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OPINION COMMITTEE

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FILE # ML-46555-10
I.D. # 46555

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August 5, 2010

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL RETURN RECEIPT
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Question: Is employment in the position of Bexar County Director of Judicial Support Services incompatible with serving as a visiting county court-at-law judge in Bexar County?

Dear General Abbott:

I respectfully request an opinion as to whether the Bexar County Director of Judicial Support Services may also serve as a visiting county court-at-law judge in Bexar County.

Background

On July 22, 2009, Bexar County Commissioners Court created the position of Director of Judicial Support Services position to assist the Commissioners Court in creating a more efficient criminal justice system with the goal of reducing the Bexar County jail population. Some of the Director's specific duties are: advise and collaborate with Bexar County judicial system stakeholders in developing system-wide process improvements initiatives and cost containment strategies; develop strategies to streamline judicial processes to include docket management and case processing initiatives to significantly reduce the backlog of cases in the Bexar County judicial system; and coordinate with other elected officials and the judiciary to identify business process improvements for an efficient and effective criminal justice and judicial system. The job description also includes the duty of assisting the regional presiding judge by accepting assignments to the Bexar County Courts, if the person holding the position is eligible and qualified for such assignment. The complete job description is attached as Exhibit A.

Tim Johnson served as judge of County Court-at-Law Number 5 for over 22 years. After he retired from judge of County Court-at-Law Number 5, Bexar County Commissioners Court hired Judge Tim Johnson as the Bexar County Director of Judicial Support Services. Although Tim Johnson is retired, he is eligible to sit as a visiting judge. Tim Johnson has declared that he will not seek a salary for his work as a visiting judge.

Law and Analysis

Both the Texas Constitution and the common law govern whether or not one person can hold two governmental positions. Article XVI, section 40, of the Texas Constitution prohibits, with certain exceptions, a person from holding more than one civil office of emolument. There is also the constitutional prohibition of holding positions in two branches of government. Tex. Const. Art II, section 1. The common-law doctrine of incompatibility has three aspects: self appointment, which prohibits a member of a governmental body making an appointment from also being the appointee; self-employment, which prohibits a member of a governing body from serving in a position that is answerable to the governing body; and conflicting loyalties, which prohibits one person from serving in two positions where one position might impose policies on the other. Op. Tex. Att’y Gen. Nos. JC-0564 (2002) and JM -129 (1984).

An important factor in the analysis of whether one person can hold two positions is the classification of each position. Is the person serving in a civil “office” or is the position one of employment? “The determining factor which distinguished 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 Independent School Dist. v. Standley, 154 Tex. 547, 280 S.W.2d 578, 583 (Tex. 1955). A public officer “is authorized by law to independently exercise functions of either an executive, legislative, or judicial character ... subject to revision and correction only according to the standing laws of this state.” State ex. Rel. Hill v. Pirtle, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994). The authorization to pronounce judgment and to adjudicate the rights of parties appearing in court has been held to be a sovereign function of the government and a mark of a public office. Thompson v. City of Austin, 979 S.W.2d 676, 683 (Tex. App. - Austin 1998, no writ history). Thus, as a judge, Tim Johnson holds a public office. Prieto Bail Bonds v. State, 994 S.W.2d 316, 320 (Tex. App. - El Paso 1999, pet. ref’d) (senior judges). In contrast, the Director of Judicial Support Services was hired by Commissioners Court and is accountable to the commissioners. The Director

does not exercise sovereign functions for the benefit of the public independent of the control of others. Thus, as Director, Tim Johnson is an employee.

Because Tim Johnson holds a public office and a position of employment, the constitutional prohibition of holding two offices is not violated,¹ but the common law doctrine of incompatibility must be considered. As stated above, incompatibility bars one from holding two positions where one position might impose its policies on the other or unduly influence the other position.² Op. Tex. Att'y Gen. No. JM -129 (1984). For Tim Johnson to successfully carry out his duties as the Director of Judicial Support Services, the Commissioners Court expects the jail population to be reduced. However, as judge, with jurisdiction to hear criminal cases, sentencing a defendant to jail time directly conflicts with the goal of lowering the jail population. Conversely, placing a defendant on probation to keep him out of jail would contribute to the success of the Director's initiatives. Yet, a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, perhaps an impossible task when one person wears a judicial robe and at the same time sits in the Director's chair.

A similar situation was addressed in Attorney General Opinion JM -1047 (1989) where a justice of the peace was considering a position as a jailer. Your office found that the jailer's duties conflicted with the duties of the justice of the peace. For instance, the jailer's personal knowledge of jail conditions might affect his ability as a magistrate to reach an impartial decision that "there is no safe jail in the county." *Id.* Additionally, the magistrate might have to hold an examining trial involving a defendant that he had dealt with as a jailer. *Id.* His personal observations of the defendant in jail might color his view of the evidence as a magistrate. *Id.* Finally, his status as the sheriff's salaried employee could undermine his independence of judgment in decisions about warrants requested by the sheriff's department. *Id.* Therefore, the conclusion was reached that the two positions, one a public office and the other a position of employment, were incompatible. *Id.* *But see* Att'y Gen. Ltr. Op. 92-35 (1992) (No legal bar to a justice of the peace serving as deputy constable in a different precinct, whether within or without his home county. Justice of the peace may also hold the position of deputy sheriff in a county other than the county he serves as justice of the peace); Att'y Gen Ltr. Op. 89-82 (1989) (Assistant District Attorney may also serve as School Board Trustee);

¹ It is not necessary to consider whether Judge Johnson's willingness to service as a visiting judge without compensation means that it is not an office of emolument.

² The other components of incompatibility, self-employment and self-appointment, are not applicable.

While the two positions that Tim Johnson holds may appear as incompatible as a justice of the peace and jailer, the Attorney General's more recent opinions reach a contrary conclusion to that of Attorney General Opinion JM-1047(1989). They hold that to find incompatibility of positions due to conflicting loyalties both positions must involve a public office. Without analysis, these recent opinions rely on Attorney General Opinion JM-1266 (1990) wherein Attorney General Opinion JM-1047 (1989) is overlooked when concluding that the "conflicting loyalties" type of incompatibility has never been applied to a situation in which one position is a public office and the other is one of employment. Moreover, none of the opinions cited in Attorney General Opinion JM-1266 (1990) as the basis for holding that two public offices are required provide any analysis of why in the conflicting loyalties situation both positions must be a public office, but when considering the self-employment or self-appointment incompatibility, the positions of an office and employment is sufficient to find incompatibility. Tex. Att'y Gen. LA-114 (1975) (self-employment, school board trustee and teacher); and Ehlinger v. Clark, 8 SW2d 666, 674 (Tex. 1928).

Other arguments have been raised that deal with the issue of dual office holding and employment. One is the constitutional prohibition of holding positions in two branches of government. Article II, section 1 of the Texas Constitution provides for the separation of powers. This provisions states as follows:

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 to one, 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 other. Tex. Const. Art II, section 1.

However, recently, your office has not considered this constitutional provision a ban on dual office holding on a local level. Op. Tex. Att'y Gen. No. GA-348 (2005); *But see*, State Comm'n on Judicial Conduct, Public Statement No. PS-2000-1 (attached as Exhibit B) (judge who serves two branches cannot accomplish task without impairing effectiveness).

When the facts raise the issue of whether a judge can hold a second position, your office has found the Code of Judicial Conduct to be determinative. Op. Tex. Att'y Gen. No. JM-0213 (1984). Canon 4 seems particularly apropos to the facts

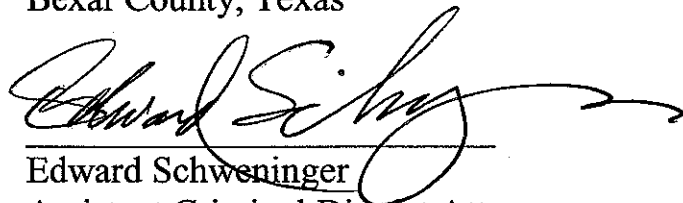
presented here. Texas Supreme Court, Code of Judicial Conduct, Canon 4, part B and H. This Canon specifically permits a judge to serve as a director of a governmental agency devoted to the improvement of the law, the legal system, or the administration of justice.

Because of the multiple facets of many of the Attorney General Opinions that touch upon the issue presented here, I seek your help in determining whether Tim Johnson may serve as a visiting county court-at-law judge and as the Bexar County Director of Judicial Support Services.

Sincerely,

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cc: Judge Tim Johnson
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