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February 10, 2005

Hon. Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0317-GA

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FEB 11 2005

OPINION COMMITTEE

Re: Request for Attorney General's Opinion

FILE # HL-44125-04

I.D. # 044125

Dear General Abbott:

I have been requested to seek an opinion from you as to whether a county commissioner may be appointed as a municipal judge for compensation and serve in both offices simultaneously.

Constitutional Prohibition Against Dual Office-Holding

Article XVI, Section 40, of the Texas Constitution holds, in part:

(a) No person shall hold or exercise at the same time, more than one civil office of emolument, except that of...*County Commissioner*...

Tex. Const. Art. XVI, sec. 40(a) [emphasis added]

"It is well-settled that a city or state employee may also hold the position of county commissioner." *Stone vs. City of Wichita Falls*, 477 F.Supp. 581, 584 (N.D. Tex. 1979); *aff'd* 646 F.2d. 1085 (5th Cir. 1981); *cert. denied*, 102 S.Ct. 637, 454 U.S. 1082, 70 L.Ed.2d 616 (1981). In an ancient Texas case, the Texas Supreme Court held that a county commissioner could simultaneously serve as a town mayor within that county, *Gaal v. Townsend*, 77 Tex. 464, 14 S.W. 365 (1890), and it should also be noted that a municipal mayor has long shared the responsibilities of a municipal judge.

It would appear that Section 40 of Article XVI carves out a clear-cut exception and does not prohibit such dual office-holding, however, there apparently must also be considered:

1. Is such dual office-holding prohibited by Article II, Section 1, with respect to the separation of powers; and
2. Does the common law doctrine of incompatibility prevent a commissioner from serving simultaneously as a municipal judge within the same county?

Separation of Powers

As to the first question, the Texas Constitution provides:

The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative; those which are Executive to another, and those which are Judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. Art. II, sec. 1.

The policy behind this provision is to prohibit one branch of government from interfering with functions constitutionally committed to other branches of government. *Turner v. Trinity Independent School District Board of Trustees*, 700 S.W.2d 1 (Tex.App.-Houston [14th Dist.] 1983, no writ). Obviously, a county commissioner functions in the Legislative Branch, and a municipal judge belongs to the Judicial. In *Turner*, the appellate court recognized that while two roles (school trustee and justice of the peace) each fell into different governmental branches, there was no violation of Article II, section 1, where the functions of one office would not interfere with the functions of the other. See also *Op. Tex. Att’y Gen. JM-519 (1986)* (constable serving dual office as school board member).

However, it appears that, in the usual circumstance, the separation of powers doctrine is no longer considered an impediment to dual office-holding. *Op. Tex. Att’y Gen. JM-519 (1986)*; *Op. Tex. Att’y Gen. JC-216 (2000)*.

Doctrine of Incompatibility

Finally, there is the issue of incompatibility, a common law doctrine holding that a person may not hold two offices if the duties are inconsistent or in conflict, or if one office is subordinate to the other. *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152 (Tex. Comm’n App. 1927, judgment adopted). The acceptance and qualification for a second office incompatible with the first office is an implied resignation of the first office. *State of Texas ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). However, if neither office is accountable to, under the dominion of, or subordinate to the other, and neither has any right to interfere with the other, the offices are not incompatible. *Turner v. Trinity Independent School District Board of Trustees*, 700 S.W.2d at 2. A “conflicting loyalties” doctrine applies when one governmental body has the authority to impose its will on another in any matter whatsoever. *Op. Tex. Att’y Gen. LO 98-094*. The crucial question in determining incompatibility is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other. *State of Texas ex rel. Hill v. Pirtle*, 887 S.W.2d at 930. If there is very broad authority in one, such as a prosecutor or district judge, there is a higher potential for conflict. See *Op. Tex. Att’y Gen. LO 95-029* and *LO 98-094*.

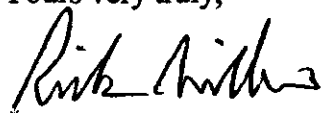
It would appear that, as with the earlier test, there does not appear to be an incompatibility problem with a county commissioner serving as a municipal judge. A municipal court is of limited

jurisdiction, and highly unlikely to ever have to deal with a problem that would require the attention of the commissioners court, other than perhaps having to hear a criminal case growing out of a Class C Misdemeanor enacted by the commissioners court.

In addition, the Texas Code of Judicial Conduct appears to specifically exempt a municipal judge from the prohibition against dual office-holding by the judiciary, although the language speaks only to "becoming a candidate in a contested election for a non-judicial office," not to actually holding the other office once elected. *Canons 5(3) and 6-C, Supreme Court of Texas Code of Judicial Conduct* (located in pocket part for Volume 3A of the Texas Government Code, in title 2, subtitle G, App. B, following Section 84.004).

Your opinion as to this question will be greatly appreciated. Should you have any questions, or desire additional information, please let me know.

Yours very truly,

A handwritten signature in black ink, appearing to read "Rick Miller". The signature is written in a cursive, slightly slanted style.

Rick Miller
Bell County Attorney