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OPINION COMMITTEE

The Honorable Greg Abbott
Office of the Attorney General
Attn. Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RQ-0458-GA

FILE # ML-44657-06
I.D. # 44657

Re: Request for Opinion

Dear General Abbott:

ISSUE

Does either the constitutional prohibition against a State Officer holding a Federal Office of profit or trust, or the common law doctrine of incompatibility, bar a County Attorney from accepting an appointment as an Ombudsman by the National Committee for Employer Support of the Guard and Reserve?

FACTS

The National Committee for Employer Support for the Guard and Reserve (ESGR) is a Department of Defense organization. It is a staff group within the Office of the Assistant Secretary of Defense for Reserve Affairs, which is in itself a part of the Office of the Secretary of Defense. ESGR was established in 1972 to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising

from an employee's military commitment. ESGR'S mission is to gain and maintain active support from all public and private employers for the men and women of the National Guard and Reserve.

ESGR'S primary means of assistance in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership is done through a nationwide Ombudsman Program. ESGR has a national network of over 900 volunteer Ombudsmen who help resolve issues between employers and their employees. These volunteers, each of whom receives extensive training on USERRA and dispute resolution techniques, serve as informal mediators between the employer and employee and inform and educate the employer and employee on what the law requires and assist in finding a mutually agreeable solution. ESGR Ombudsmen have successfully mediated over 95 percent of cases in the past year. Most ESGR Ombudsmen are not attorneys, and they may not in any event provide legal advice to Reserve component members or employers.

ESGR Ombudsmen offer mediation services only in cases referred to them by the National Committee, and only under the guidelines established by the National Committee. While an ESGR Ombudsman may recommend that the United States Department of Labor assist a Reserve component member with legal representation, the Department of Labor is under no obligation to accept such a recommendation, and retains full decision making and enforcement authority. More facts about the ESGR may be found at www.esgr.org.

LEGAL AUTHORITY

Article 16, § 12 of the Texas Constitution states:

No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust

under this State.

The office of County Attorney is an office of profit or trust, created by the Texas Constitution in each county for which the Legislature has not established a Criminal District Attorney. Art. 5, § 21, Texas Constitution. If an ESGR Ombudsman is an “office of profit or trust” under the United States, then simultaneously holding an office or profit or trust of this state is prohibited. Tex. Att’y Gen. Op. GA-0057 (2003) at 2-3.

As an unpaid volunteer, an Ombudsman does not hold an “office of profit.” Even an unpaid volunteer may hold an “office of trust,” if the individual has been delegated “some of the sovereign functions of the United States Government.” Tex. Att’y Gen. Op. MW-360 (1981) at 3. (Holding unpaid service on a Selective Service draft board an office of trust because draft boards adjudicate facts and exercise discretion in determining whether persons should be inducted, exempted from military service, or have their service deferred.) *See also* Tex. Att’y Gen. Op.’s GA-0057 (2003), 0-5550 (1943).

The Secretary of Defense is allowed to accept the services of volunteers as ESGR Ombudsmen under authority of 10 U.S.C.A. §1588(a). This authorizing legislation specifically restricts the ability of the Secretary of Defense to delegate any sovereign functions of the United States to ESGR Ombudsmen:

(2) With respect to a person providing voluntary services accepted under subsection {1588} (a), **the Secretary concerned shall--**
(A) **supervise the person to the same extent as the Secretary would supervise a compensated employee providing similar services;**

...

(3) With respect to a person providing voluntary services accepted under subsection (a), **the Secretary concerned may not--**
(A) **place the person in a policy-making position;**

10 U.S.C.A. §1588(b) (emphasis added). If full decision and policy making authority is retained by

the Federal Government, a volunteer does not hold an “office of trust” under the United States. Tex. Att’y Gen. Op. C-527 (1965) (Holding that service on Interstate Commerce Commission board was not an “office of trust” when the board could only make recommendations, and all decisions were made by the ICC.) If a person’s actions are under the control of a superior body, and he or she does not act largely independently of the control of others, then that person is not an officer. Tex. Att’y Gen. Op. JM-1²666 (1990) at 2. I would conclude therefore that service as an ESGR Ombudsman does not violate the Art. 16, §12, of the Texas Constitution.

The common law doctrine of incompatibility forbids dual office holding in three circumstances: self-appointment, self-employment and conflicting loyalties. Tex. Att’y Gen. Op. Nos. GA-0273 (2004) at 2-3, GA-0224 (2004) at 2, GA-0032 (2003) at 4. Because a County Attorney neither appoints, nor supervises ESGR Ombudsmen, neither self-appointment, nor self-employment are applicable. The conflicting loyalties portion of the common law doctrine of incompatibility applies only when a person holds two offices, and thus does not apply if an ESGR Ombudsman is not an officer. Tex. Att’y Gen. Op’s. GA-0169 (2004) at 3. If, based on the same facts and law set out above concerning the question of whether an ESGR Ombudsman is an officer of profit or trust under the United States, one concludes that an ESGR Ombudsman is not any sort of officer of the United States, then there is no conflict.

A County Attorney serving as an ESGR Ombudsman should of course keep in mind the danger of a conflict under the Texas Rules of Professional Conduct, if assigned a case involving the

County Government of the county for which he or she is elected.

Sincerely,

Russell Wilson

