

Tom Green County



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OPINION COMMITTEE

FILE # ML-41785-00

I.D. # 41785

Honorable John Cornyn
Attorney General of Texas
Request for Opinion
P.O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL #P 379 565 770
RETURN RECEIPT REQUESTED

Re: Request for Opinion

Dear General Cornyn:

The District Attorney for the 119th Judicial District, serving Tom Green, Concho and Runnels Counties, is subject to the Professional Prosecutors Act by the Texas Government Code, Section 46.002. During the recent election campaign, the incumbent District Attorney's opponent brought out the fact that the incumbent serves in the United States Air Force Reserve as a legal officer, receiving pay from the Air Force for his services.

Service in the Air Force Reserve is in a paid or unpaid status, or both. If a member of the individual reserve serves in a pay status (a reservist may also be a member of a unit, and different rules apply; however, this is not applicable to this fact situation), he is paid for each day of service and earns one retirement point per day. If the member serves in an unpaid status, he receives two retirement points for each day of service. Each member is granted 15 points per year for membership, and must earn a minimum of 50 points per year to remain in good standing. Points are earned for service, as indicated above, and by other activities such as education, public work, etc.

Official military records obtained under the Freedom of Information Act by the incumbent's opponent publicly released information which indicated that during his 12 years of service as 119th District Attorney, the incumbent District Attorney performed both paid and unpaid service each year as a legal officer for the Air Force. The number of retirement points earned each year ranged from a minimum of 45 to a maximum of 80 in 1996. As stated above, a member must obtain a minimum of 50 points every year to remain in good standing in the reserve. During the election campaign, the incumbent stated that he had served up to 29 "working days" per year performing Air Force legal duties, and had earned up to \$7,000.00 in one year for his service.

The issue of a prosecutor who is subject to the Professional Prosecutors Act, performing paid legal services, was addressed in Attorney General Opinion No. JC-0034. This opinion states that a County Attorney (professional prosecutor) is barred by Chapter 46 from entering into a contract to provide legal service to a municipality in his private capacity (emphasis added). Opinion No. JC-0034 also gives a definitive definition of "the private practice of law" for the purpose of Government Code, Section 46.005(a); to mean the sale of legal services. The opinion goes on to state that Section 46.005(a) does not prevent the professional prosecutor from offering and providing legal services on a voluntary (unpaid) basis.

Questions Presented

Does the Professional Prosecutors Act prohibit a District Attorney subject to the act from paid service as an Air Force Reserve legal officer?

If the act does prohibit a professional prosecutor from paid service as an Air Force Reserve legal officer, what is the remedy for violation of the act?

Absent a statutory exemption from military reserve service, it would appear that the Professional Prosecutors Act would prohibit a District Attorney subject to the act from performing paid service as an Air Force Reserve legal officer. Opinion No. JC-0034 gives a definitive definition of "private practice of law", and in a similar fact situation regarding additional government legal service, held that such paid legal service is not allowed under the Professional Prosecutors Act. Since unpaid service is an option for members of the Air Force Reserve, and unpaid service earns double the retirement points of paid service, a District Attorney is able to maintain good standing in the Air Force Reserve, and earn points for retirement, without performing paid legal services.

The Professional Prosecutors Act does not provide a remedy for violation of the act by a prosecutor who is subject to the act, and this appears to be a question of first impression. No other statutory remedies can be found which could apply to the Professional Prosecutors Act, and there is no case law which interprets the act or mentions remedies for violation of the act. Prosecutors subject to the Professional Prosecutors Act are paid an additional salary by the State, therefore would forfeiture of the additional salary be a legal remedy for violation of the act?

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However since the violation of the Professional Prosecutors Act was made an issue by the incumbent's opponent in the recent election, does the re-election of the incumbent District Attorney make the issue of a possible violation of the Professional Prosecutors Act in a previous term of office, moot?

An opinion from the Attorney General is the only definitive way in which to interpret Opinion No. JC-0034, and to answer the questions presented by the facts as presented by this case.

Very truly yours,


Thomas M. Goff
Tom Green County Attorney

TMG/km