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DONNA R. BENNETT
District Attorney
173rd Judicial District
Henderson County

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FILE # ML-43735-Q
I.D. # 43735

May 26, 2004

RQ-0234-GA

Mr. Greg Abbott
Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for an opinion concerning District Attorney

Dear Mr. Abbott:

I am the elected District Attorney for the 173rd Judicial District, Henderson County, Texas and I am employed under the Professional Prosecutor's Act. Please note we have a County Attorney.

As the elected District Attorney, may I hold a part-time teaching position at Trinity Valley Community College, and receive compensation for the same?

Under Article XVI of the Texas Constitution, there is a prohibition from an individual holding more than one civil office of emolument.

I believe that a part-time teaching position at a public junior college is not considered an office of emolument.

John Hill's opinion in 1973 indicated an Assistant District Attorney could not also be employed as a professor at Sam Houston State University. (See attached opinion).

Dan Morales' opinion in 1993 indicated the District Attorney could hold a compensated teaching position with a state university. (See attached opinion).

I have been unable to locate an opinion, which specifically addresses whether the elected District Attorney who is under the Professional Prosecutor's Act could obtain and be compensated for a part-time teaching position at a public school.

I am requesting an opinion on that issue.

I have never requested a letter opinion before. If I have failed to supply you with any information, please feel free to call me.

Respectfully,

Donna R. Bennett

DRB/sme

enclosures

October 26, 1993

Honorable Ronald Earle
Travis County District Attorney
P.O. Box 1748
Austin, Texas 78767

Letter Opinion No. 93-96

Re: Whether a district attorney may simultaneously hold a compensated teaching position with a state university (ID# 21290)

Dear Mr. Earle:

You request our opinion as to whether a district attorney may simultaneously hold a compensated teaching position with a state university.

Article XVI, section 40 of the Texas Constitution prohibits an individual from holding simultaneously more than one "civil office of emolument." A question virtually identical to the one you pose here was addressed in Letter Opinion No. 90-39 (1990). There, the issue was whether an elected county attorney was authorized to hold a paid, part-time professorship at a state university. The opinion held that, since "a college professor does not hold a civil office of emolument," the general prohibition of article XVI, section 40 was not applicable to the circumstances described. See Ruiz v. State, 540 S.W.2d 809 (Tex. Civ. App.--Corpus Christi 1976, no writ); Letter Advisory No. 137 (1977).

Letter Opinion No. 90-39 also noted that a proviso to article XVI, section 40, states that

> 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 [various local political subdivisions].

This proviso is applicable, however, "only if the office is that of membership on the governing bodies of school districts, cities, towns, or other local governmental districts." Letter Opinion No. 90-39 concluded that, since "a county attorney is not a member of such a governing body," the referenced proviso "does not prevent a county attorney from being paid as a part-time professor at a state university." The same reasoning compels the conclusion that the proviso to article XVI, section 40 is not applicable to the facts you describe, and consequently, the Texas Constitution does not bar a district attorney from holding simultaneous employment with a state university. [footnote 1]

Letter Opinion No. 90-39 additionally declared that

> [t]he common law doctrine of incompatibility also acts to prohibit dual office holding in certain instances, even where the Texas Constitution is no bar.

Incompatibility may arise where one position is subordinate to another, or where the holding of the two positions might create "conflicting loyalties." See Attorney General Opinion JM-1266 (1990). Under the

circumstances you have described, the teaching position is not subordinate to the office of district attorney. Furthermore, we can perceive no possibility of "conflicting loyalties" between the two positions. Accordingly, the common-law doctrine of incompatibility does not bar a district attorney from simultaneously holding a teaching position with a state university.

S U M M A R Y

A district attorney is not prohibited, either by article XVI, section 40, of the Texas Constitution, or by the common-law doctrine of incompatibility, from simultaneously holding a compensated teaching position with a state university.

Yours very truly,

Rick Gilpin
Deputy Chief
Opinion Committee

FOOTNOTES

[1] Whether the compensation for the teaching position comes from legislatively appropriated funds is irrelevant.

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THE ATTORNEY GENERAL OF TEXAS

JOHN L. BILL
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

overrules A. 297

July 17, 1973

The Honorable Jerry A. Sandel
District Attorney
P. O. Box 1232
Huntsville, Texas 77340

Letter Advisory No. 55

Re: Dual employment-State College professor as Assistant District Attorney

Dear Mr. Sandel:

You have requested an opinion from this office concerning the legality of employing as an Assistant District Attorney a well qualified attorney who is presently employed as a professor at Sam Houston State University and whose hours there would permit him to also work in your office full time. You advise that you would pay his salary from a Criminal Justice Council grant for that purpose "and/or" Officers Salary Fund from the five counties constituting the Twelfth Judicial District.

District and County Attorneys are constitutional officers (Article 5, § 21, Constitution of Texas), and are elected statutory officers of the state exercising governmental powers. While it would seem that the duties and functions of these officers would clearly make them a part of the executive department and we would so hold, the Supreme Court in State v. Moore, 57 Tex. 307 (1882) held that they are of the judicial department and we are bound by that decision.

On the other hand, professors and teachers at state institutions such as Sam Houston State University are part of the executive branch of government. See Attorney General Opinion H-6 (1973) and Attorney General Letters Advisory Nos. 4, 20, 22, 23, and 30 (1973).

The Separation of Powers provision of the Texas Constitution (Article 2, § 1) provides, after directing that the powers of the State government shall be divided into three distinct departments (Legislative, Executive and Judicial), each to be confided to a separate body of magistracy:

> " . . . 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."

A teacher, instructor or professor employed by a public institution of learning is "of" the executive department and ordinarily exercises a function implementing a governmental power, thus coming within the prohibition. Attorney General Opinion H-6 (1973).

But whether the professor involved here, in fact, exercises such an executive function is not controlling because an Assistant District Attorney, by definition, exercises governmental power in his judicial office. The exercise of a governmental power in either department works a bar. Hence, the two posts may not be constitutionally occupied by the same person at the same time unless a constitutional exception applies. See also Attorney General Opinion H-7 (1973).

Article 16, Section 40 of the Constitution as now constituted (following its amendment in 1972) provides an exemption from the Separation of Powers prohibition for certain military officers and men, and for officers of State soil and water conservation districts, and gives a limited exemption therefrom to State employees or other persons compensated by the State who are not State officers, insofar as it permits them to serve on local governmental bodies without compensation therefor. But neither of those exemptions apply here.

Another provision of the present Article 16, Section 40 allows non-elective State officers to hold other non-elective offices under certain circumstances, but only if "there is no conflict with the original office for which he receives salary or compensation." This provision is not as broad as the "military and soil and water conservation district" exemption of Section 40 which specifies that "nothing in this Constitution shall be construed to prohibit. . . ." We do not believe the "non-elective State officer " provision of Section 40 overrides the Separation of Powers provision of Article 2, Section 1. The "no conflict" clause argues against it. We are aware of no other applicable constitutional provision.

You have referred to Attorney General Opinion M-297 (1968) which concluded that a college professorship at a state university was not a "civil office of emolument" within the meaning of Article 16, Section 40 of the Constitution prior to its amendment but, rather, a "position of honor, trust or profit." The opinion concluded that a county attorney, an elected state officer, could act as such a professor provided he forewent compensation from the State Treasury for such services, since, it was said, Article 16, Section 33 of the Constitution, as it then read, did not prohibit the occupancy of two "positions of honor, trust or profit" though it prohibited payment of a State salary for both from the Treasury.

That opinion did not advert to the Separation of Powers provision of the Constitution, and we think it was erroneous in failing to apply that concept, which would have resulted in a different conclusion. For that reason, Opinion M-297 is overruled. Because the matter here is determined by the Separation of Powers doctrine (to which none of the constitutional exceptions here apply), it is unnecessary in this review for us to further analyze the basis upon which that opinion rested. But see Boyett v. Calvert, 467 S. W. 2d 205 (Tex. Civ. App., Austin, 1971), writ ref., n. r. e., app. dis'm. 405 U. S. 1035 (1972).

The fact situation here is to be distinguished from the circumstances with which Attorney General Letters Advisory Nos. 22 and 30 (1973) were concerned. Both of those Advisories involved professors at State universities filling what were essentially "consultant" roles of an impermanent, detached, and independent advisory nature in other governmental areas which did not cause them to be "of" other departments. Here, the contemplated employment is such that the professor would occupy a "position" or "office" as those terms are legally, not merely colloquially used. See Attorney General Opinion V-371 (1947).

You are accordingly advised that, in our opinion, the employment as an Assistant District Attorney of a person currently employed as a professor at Sam Houston State University is constitutionally prohibited.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

LARRY F. YORK, First Assistant

DAVID M. KENDALL, Chairman
Opinion Committee