



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 3, 2021

The Honorable Stephen L. Mitchell
Culberson County Attorney
Post Office Box 276
Van Horn, Texas 79855

Opinion No. KP-0352

Re: Whether a deputy sheriff may simultaneously serve as an elected alderman of a Type-A general-law city (RQ-0370-KP)

Dear Mr. Mitchell:

You ask whether a deputy sheriff may simultaneously serve as an elected alderman of a Type-A general-law city.¹ You tell us that a serving deputy sheriff of Culberson County (the “County”) ran for and was elected to the office of alderman on the city council of the town of Van Horn (the “Town”), the county seat of the County. Request Letter at 1. You explain that the individual, now promoted to chief deputy sheriff, receives monthly compensation from both the County as chief deputy sheriff and from the Town as alderman. *Id.* You explain that the individual’s simultaneous service in the two positions raises issues about dual officeholding and constitutional or common-law limitations on holding two positions. *Id.* You also ask whether Attorney General Letter Advisory 112 resolves the issue. *Id.* (citing Tex. Att’y Gen. LA-112 (1975)).

Letter Advisory 112 concluded that the separation of powers doctrine of article II, section 1 of the Texas Constitution precludes one person from simultaneously serving as deputy sheriff and city councilmember. Tex. Att’y Gen. LA-112 (1975) at 2. The letter advisory relied on Attorney General Opinions H-6 and H-7.² *Id.* at 1–2. However, a subsequent attorney general opinion questioned H-6 and H-7 in part because “the language of article II, section 1 might be construed as applying only to state level offices, and not to offices of political subdivisions.” Tex. Att’y Gen. Op. No. JM–213 (1984) at 4. More recently, a Texas Supreme Court opinion

¹See Letter from Honorable Stephen L. Mitchell, Culberson Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 5, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0370KP.pdf> (“Request Letter”).

²See Tex. Att’y Gen. Op. Nos. H-6 (1973) at 3 (concluding that article II, section 1 of the Texas Constitution barred a public school instructor from serving on the commissioners court), H-7 (1973) at 3 (concluding that article II, section 1 precludes appointment of a state or county judge or a legislator as a special Texas ranger). A later attorney general opinion overruled attorney general opinion H-6 on related grounds, determining that “article II, section 1 “ordinarily” does not play a role in dual-officeholding matters. See Tex. Att’y Gen. Op. No. JC-0074 (1999) at 2.

definitively settled the question, holding that the separation of powers doctrine in article II, section 1 of the Texas Constitution “only guarantees the separation of the state legislative, executive, and judicial branches of government.” *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 72 (Tex. 2000). Therefore, the separation of powers provisions of article II, section 1 does not apply to officers of local government. *See A.H.D. Houston, Inc. v. City of Houston*, 316 S.W.3d 212, 222 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (“The separation of powers provision of the Texas Constitution applies only to the branches of state, not local, government.”). Accordingly, article II, section 1 of the Constitution does not prevent a deputy sheriff from simultaneously serving as a member of a city council.³

We now turn to the dual-officeholding prohibition of article XVI, section 40 of the Texas Constitution. Article XVI, section 40 provides that, with exceptions not pertinent here, “[n]o person shall hold or exercise at the same time, more than one civil office of emolument.” TEX. CONST. art. XVI, § 40(a). However, the prohibition applies only if both positions are “civil offices of emolument” within the meaning of the constitutional provision. *State ex. rel. Hill v. Pirtle*, 887 S. W.2d 921, 931 (Tex. Crim. App. 1994) (orig. proceeding). The distinguishing factor of a public “office” subject to article XVI, section 40, is whether the person exercises a sovereign function of the government “largely independent of the control of others.” *Id.* A deputy sheriff acts at the direction and pleasure of the sheriff. TEX. LOC. GOV’T CODE § 85.003(c). Because a deputy sheriff does not exercise a sovereign function largely independent of the control of others, a deputy sheriff does not hold a public office for purposes of article XVI, section 40. *See* Tex. Att’y Gen. Op. Nos. KP-0189 (2018) at 2, GA-0470 (2006) at 4, GA-0402 (2006) at 1. Accordingly, article XVI, section 40 does not preclude a person from simultaneously holding the positions of deputy sheriff and city councilmember. Tex. Att’y Gen. Op. No. KP-0189 (2018) at 2.

Finally, simultaneously holding two offices may implicate the common-law incompatibility doctrine, which prevents one person from holding two public offices with inconsistent or conflicting duties. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928); *Thomas v. Abernathy Cnty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm’n App. 1927, judgment adopted). But like the constitutional prohibition on dual officeholding, the common-law doctrine of incompatibility prevents a person from holding two positions only when each position constitutes an office. *See Thomas*, 290 S.W. at 152–53. Prior opinions of this office conclude that because a deputy sheriff does not hold an office, the common-law doctrine of incompatibility does not apply. *See* Tex. Att’y Gen. Op. Nos. KP-0189 (2018) at 2; GA-0470 (2006) at 4, GA-0402 (2006) at 1. In sum, neither the separation of powers provision of article II, section 1 of the Texas Constitution, nor the dual-officeholding prohibition in article XVI, section 40, nor the common-law incompatibility doctrine precludes a deputy sheriff from simultaneously serving as a city councilmember.

³We overrule Letter Advisory 112 and Attorney General Opinions H-6 and H-7 to the extent they conclude that the separation of powers doctrine in article II, section 1 of the Texas Constitution applies to offices other than those in the state legislative, executive, and judicial branches of government.

S U M M A R Y

The separation of powers provision of article II, section 1 of the Texas Constitution does not apply to officers of local government. The dual-officeholding prohibition of article XVI, section 40 of the Texas Constitution and the common-law doctrine of incompatibility prevent, in certain circumstances, one person from simultaneously holding two public offices. A deputy sheriff does not hold such an office because a deputy sheriff does not exercise a sovereign function largely independent of the control of others. Thus, neither the separation of powers provision of article II, section 1 of the Constitution, nor the dual-officeholding prohibition in article XVI, section 40, nor the common-law incompatibility doctrine preclude a deputy sheriff from simultaneously serving as a city councilmember.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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