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AUG 23 2005
OPINION COMMITTEE

Richard E. Glaser
County and District Attorney

FILE # ML-44344-05
I.D. # 44344

Via Certified Mail RRR 7004 0550 0000 4465 1492
August 18, 2005

The Honorable Greg Abbot
Texas Attorney General
P.O. Box 12548
Austin, TX 78711

RQ-0383-GA

Dear General Abbot,

This is a request for an opinion from the Fannin County Sheriff presented by the Fannin County Attorney's Office on the following issue:

Whether an elected Constable may while serving in his capacity as Constable, simultaneously serve as a fulltime paid Sheriff's Deputy.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Richard E. Glaser", is written over a horizontal line.

Richard E. Glaser
Fannin County Attorney

cc: Kenneth L. Moore
Fannin County Sheriff

BRIEF IN SUPPORT OF REQUEST FOR ATTORNEY GENERAL'S OPINION

Facts

Mr. James Woods was employed as a jailer with the Fannin County Sheriff's Office prior to November 2004. In the general election November 2, 2004 Mr. Woods was elected to the office of Constable for Precinct #3 of Fannin County. Mr. Woods continued his employment with the Sheriff's department as a full-time paid jailer after his election. In May of 2005 Mr. Woods requested and received a transfer from the jail and was subsequently appointed to the position of Sheriff's Field Deputy.

Discussion

- 1. A Commission as Sheriff's Deputy is not an "Office" Under Article XVI, Section 40 of the Texas Constitution Because a Sheriff's Deputy Exercises his Authority at the Sole Discretion of the County Sheriff.*

In approaching the so called dual office question the Texas Constitution is clearly the most important provision dealing with the topic. The initial clause of Article XVI, section 40 states, "No person shall hold or exercise at the same time, more than one civil office of emolument." In attempting to define the term "officer" the Attorney General's own website states that for purposes of so called dual office questions there are two potential categories of officers, 1) "public officers", and 2) "public employees." See http://www.oag.state.tx.us/ag_Publications/txts/2004trapshb_4.shtml (last viewed Aug. 8, 2005).

The Texas Supreme Court has held that "the determining factor which distinguished 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.” *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (1955). Under this definition clearly all elected officials are to be considered public officers, because those officials exercise “sovereign function[s] of the government . . . largely independent of the control of others.” *See* Tex. Att’y Gen. Op. No. GA-0032 (2003) (members of board of trustees of junior college district and members of board of municipal utility district, as elected officials, are “officers” within article XVI, section 40 of the Texas Constitution). Thus, Mr. Woods’ position as elected Constable of Precinct #3 of Fannin County is clearly an “office” under the dual office analysis.

The Attorney General has stated that a person is not ordinarily an officer if his actions are subject to control by a superior body, for in such instance, he cannot be said to exercise his authority “largely independent of the control of others.” Under this formulation, the following positions have been previously determined not to be an officer in considering the dual office question: 1) assistant district attorney, 2) jailer, 3) court reporter, 4) a chief deputy of a county tax assessor-collector, 5) a county law librarian, 6) a county emergency medical services administrator, 7) a volunteer fireman, 8) an at-will city attorney who serves under the direction of the city council, 9) chief appraiser of a county appraisal district (despite classification as an “officer” for purposes of the nepotism statutes). *See* <http://www.oag.state.tx.us/ag/Publications/txts/2004trapshb4.shtml>. The Attorney General has found that the above listed “public employees” do not hold an “office” for the purposes of the dual office question because each exercises his or her functions subject to review and correction by a supervisor generally an elected official, a department head or some sort of appointed board. Further each of the above

listed governmental employees have been found to serve at the pleasure of his or her supervisor's (for lack of a better term) pleasure. Thus, the Attorney General has found that the above listed "public employees" duties are not exercised "largely independent of the control of others."

On the other hand, the instances in which the Attorney General has previously found that someone holds an "office" for the purpose of the dual office question are as follows: 1) a member of the board of managers of a county hospital, and 2) member of a city planning and zoning commission. See http://www.oag.state.tx.us/ag/Publications/txts/2004trapshb_4.shtml. The distinguishing factor in these cases is that the two above listed offices are not subject to the control of another and may act independently.

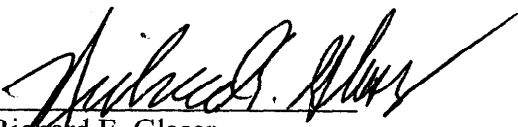
A sheriff's deputy acts solely at the discretion of the County Sheriff. A sheriff's deputy has no separate constitutional or statutory duties which may be exercised outside the direction of the sheriff. "A deputy serves at the pleasure of the sheriff. A sheriff is responsible for the official acts of a deputy." TEX. LOC. GOV'T CODE § 85.003(c)(d) (Vernon 1999). Thus, clearly Mr. Woods does not hold two offices simultaneously because while clearly an elected constable is an officer; a sheriff's deputy is not an officer for the purpose of dual office analysis because a deputy neither serves at the pleasure of the sheriff nor has no statutory or constitutional authority to act independently of the County Sheriff's direction.

Conclusion

An elected constable may serve simultaneously as sheriff's deputy without violating the restriction of holding dual offices, because a sheriff's deputy is a "public

employee” rather than a public official. A sheriff’s deputy does not have independent authority to act outside of the discretion of the sheriff. Further, a sheriff’s deputy position is more analogous to the other positions Attorney General has previously found do not amount to an “office” in the dual office context, *e.g.* assistant district attorney, jailer, court report, etc, than to the positions which the Attorney General has found to amount to such an office, *e.g.* a member of the board of managers of a county hospital, and member of a city planning and zoning commission. We respectfully request your consideration and opinion on this issue.

Respectfully submitted,



Richard E. Glaser