



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

December 12, 1951

Hon. Edward B. Stewart
County Attorney
Young County
Graham, Texas

Opinion No. V-1370

Re: Legality of paying a constable's salary while he is temporarily being paid as a city policeman, replacing a policeman who is ill.

Dear Sir:

You have requested an opinion on the following questions:

"1. Is the acceptance by a constable of a temporary paid position as a policeman of an incorporated city, to replace a regular policeman who is ill, such an abandonment of the former position as to preclude the county treasurer from paying him the constable's salary?

"2. If the county treasurer is unauthorized to pay such salary during the existence of such temporary employment by the city, would he be authorized to resume paying such salary upon the termination of such temporary employment by the city and before the re-election of the constable to his office as constable?"

Section 40 of Article XVI of the Constitution of Texas provides in part:

"No person shall hold or exercise, at the same time, more than one Civil Office of emolument . . . exceptions not applicable."

A policeman of an incorporated city is an officer within the meaning of the above quoted constitutional provision. Irwin v. State, 177 S.W. 2d 970 (Tex. Crim. 1944). Likewise, a constable is an officer within the meaning of the above quoted constitutional provision. Torno v. Hochstetler, 221 S.W. 623 (Tex. Civ. App. 1923). In the Irwin case it was held that Section 40 of Article XVI of the Constitution of Texas prohibited one person from being at the same time a policeman of an incorporated

city and a deputy sheriff. In the Torno case it was stated at page 624:

"If the officer who levied the execution in this case, the said Gentry, while being the legal and duly qualified constable, was subsequently appointed town marshal of the legally incorporated town of Sinton, had duly qualified and acted as such, he ceased to be and vacated his office of constable and became the town marshal, an office wholly incompatible with that of constable, and would have no power to execute writs of execution such as was done in this case. See Article 16, § 40 of the Constitution by Harris, and cases cited; State v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109; Alsop v. Jordan, 69 Tex. 303, 6 S.W. 831, 5 Am. St. Rep. 53."

Therefore, it is our opinion that Section 40 of Article XVI of the Constitution of Texas prohibits a constable from being at the same time a policeman of an incorporated city.

Apart from the constitutional prohibition contained in Article XVI, Section 40, it is also a rule of common law that a person cannot hold two offices where the duties of the offices are incompatible. State v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109 (1886); Thomas v. Abernathy County Line Independent School Dist., 290 S.W. 152 (Tex. Comm. App. 1927). Irwin v. State, *supra*, held that the office of town marshal is "wholly incompatible with that of constable." We think it follows from that holding that the position of city policeman is incompatible with the office of constable.

In Pruitt v. Glen Rose Ind. School Dist. No. 1, 126 Tex. 45, 84 S.W. 2d 1004, 100 A.L.R. 1158 (1935), the Supreme Court stated, at 84 S.W. 2d 1007:

"The text, 34 Tex. Jur. 354, Sec. 19, summarizes the rule, thus: 'Having elected to accept and qualify for the second office, ipso facto and as a matter of law, he vacates the first office. This is true, where both offices are places of emolument, regardless of whether they are incompatible, and if they are incompatible there is a vacation of the first office regardless of whether both are offices of emolument within the meaning of the Constitution. In such circumstances the constitutional provision that all officers shall continue to perform the duties of their offices until a successor has been qualified does not apply.'"

In an annotation to this case, 100 A.L.R. at 1164, it is stated:

"It is a well-settled rule of the common law that a person cannot at one and the same time rightfully hold two offices which are incompatible, and thus, when he accepts appointment to the second office, which is incompatible, and qualifies, he vacates, or by implication resigns, the first office."

Therefore, we agree with your conclusion that when the constable accepted the appointment as a policeman of an incorporated city he vacated his office of constable and the county treasurer was unauthorized to pay him any salary as constable after he assumed the duties of city policeman. We are assuming in this opinion that the appointment to the latter office was in accordance with the charter and ordinances of the city for which he served as policeman.

The person in question can resume the office of constable only by being appointed to fill the vacancy heretofore created or by being elected to the office at the next general election.

SUMMARY

One person cannot hold or exercise at the same time the office of constable and the office of city policeman. When a constable accepts an appointment as a policeman of an incorporated city, he vacates his former office, and the county treasurer is not authorized to pay him any salary as constable from the date of his acceptance of the latter office. Sec. 40, Art. XVI, Tex. Const.; Irwin v. State, 177 S.W. 2d 970 (Tex. Crim. 1944); Torno v. Hochstetler, 221 S.W. 623 (Tex. Civ. App. 1923); Pruitt v. Glen Rose Ind. School Dist. No. 1, 126 Tex. 45, 84 S.W. 2d 1004, 100 A.L.R. 1158 (1935).

APPROVED:
J.C. Davis, Jr.
County Affairs Division
Jesse P. Luton, Jr.
Reviewing Assistant
Charles D. Mathews
First Assistant

Yours very truly,

PRICE DANIEL
Attorney General

By s/John Reeves
John Reeves
Assistant