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DISTRICT 41

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July 15, 2009

R.Q.-0813-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

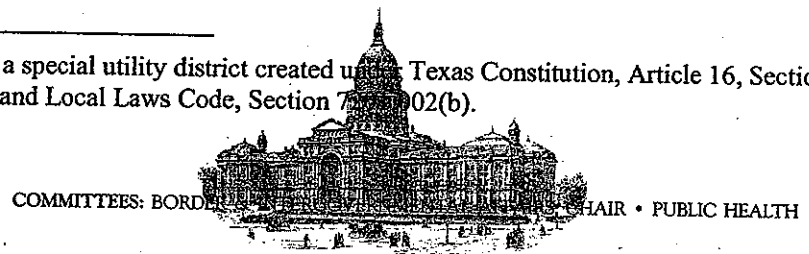
Re: Request for Attorney General Opinion

Dear General Abbott:

I respectfully request an attorney general's opinion on whether a member of the Agua Special Utility District (the "District")¹ Board of Directors (the "Director") who has been elected as a member of the board of trustees of South Texas College (the "College"), a community college, is disqualified from serving on the District's Board pursuant to the common law doctrine of incompatibility. The District raises this question out of its concern that if the Director is later found to have vacated his office by virtue of having qualified for an incompatible office, the Director would not be entitled to vote as a member of the District's Board, or to be counted for purposes of a quorum.

The boundaries of the College overlap the service area of the District. The District is a water utility in the business of providing water service (and in the future, sewer service) to customers within its service area. The College is not a water customer of the District, and is not expected to become a customer because the College's facilities are not located within the District's service area. The District and the College have the power to contract with other entities, including governmental entities, but there are no contracts between them, and due to the specialized nature of their functions and activities, it is not anticipated that there will be any contractual relations between the two. The College has the power of taxation within its jurisdiction. The District has no taxing authority. Both entities have the power of eminent domain.

¹ The District is a special utility district created under the Texas Constitution, Article 16, Section 59. See, Special District and Local Laws Code, Section 7.02(b).



We understand that the Texas Constitution does not prohibit an individual from holding both these offices simultaneously because they are uncompensated positions and are, therefore, not offices of "emolument." See, Texas Constitution Article 16, Section 40; Op. Tex. Att'y Gen. No. GA-0015 (2003). However, even though a District board member is not prohibited by the constitution from serving as a trustee of the College, the question remains whether such service is incompatible with his office as member of the District's Board of Directors.

The doctrine of incompatibility prohibits an individual from holding two positions of public office if the officer will thereby be in a position to promote the interests of one constituency at the expense of another. It prohibits one office from improperly imposing its policies on the other or subjecting it to control in some way. See, *Thomas v. Abernathy County Line I.S.D.*, 2905 S.W. 152 (Tex. Comm'n App. 1927, judgment adopted); Op. Tex. Att'y Gen. No. LO-95-029 (1995).

The aspect of the doctrine of incompatibility potentially applicable here relates to whether the two offices give rise to conflicting loyalties that may exist when one person holds two offices and by virtue of holding one office could impose its policies on the other or subject it to control in some other way. *Id.* In determining whether incompatibility exists, the Attorney General has said that the potential for conflict is more likely where geographic boundaries of the two governmental entities overlap because the duties of the two offices are more likely to conflict. Op. Tex. Att'y Gen. No. 0015 (2005). Circumstances that may result in incompatibility include: 1) when the two governmental entities are authorized to contract with each other, one person may not serve as a member of both; 2) when the two entities have overlapping powers of taxation, the potential for conflict is insurmountable because each has an interest in maximizing its revenues; 3) when one entity has directory or supervisory power with respect to duties of the other; and 4) when both entities have the power of condemnation in the overlapping jurisdiction. See, Op. Tex. Att'y Gen. No. JC-0363 (2001); Op. Tex. Att'y Gen. No. GA-0348 (2003); Op. Tex. Att'y Gen. No. GA-0015 (2005). However, geographic overlap is not sufficient to result in conflicting loyalties where there is practically no relationship between the offices. Op. Tex. Att'y Gen. No. GA-00348 (county commissioners office is not incompatible with municipal judge); Op. Tex. Att'y Gen. No. JM-1266 (1990) (city council member could simultaneously serve as director of navigation district).

In the current situation, while the boundaries of the College and the District overlap, it appears that for the most part, the factors that would indicate conflicting loyalties do not exist or are remote. For example, there is no overlapping taxing authority, and neither entity has any regulatory or supervisory power over the other. While the two entities have contracting authority and both have the power of condemnation, there is no existing contractual relationship between them, and the possibility of such a relationship appears remote. The College is not a water service customer of the District, and has no facilities within the District's service area that could potentially be served by the District. Moreover, the District's services are not provided pursuant to individually negotiated

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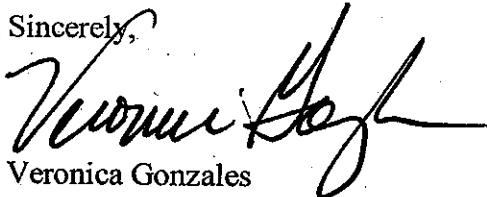
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contracts, but are provided at rates established in its tariff that is applicable to all customers. Additionally, because the purposes of the entities are very different (water service and education), it is not likely that they would enter into contracts, if at all, other than for water service. Nonetheless, there is at least one Attorney General Opinion that concludes that merely having the authority to contract, as well as having condemnation authority in overlapping jurisdictions, is sufficient to result in incompatibility. Op. Tex. Att'y Gen. No. LO-95-052 (1945); Op. Tex. Att'y Gen. No. JC-0363 (2001).

We are not aware of any decision or Attorney General Opinion that addresses the question of incompatibility under the District's circumstances described above. In light of this, I request this opinion because of the potential problems that may occur if the Director's College trustee position is later found to be incompatible. The effect of incompatibility is that the officer is deemed as a matter of law to have vacated his first office when he qualifies for a later, incompatible office, and he is no longer entitled to vote in his former office, or to be counted for purposes of making up a quorum. See, *Thomas v. Abernathy County Line I.S.D.*, supra; Opinion GA-0015. The District wishes to avoid a situation where the passage of an action of the Board of Directors depends on the vote or presence of a member later found to have vacated his position by virtue of having accepted an incompatible office.

Thank you for your assistance with this request. Please do not hesitate to contact me with any questions.

Sincerely,



Veronica Gonzales

State Representative, District 41

Chair, Border and Governmental Affairs