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Opinion Committee

FILE # ML-41067-99

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October 18, 1999

Hon. John Cornyn
Office of the Attorney General
Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

RQ-0131-JC

Re: Request for an Attorney General Opinion

Dear Sir or Madam:

Please consider this a request for an Attorney General's Opinion to consider the following issues:

1. Does an individual violate the Common Law Doctrine of Incompatibility by serving as a member of the Gilmer City Council and as a member of the Gilmer Volunteer Fire Department at the same time?
2. Does an individual violate the terms of the Home Rule Charter of the City of Gilmer by serving as a member of the Gilmer City Council and as a member of the Gilmer Volunteer Fire Department at the same time ?
3. Does an individual by taking the oath of office as a member of the Gilmer City Council Operateve, ipso facto, as a resignation from the Gilmer Volunteer Fire Department?

I have attached pertinent information that I am hopeful is of assistance in the resolution of these matters.

FACTUAL BASIS

An individual who was and had been for a brief number of years a member of the Gilmer Volunteer Fire Department ran for office for the Gilmer City Council and was properly and duly elected. He took office in the spring of 1999. The question has arisen as to whether there is some reason that this individual can not serve in both positions simultaneously.

Attached hereto is a copy of a letter dated May 14, 1999, by the City Attorney for the City of Gilmer as it relates to this matter as well as portions of the Charter of the City. Further, I have attached three Attorney General Opinions that seem pertinent, but somewhat conflicting. In Opinion Number MW-432, the opinion of the Attorney General indicates that essentially an individual may not serve as a Fire Chief and City Council Member at the same time by virtue of the Common Law Doctrine of Incompatibility. Further, a person accepting the office of City Council Member, ipso facto, resigns as Fire Chief. Letter Opinion Number 94-0070 indicates that the Common Law Doctrine of Incompatibility is not violated in that context by an individual serving on the City Council and acting as a member of the Volunteer Fire Department. The opinion goes to some length to indicate that the Volunteer Fire Department is a private Volunteer Fire Department, however, the opinion also points out that the Fire Department does receive funds from the City but is no under control of the city. I have also attached Letter Advisory Opinion Number 154 in which the opinion indicates that an individual does not violate the Common Law Doctrine of Incompatibility when one serves as a City Councilman and a member of the Volunteer Fire Department. Therefore, the essence of the inquiry appears to be the amount of control that the City entity has over the Volunteer Fire Department. It is important to note, in a context of the particular case here in Gilmer, that the Volunteer Fire Department is indeed a separate entity. However, as the City Attorney points out, the Department is funded by the City. Further, the Charter clearly shows that the Council and the City Manager have some control over the Fire Chief. Whether that is sufficient control to consider it to be more like the opinion set forth in MW-432 or whether it is more similar to the Letter Opinion 94-0070 and Letter Advisory Number Opinion 154 is really the crux of the matter. Further the Charter of the City has certain provisions regarding dual office holding. Specifically, Section 3.02 addresses the matter and indicates that no person may serve on the City Council if they are appointed to any office or position in the service of the city. Further, that section indicates that such election to the City Council, ipso facto, forfeits the prior position. Clearly, the entire purpose of the Doctrine of Incompatibility and the issue attempted to be addressed in Section 3.02 is so that no City Council Member can be said to have a bias or prejudice or to be serving two masters at the same time. Such a policy, of course, is a sound public policy. Other public policy considerations may be that, especially in rural areas, those who wish

to do their duty in public service positions are sometimes limited in numbers. Therefore, the potential for such conflicts may occur more often than in urban areas.

The City Council Member in the case here in Gilmer, is simply a member of the Volunteer Fire Department and not, apparently, in a decision making role within the Volunteer Fire Department itself. That fact may be significant regarding the Charter itself as well as the opinion MW-432 and its conclusion. An opinion addressing these particular issues would be appreciated as soon as it may be obtained so that the City of Gilmer may put this matter behind them and move on. If you have any questions regarding this matter, please do not hesitate to contact me.



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TC/mb

**cc: Hon. Mike Martin
City Attorney
City of Gilmer, Texas**