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October 18, 2006

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

FILE # ML-45033-06
I.D. # 45033

RQ-0543-GA

Re: Whether a board member of a local government board, a metropolitan transit authority ("MTA"), may also serve as a city manager for one of the cities in the MTA service area.

Dear Attorney General Abbott:

Please accept this letter as a request pursuant to Texas Government Code Section 402.042 for an opinion from your office for clarification on the common law doctrine of incompatibility regarding whether a board member of a local government board, a metropolitan transit authority ("MTA"), may also serve as a city manager for one of the cities in the MTA service area.

Question Presented:

Does the common law doctrine of incompatibility prohibit a board member of a MTA from serving as the city manager of a city within the MTA service area?

The doctrine recognizes and prohibits three kinds of conflicts that may arise from holding two public offices: (1) self-appointment; (2) self-employment; and (3) conflicting loyalties. Tex. Att'y Gen. Op. No. GA-0032 (2003). The conflicting loyalties provision prohibits a person from holding two positions in separate governmental units which may have conflicting interests. In the case of an office holder holding another official position, numerous Attorney General Opinions have opined that both positions must be "offices" in order for conflicting loyalties incompatibility to be applicable. Att'y Gen. Op. Nos. GA-0195 (2004); JM-1266(1990); LO-96-148 (1996); JC-0054(1999); GA-0127(2003). The Attorney General applies the following test to determine whether a position is an "office" under the conflicting loyalties doctrine: "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." *Aldine Independent School District v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955). According to this test, a "civil office" is "any elected office or a non-elected office which nevertheless exercises a sovereign function of government. A "mere employee" does not hold a civil office.

Therefore, the question becomes whether a city manager exercises sovereign functions largely independent of the control of others or whether a city manager is, in the words of the Attorney General, a "mere employee" of the city.

The city manager at issue is employed under a contract as "Acting City Manager" with the following terms applicable to the question presented:

EMPLOYMENT AGREEMENT

"Section 1. Duties.

The Council hereby employs the Acting City Manager as the chief administrative officer of the City to perform the duties and functions specified in this Agreement, and such other duties as the Council shall, from time to time, assign to the Acting City Manager consistent with the intent of this Agreement.

Section 2. Term.

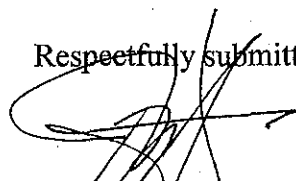
The Acting City Manager shall serve at the pleasure of the Council and nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the Council, or the City Manager, to terminate the services of the City Manager at any time, subject only to applicable provisions of the City personnel policies, and the provisions set forth hereinafter in the section titled "Termination."

AMENDMENT NO. 1 TO EMPLOYMENT AGREEMENT—See Exhibit "A" attached hereto and incorporated herein.

It is clear that under the contract the city manager serves at the "pleasure" of the city council and there are no specific duties and functions delineated other than Section 1 of the contract. Additionally, the city and the city manager have addressed any potential conflict of interest between the city and the MTA in the amendment to the contract. However, the question remains as to whether the city manager, as a city employee in the position of "chief administrative officer," exercises sovereign functions solely due to the position as city manager.

This question is not squarely addressed by any Attorney General Opinions or in case law; therefore, guidance from the Attorney General is necessary.

Respectfully submitted,



Jim Keffer, Chair
House Committee on Ways and Means