



Joe F. Grubbs

ELLIS COUNTY AND DISTRICT ATTORNEY

Temporary Administration Building
1201 N. Hwy 77, Suite B
Waxahachie, Texas 75165-5140
Phone: 972/825-5035 Fax: 972/825-5047



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December 8, 2003

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The Honorable Gregg Abbott
Texas Attorney General
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FILE # ML-43373-03
I.D. # 43373

RE: Waxahachie Temporary Municipal Court Judge

Dear Attorney General Abbott,

The City of Waxahachie's full time Finance Director has been named as Temporary Judge for the Waxahachie Municipal Court. As Temporary Judge he serves as Municipal Court Judge when the regular Municipal Court Judge is unavailable or unable to serve. In his capacity as Temporary Judge, he hears cases in the Waxahachie Municipal Court and handles arraignments for the City of Waxahachie and for Ellis County. He does not receive any additional salary or other compensation for his service as the Temporary Judge.

The City of Waxahachie has requested that the Ellis County and District Attorney present this request for an Attorney General's opinion. I respectfully present the following issues for your review and ultimately an opinion.

Issue:

1. In light of Texas Constitution Article XVI, Section 40, Judicial Cannons of Ethics, and the common-law doctrine of incompatibility can the City of Waxahachie's Finance Director also serve as the Temporary Judge for the Waxahachie Municipal Court?

2. If it is determined that the Temporary Judge can not hear cases or set fines in the Waxahachie Municipal Court, can he continue to serve as Temporary Judge for the purpose of handling arraignments and setting bonds for the City of Waxahachie and the County of Ellis?

Discussion:

The Texas Constitution Article XVI, Section 40 prohibits a person from holding or exercising more than one civil office of emolument at the same time. "More than one civil office

of emolument” essentially means two paid offices. The position of Municipal Judge is clearly an “office”; however the position of Finance Director appears to be one of an “employee”. The determining factor is the essential nature of his duties and whether any sovereign function of 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 ISD v. Standley* 154 Tex 547, 280 S.W.2d 578, 585 (1955). The position of Finance Director is hired and reports to the City Manager and contains no sovereign function that is largely independent of the control of others as the City budget is subject to the approval of the Waxahachie City Council. The Attorney General has said that a person is not ordinarily an officer if his or her actions are subject to control by a superior body, for in such instance, the person cannot be said to exercise his or her authority “largely independent of the control of others”. Tex. Att’y Gen. Op. JM-1266 (1990).

The Finance Director position is a salaried position, but there is no payment or remuneration of any type provided for the position of Temporary Judge of the Municipal Court, and thus it is not a position of emolument. In this case it appears that the prohibition of Article XVI Section 40 has not been violated for two reasons. First the office of Temporary Judge of the Municipal Court is not one of emolument and second the position of Finance Director is one of an employee rather than of an office holder.

The other issue is whether the common-law doctrine of incompatibility has been violated by serving as both Finance Director and Temporary Judge. Incompatibility occurs when there are two inconsistent public duties. Tex. Att’y Gen. Op. JM-172 (1984). The doctrine prohibits a person from holding two positions where one position might impose its policies on the other or subject it to control in some other way. Tex. Att’y Gen. Op. No. JM-129 (1984). The mere possibility of a conflict does not give rise to incompatibility. Tex. Att’y Gen. LO-93-059; however the likelihood of potential conflict plays a significant role. Tex. Att’y Gen. Op. No. JM-184 (1987).

Here the Finance Director is responsible for working on the budget for the City and is responsible for projecting revenue flow to the City. When the Temporary Judge hears a case in the Waxahachie Municipal Court, the Judge has the ability to set the fine amount on a guilty plea or finding of guilt within his or her discretion subject to the statutory limits for Class C misdemeanors. There was been no indication whatsoever that the Temporary Judge has allowed his capacity as Finance Director to influence him in setting fine amounts, but the theoretical possibility of a conflict does exist. The likelihood of the potential conflict is hard to determine and makes the issue of whether the Temporary Judge should provide over cases in the Waxahachie Municipal Court difficult to answer with any degree of certainty. While restraint in presiding over any case involving a fine in the Waxahachie Municipal Court should eliminate any appearance of impropriety or incompatibility, the Judicial Cannon Ethics requires that the appearance of impropriety be avoided.

If it is determined that the Temporary Judge should not preside over cases, there remains the question whether the Temporary Judge may still preside over arraignments. Here the Temporary Judge would only set bond amounts. This does not seem to present the same

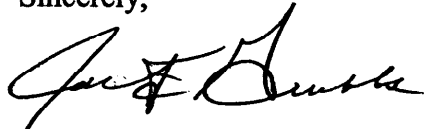
difficulties as presiding over cases in the Municipal Court as no fines, or other potential sources of revenue are being generated for the City.

Answer:

Texas Constitution Article XVI, Section 40 is not violated by the Finance Director of the City of Waxahachie serving as Temporary Judge of the Waxahachie Municipal Court. There is no bright line violation of the common-law doctrine of incompatibility, however prudence and Judicial Cannons of Ethics dictate that the Finance Director not preside as Temporary Judge over cases in the Waxahachie Municipal Court which might provide a revenue source to the City so as to avoid an appearance of impropriety. The Finance Director should be allowed to preside over arraignments for the City of Waxahachie and the County of Ellis as these proceedings do not provide revenue to the City and thus avoid running afoul of the common-law doctrine of incompatibility.

I await your reply.

Sincerely,



Joe F. Grubbs
Ellis County & District Attorney

cc: Jim Chapman, Attorney