



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

October 24, 1973

Overruled By:

MW-415

The Honorable Harold Vittitoe
County Attorney, Brooks County
P. O. Box 502
Falfurrias, Texas 78355

Letter Advisory No. 63

Re: Dual Employment
City Policeman as
Civil Defense Director

Dear Mr. Vittitoe:

You have asked us to advise you concerning the propriety of one person serving as a policeman of the City of Falfurrias and at the same time accepting appointment as Director of Civil Defense for Brooks County, apparently a county position under the Commissioners Court of Brooks County. He is being paid a monthly salary as a policeman and expects to receive a monthly salary for services as Civil Defense Director. You have asked whether it would be appropriate for this latter salary to be paid at the same time he receives his pay as a policeman.

Section 40 of Article 16 of the Constitution of Texas, as amended in 1972, provides generally that no person shall hold, at the same time, more than one "civil office of emolument."

Application of this prohibition has been made difficult because of uncertainty as to what positions are "civil offices". In our opinion, a "civil office", as used in § 40, is something more than a "public employment" and something less than a "public office", though many prior Attorney General Opinions treated them as synonymous. Compare Pruitt v. Glen Rose Independent School District, 84 S. W. 2d 1004 (Tex. 1935) and Aldine Independent School District v. Standley, 280 S. W. 2d 578 (Tex. 1955). We also believe that a "civil office" is something more than - - and is distinct from (though it may include) - - a "position of honor, trust or profit".

From the constitutional usages, from the cases, and from past Attorney General opinions, we draw the conclusion that a "public office" exists if a public employment is (1) created by law, (2) with duties cast

upon the incumbent which are essentially governmental in nature and involve an exercise of some portion of the sovereign power, (3) in the performance of which the public is concerned, (4) which are continuing and not intermittent or occasional in nature, and (5) which are exercised by him for the benefit of the public, (6) largely independent of the control of others. A "civil office", within the meaning of Article 16, § 40 of the Constitution, differs from a "public office" in that a "civil office" need not be created by law (although it may be), and its occupant need not be independent of the control of others in the exercise of his duties (although again, he may be).

In other words, excepting military officers, every "public office" is also a "civil office", but not every "civil office" is a "public office". In Tilley v. Rogers, 405 S. W. 2d 220 (Tex. Civ. App., Beaumont, 1966, err. ref'd., n. r. e.), the Court saw no difference in the meaning of "public office" and "civil office". That conclusion, however, was gratuitous. The question before the Court was the validity of a zoning ordinance which was attacked upon the ground, among others, that when it was adopted, a quorum of the City Council was not present. One member, prior to and at the time of his qualifications as a councilman, was a professor at a State school. The Court's statement was unnecessary because in any event, since the assumption of a second civil office ipso facto vacates the first one, and since the position as councilman was the latter of the two, the councilman acted validly in that capacity whether or not he was still a professor. The question would have been material to the decision only if it had been his station as a professor that was challenged. Pruitt v. Glen Rose Independent School District, supra.

In our opinion, a policeman occupies a civil office. Irwin v. State, 177 S. W. 2d 970 (Tex. Crim. 1944). We are unable to determine from the limited description you have given us whether the position of Director of Civil Defense amounts to a civil office, but, in all probability, it does.

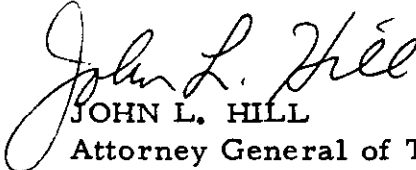
To the extent that an occupant of a "civil office" receives more than his expenses, the office is a "civil office of emolument". State v. Mycue, 481 S. W. 2d 476 (Tex. Civ. App., San Antonio, 1972, no writ).

No one person may occupy two civil offices of emolument unless coming within one of the special exceptions contained in § 40 of Article 16. The first such exception applies to officers or enlisted men in the National Guard,

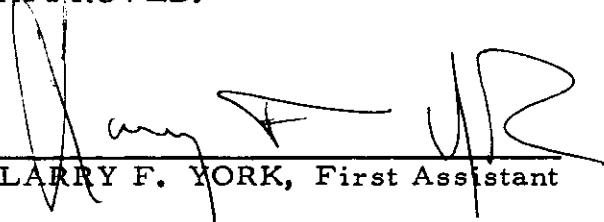
the Reserves, etc. The second applies to State employees serving on the governing body of various political divisions. Another provides that a "non-elective State officer" may hold other non-elective offices under certain circumstances. None of these exceptions apply to the offices of police officer or County Director of Civil Defense. Neither a city policeman nor a County Civil Defense Director is a State officer. Compare Willis v. Potts, 377 S.W.2d 622 (Tex. 1964). The last exception applies only to members of the Legislature.

It is therefore our opinion that the policeman you describe is prohibited by § 40 of Article 16 of the Constitution from occupying the position of County Civil Defense Director if the latter amounts to a "civil office", as it is defined.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee