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OPINION COMMITTEE



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FILE # M2-48027-16
ID. # 48027

Tim Moody
Investigator

May 23, 2016

RQ-0112-KP

Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear Sir or Madam:

Question: Can the Chief of Police for the City of Lumberton, Texas (a home rule city) also hold the office of Precinct Constable for the Precinct in which the City lies?

Facts: The Chief of Police for the City of Lumberton, Texas was elected as Precinct Constable for Hardin County, Texas in the March primary elections for Precinct 5 where the City of Lumberton is located. There is no opponent for the November election, therefore the Chief of Police will take office as the Constable for Precinct 5, Hardin County, Texas on January 1, 2017. Both of these positions are compensated.

Brief:

As stated in the recent Attorney General Opinion KP-0032, "Article XVI, section 40 of the Texas Constitution provides that '[n]o person shall hold or exercise at the same time, more than one civil office of emolument.' TEX. CONST. Art XVI, §40. This prohibition applies if both positions are civil offices that are entitled to emolument. *State ex rel. Hill v. Pirile*, 887 S.W.2d 921,931 (Tex. Crim. App. 1994) (orig. proceeding). An emolument is 'a pecuniary profit, gain, or advantage.'" *Id.*

"For purposes of article XVI, section 40, a 'civil office' is a 'public office.'" *Tilley v. Rogers*, 405 S.W.2d 220, 224 (Tex. Civ. App.-Beaumont 1966, writ ref'd n.r.e.) Tex. Att'y Gen. Op. KP-0032. The Texas Supreme Court has long held that 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 Indep. Sch. Dist. V. Standlee*, 280 S.W. 2d 578, 583 (Tex. 1955). A constable is an elected official and the office of constable is a public office within the scope of article XVI, section 40 and the constable clearly holds his position

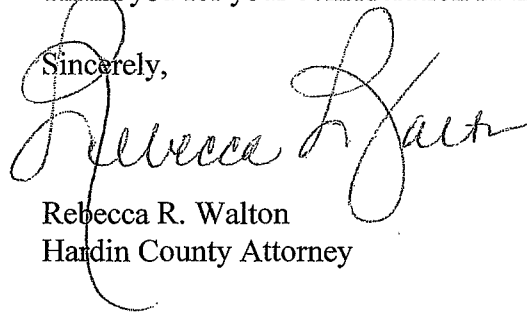
largely independent of the control of others.” See Tex. Att’y Gen. Op. Nos. GA-0540 (2007) at 2, GA-0402 (2006) at 1. However, in Attorney General Opinion DM-212 “we conclude that neither city police officers nor sheriff’s deputies hold civil offices within the meaning of article XVI, section 40 as a matter of law.” If the *Aldine* test is applied to the facts presented in the present matter, the Chief of Police for the City of Lumberton does not “hold his position largely independent of the control of others.” *Aldine Indep. Sch. Dist. V. Standley*, 280 S.W. 2d 578, 583 (Tex. 1955). In fact, the chief of police is employed by and serves at the will of the Lumberton City Council. Attorney General Opinion LO-93-27 states, “under ordinary circumstances, a municipal police officer performs his duties under the direction and control of others, and thus, does not hold an ‘office.’” Therefore, as the Chief of Police for the City of Lumberton he would not be a public officer but instead a public employee. In furtherance of this, Attorney General Opinion KP-0032 recently determined that “a school district police chief is not a public office to which article XVI, section 40 applies because the school district police chief answers to, and is subject to the control of, the school board and the superintendent.”

The common law doctrine of incompatibility has three aspects: self-appointment, self-employment, and conflicting loyalties. See Tex. Att’y Gen. Op. No. GA-0328 (2005) at 1 citing, *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152, 153 (Tex. Comm’n App. 1927, judgment adopted). The first two do not apply in this situation because neither position appoints or employs the other. The remaining issue, then, is whether there are conflicting loyalties. Texas Attorney General Opinion GA-0127 (2003) states “‘conflicting loyalties’ incompatibility applies only where both positions are offices.” Therefore, if the position of chief of police is not a civil office, then there is no conflicting loyalties and no violation of the common-law doctrine of incompatibility between that position and the position of constable, to which he was elected.

This matter is of great interest to the citizens of Hardin County and the citizens of the City of Lumberton. Please issue a determination on whether a municipal police chief may also hold the elected position of constable under the facts presented herein.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Rebecca R. Walton". The signature is written in black ink and is positioned to the right of the typed name.

Rebecca R. Walton
Hardin County Attorney