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Michael A. Stafford
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June 21, 2001

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OPINION COMMITTEE

Hon. John Cornyn
Attorney General of Texas
Supreme Court Building
Post Office Box 12548
Austin, Texas 78711-2548

Attention: Opinion Committee

FILE # ML-42047-A
I.D. # 42047

Re: Dual office holding under Texas law

Dear General Cornyn:

We request your opinion regarding the following questions:

1. Whether a State Representative may simultaneously be employed as an Assistant County Attorney?

2. If the answer to Question 1 is yes, may the person receive compensation for both positions?

Our memorandum brief is attached. Thank you for your consideration of this request.

Sincerely,

MICHAEL A. STAFFORD
County Attorney

Melissa L. Barloco

By MELISSA L. BARLOCO
Assistant County Attorney

Enclosure

Approved:

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MEMORANDUM BRIEF

I. QUESTIONS PRESENTED

1. Whether a State Representative may simultaneously be employed as an Assistant County Attorney?

2. If the answer to Question 1 is yes, may the person receive compensation for both positions?

II. DISCUSSION OF QUESTION 1

The first question presented implicates the doctrine of dual office holding, which under Texas law includes the following limitations: (1) article XVI, section 40 of the Texas Constitution, which prohibits a person from holding more than one civil office of emolument and prohibits a state legislator from holding another office or position of profit under the state or the United States; (2) article III, section 18 of the Texas Constitution, which prohibits a legislator from holding another civil office of profit; (3) article II, section 1 of the Texas Constitution, which requires separation of powers; and (4) the common law doctrine of incompatibility, which prohibits self-appointment, self-employment, and conflicting loyalties.

A. TEX. CONST. art. XVI, § 40

Article XVI, section 40 of the Texas Constitution provides in part, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument. . ." The terms "civil office" and "public office" are used interchangeably in cases and attorney general opinions dealing with constitutional prohibitions against dual office holding because there is "no real distinction between a public office and a civil office." *Tilley v. Rogers*, 405 S.W.2d 220 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.). The difference between a "civil office" and others is in reference to military offices, which are often excepted from provisions of state law applicable to public officials. *See* 35 D. Brooks, Texas Practice: County and Special District Law, Public Officeholding § 7.1, at 201 (1989).

The leading Texas case discussing the characteristics of a public office as distinguished from mere employment is *Aldine Independent School District v. Standley,* 280 S.W.2d 578 (Tex. 1955). The court was asked to determine if an assessor-collector of taxes for a school district, appointed by the board of trustees, was a public office. The tax assessor, who had been fired by the board after one year of service, was claiming that as a public official his term of office was set at two years pursuant to article XVI, section 30 of the Texas Constitution. While the court was not dealing with dual office holding, it held that an assessor-collector of taxes was not a "public officer," but was "only an agent or employee of such school board at its discretion." The court explained:

> The determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government

> is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.

280 S.W.2d 578, 583 (Tex. 1955). The court considered the following factors in its decision: no statutory term of office; no provision for removal of such person; no requirement that an official oath and bond be executed; and no statutory qualifications provided for the position. *Id.* at 581.

Several cases and attorney general opinions have found assistant district attorneys to be public employees, not public officers. In *Powell v. State*, the court held that an assistant district attorney was a public employee and did not occupy a civil office of emolument for purposes of the constitutional prohibition against dual office holding. 898 S.W.2d 821 (Tex. Crim. App. 1994). Relying on *Aldine,* 280 S.W.2d 578 and *Green v. Stewart,* 516 S.W.2d 133 (Tex. 1974), the attorney general determined that an assistant district attorney was an employee, not an officer, and was not prohibited from also serving on a school's board of trustees. *See* Tex. Att'y Gen. LO-89-082. The attorney general explained, "[a]n individual's status as an officer depends upon whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Id.* at 1. The attorney general stated that the language in Chapter 41 of the Government Code supported the conclusion that an assistant district attorney was an employee and not a public officer. *Id.* The attorney general pointed to section 41.101 of the Government Code, which provides that a "prosecuting attorney" includes a county attorney, district attorney, or criminal district attorney. *Id.* at 2. Section 41.102 gives a prosecuting attorney the power to "employ" assistant prosecuting attorneys, investigators, secretaries, and other personnel that in his judgment are required for the proper and efficient operation and administration of the office. The attorney general concluded that the assistant district attorney acts only under the authority of the district attorney and does not exercise any sovereign function of the government largely independent of the control of others because "as the assistant district attorney's title indicates, his function is to assist the district attorney." *Id.*

Cases and opinions reviewing other county positions have followed the same rationale. In *Krier v. Navarro*, the court determined that an appointed county elections administrator was not a public officer for purposes of the two-year term of office provision of the Texas Constitution. 952 S.W.2d 25 (Tex. App.—San Antonio 1997, writ denied). The court did recognize that the position had some characteristics of a public office, but nevertheless held that the administrator was not a public officer because he or she could not act "largely independent of the control of others." *Id.* Court reporters have been held not to occupy public offices because they have no independent authority to exercise sovereign governmental functions. *See Robertson v. Ellis County*, 38 Tex. Civ. App. 146, 84 S.W. 1097 (1905, no writ); Op. Tex. Att'y Gen. No. JM-163 (1984). In *Harris County v. Schoenbacher*, 594 S.W.2d 106 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) the court held that an appointed chief juvenile probation officer of a county was not a public officer because the officer did not exercise any sovereign functions largely independent of the control of others and was subject to the direction of the juvenile board. However, in *Know v. Johnson*, an elected superintendent of a state hospital was a public officer because his term of office, salary, and duties were fixed by statute. 141 S.W.2d 698 (Tex. Civ. App.—Austin 1940, writ ref'd).

Whether deputy sheriffs and deputy clerks are public officers has depended on their authority to act. The Texas Supreme Court has held that a deputy tax-assessor-collector was not a public officer because he lacked the authority to act independently because there was only one public officer e.g. the tax assessor. *See Green v. Stewart*, 516 S.W.2d 133. The attorney general has determined that neither a deputy county clerk nor a deputy district clerk constituted a public office; therefore, an individual could occupy both positions simultaneously. Op. Tex. Att'y Gen. No. MW-415 (1981).

The county civil service statute defines "employees" as persons "not authorized by statute to perform governmental functions involving an exercise of discretion in the person's own right." Tex. Loc. Gov't Code Ann. § 158.001(2) (Vernon 1999). In Op. Tex. Att'y Gen. No. H-985 (1977), deputy sheriffs were determined to be public officers because they exercise sovereign authority for the benefit of the public. However, deputy county clerks have been held to be employees because they are not authorized to act in their own right but only in the name of their principal. *See* Tex. Att'y Gen. No. H-1114 (1978). Deputies of county officials have also been considered "employees" under the civil service statute. See Tex. Att'y Gen. No. M-1088 (1972).

A city position is considered a public office according to the same factors discussed above. In *Loard v. Como*, the court held that a special attorney employed by the city was not a public official and not required to live in the city as required under law applicable to city officials. 137 S.W.2d 880 (Tex. Civ. App.—Amarillo 1918, no writ). The court distinguished a mere employee, agent, or independent contractor of a local government and explained:

> There are material distinctions between one occupying an official position and another who performs duties purely by virtue of employment. An official may be and often is elected by the resident electors; he subscribes the oath of office and is entrusted with the performance of some of the sovereign functions of government; is subject to removal for failure to so perform the duty or for misconduct or malfeasance in office; his election or appointment is for a definite period of time and his services thereby become continuing and permanent rather than temporary and transitory, as is the case of an employee under a contract, such as the one in the instant case.

137 S.W.2d 880, 882 (Tex. Civ. App.—Amarillo 1918, no writ).

A 1972 amendment to the Texas Constitution added the following sentence to Article XVI, section 40: "[n]o member of the Legislature of this State may hold any other office or position of profit under this State, or the United States..." Several attorney general opinions have interpreted the meaning of "position of profit." The attorney general has concluded that a firefighter holds a "position of profit" and thus may not simultaneously serve as a member of the legislature, nor occupy inactive or leave–without pay status as a municipal firefighter while serving in the legislature. Tex. Att'y Gen. LO-90-055 at 2. The attorney general explained, "[w]e believe a person's occupation of a position which assures him of a salaried status at a definite future date constitutes a position of profit." *Id.* On the other hand, the attorney general

has determined that a member of the Texas House of Representatives may volunteer his services as a part-time instructor at a state-funded university without violating Article XVI, section 40 of the Texas Constitution. Op. Tex. Att'y Gen. No. JM-32 (1983).

In later opinions regarding "positions of profit," the attorney general has distinguished between employees and independent contractors. In Tex. Att'y Gen. LO-93-31, the attorney general concluded that a legislator was not as a matter of law prohibited by article XVI, section 40 of the Texas Constitution from acting in the capacity of independent contractor for a school district on a part-time basis. Following the same rationale, the attorney general determined that article XVI, section 40 of the Texas Constitution did not prohibit a member of the legislature from working as an independent contractor on a part-time basis for a county government. Tex. Att'y Gen. LO95-022.

In an opinion dealing with a legislator seeking a salaried position at the federal level, the attorney general concluded that the "position of profit" language prohibits a legislator from being employed by the federal government. Op. Tex. Att'y Gen. No. H-1304 (1978) at 1. However, the attorney general stated that a legislator was not per se prohibited from entering into contracts with the federal government. *Id.* at 2.

B. TEX. CONST. art. III, § 18

Another constitutional limitation on dual office holding is contained in Section 18 of article III of the Texas Constitution that provides:

> No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the legislator.

The attorney general has concluded that a member of the legislature, who intends to resign his legislative office, is not prohibited by article III, section 18 of the Texas Constitution from assuming a chancellor position at Texas Tech University because the chancellor position is not a "civil office of profit." Tex. Att'y Gen. LO-96-080. The attorney general explained that the board of regents, and not the chancellor, primarily exercised the sovereign functions of the government and the chancellor exercised such functions under the direction and control of the board. *Id.* at 2. Since the legislator was resigning, the attorney general declined to consider the dual office-holding prohibitions provided in article XVI, section 40 of the Texas Constitution.

C. TEX. CONST. art. II, § 1

Article II, section 1 of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be

> confined to a separate body magistracy...(Legislative, Executive, and Judicial)...and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The separation of powers provision is violated when one branch of government assumes a power that is more properly attached to another branch or when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Armadillo Bail Bonds v. State,* 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). The separation of powers provision does not prevent an officer from holding an employment in another branch of government. *See* Op. Tex. Att'y Gen. No. 89-082 (1989); *Turner v. Trinity Independent School Dist.*, 700 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1983, no writ); *Ruiz v. State,* 540 S.W.2d 809 (Tex. Civ. App.—Corpus Christi 1976, no writ).

A State Representative is a member of the legislative department and an assistant county attorney is a part of the judicial department, according to the Texas Supreme Court. *See State v. Moore,* 57 Tex. 307 (1882). The attorney general issued an opinion that the separation of powers provision does not prohibit a junior college trustee from simultaneously serving as a municipal judge. Op. Tex Att'y Gen. No. JC-0216 (2000) at 1. The attorney general concluded, "in the usual circumstance, the separation of powers doctrine does not constitute an impediment to dual office holding." *Id.* at 2. The attorney general explained that the view held in several 1970s attorney general opinions that article II, section 1 posed an obstacle to dual office holding had been abandoned, particularly at the local level. *See* Op. Tex. Att'y Gen. No. JM-519 (1986) at 4; Tex. Att'y Gen. LO-92-004, at 1; Tex. Att'y Gen. LO-88-19.

D. DOCTRINE OF INCOMPATIBILITY

The doctrine of common-law incompatibility prohibits self-appointment, self-employment, and conflicting loyalties. If the holding of two offices creates a situation of self-appointment, self-employment, or conflicting loyalties, then an individual is barred from serving those two offices at the same time. *See Thomas v. Abernathy County Line Independent School District,* 290 S.W.152 (Tex. Comm'n App. 1927); *Ehlinger v. Clark,* 8 S.W.2d 666,674 (Tex. 1928); Op. Tex. Att'y Gen. No. JM-1266 (1990). In addition, individuals are barred from holding an office and employment if the office has a supervisory role over the employment or if one office might impose its policies on the other or subject it to control in some other way. *See* Tex. Att'y Gen. LA-114 (1975); Op. Tex. Att'y Gen. No. DM-55 (1991).

Self-appointment and self-employment are not at issue because a State Representative is elected, and the county attorney employs assistant county attorneys, according to section 41.102 of the Government Code, as previously discussed. The remaining issue under the doctrine of incompatibility is the prohibition against holding two positions with conflicting loyalties.

The conflicting loyalties aspect of incompatibility was first recognized in *Thomas v. Abernathy County Line Independent School District.* 290 S.W.152. The court held that the office

of city alderman was incompatible with the office of a school trustee because of the city's authority over school property in areas such as sanitation and fire prevention regulations.

Attorney general opinions since 1990 have held that for the conflicting loyalties doctrine to apply, both positions must be "offices." Op. Tex. Att'y Gen. No. JC-0270 (2000) at 2, citing to Op. Tex. Att'y Gen. Nos. JC-0054 (1999), JMj-1266 (1990); Tex. Att'y Gen LOs-96-148, 052, 95-029, 93-027. In Op. Tex. Att'y Gen. No. DM-156, the attorney general concluded that since the assistant fire chief position was not an office but rather employment, the common law doctrine of incompatibility did not preclude a deputy constable from also serving as assistant fire chief. Op. Tex. Att'y Gen. No. DM-156 (1992) at 5. In Letter Opinion 95-048, the attorney general stated that the conflicting loyalties type of incompatibility has never been held to apply to a situation in which one position is an "office" and the other a mere "employment." Tex. Att'y Gen. LO-95-048 at 1. Similarly, in a 1998 opinion, the attorney general concluded that an employee of a regional planning commission was not an officer and was not barred from simultaneously serving as a commissioner of the Port of Beaumont Navigation District because the conflicting loyalties aspect of the doctrine of incompatibility had no application unless both positions were "offices." Tex. Att'y Gen. Lo. 98-100, (citing to Letter Opinions 96-148, 95-052, 93-027). Finally, in a recent opinion, the attorney general determined that the only judicial decisions to deal directly with conflicting loyalties and incompatibility, specifically involved situations in which both positions were "offices."

DISCUSSION OF QUESTION 2

The second question presented is if a State Representative, simultaneously employed as an assistant county attorney, may receive compensation for both positions. Article XVI, section 40 of the Texas Constitution provides in pertinent part:

> State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local government districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies...

This provision applies to State employees who are not officers and a State representative is an elected officer. The attorney general has interpreted this provision as it applies to state employees seeking dual employment with a county. The attorney general has concluded that county attorneys and district attorneys are not members of governing bodies of school districts, cities, towns, or other local government districts. *See* Tex. Att'y Gen. LO-90-39; Tex. Att'y Gen. Op. LO-93-96.