for schools, and even sit on site-based decisionmaking committees. On school career days, one might see parents, community members, and business owners in the classrooms, talking to students about various careers and continuing education. Teachers enrich their classes by asking a wide variety of persons to come in and guest lecture for their students. Volunteerism is common enough that Pearland ISD sees the trustee's volunteer teaching less as a separate position subject to the common-law doctrine of incompatibility, and more as additional duties related to the office of trustee:

Nor is the prohibition against holding more than one office violated by assigning additional powers or duties to an office, even though additional compensation is provided therefor....



Mr. Jim Nelson
November 2, 2000
Page 4

60 Tex. Jur. 3d § 38 (1988). In the Texas Southern opinion discussed above, the Attorney General noted that allowing a regent to volunteer as an unpaid coach was more akin to assigning him additional duties related to his office (and therefore permissible) than it was a second position. See L.O. No. 98-036, at 4 n.16, *see also* Att'y Gen. Op. DM-55 (1991). Numerous courts have also held that there is no constitutional or common law prohibition to granting an official new and additional duties, even where the official would be paid extra for those duties. See, e.g., *Jones v. Alexander*, 59 S.W.2d 1080 (Tex. Comm'n App. 1933, opinion adopted); *City of Houston v. Stewart*, 87 S.W. 663, 665 (Tex. 1905); *Neff v. Elgin*, 270 S.W. 873, 879 (Tex. Civ. App.—San Antonio 1925, writ refused).

As can be seen above, although Pearland ISD believes that allowing a trustee to teach a class at the high school in a volunteer, unpaid capacity would not violate the common-law doctrine of incompatibility, this is enough of a gray area that Pearland ISD would like the Attorney General's opinion regarding its proposal before it allows the trustee to actually begin teaching. Because Pearland ISD cannot, as a matter of statutory law, submit its question directly to the Attorney General, the Pearland Independent School District respectfully requests that the Commissioner of Education submit the question on its behalf. We would be happy to work with you and your staff to draft the request to the Attorney General, should you desire our assistance. If you have any questions, please do not hesitate to contact either Merri Schneider-Vogel at (713) 221-1218, or me at (713) 221-1372.

Very truly yours,

Bracewell & Patterson, L.L.P.

A handwritten signature in black ink, appearing to read 'Chris Gilbert', written over a large, horizontal, loopy scribble.

Christopher B. Gilbert

CBG/

cc: Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas

by telecopier