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January 6, 2000

Hon. John Cornyn
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General's Opinion

Dear General Cornyn:

I have been requested by the City of Killeen to seek an opinion from you as to whether an elected junior college trustee may be appointed as a municipal judge and serve in both offices simultaneously.

Mrs. Barbara Weaver is an elected trustee of the governing board of Central Texas College. Recently she was appointed by the City of Killeen to sit as its municipal judge. The question is whether there is a Constitutional problem.

With certain exceptions not applicable to this question, Article XVI, Section 40, requires:

No person shall hold or exercise at the same time, more than one civil office of emolument....unless otherwise specially provided herein....State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies...."

Tex. Const. art. XVI, sec. 40.

It is statutorily mandated that the members of a governing board of a junior college of other than an independent school district, which is the instant case, may not receive any remuneration or emolument other than reimbursement for actual expenses incurred in performing board duties. *Tex. Educ. Code Ann. sec. 130.082(d) (Vernon 1991)*. Thus, the position of a non-salaried member of such a governing board is not a "civil office of emolument." *Op. Tex. Att'y Gen. M-1194 (1972); LO 98-094*. On the other hand, a municipal judge holds a civil office of emolument. *Op. Tex. Att'y Gen. JM-333 (1985)*.

Thus it would appear that the present situation does not run afoul of Article XVI, Section 40. However, other past consideration of dual office holding issues has looked at two additional factors:

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OPINION COMMITTEE

RQ - 0171-JC
FILE # ML-41221-00
I.D. # 41221

1. Whether the dual office holding is prohibited by Article II, section 1, regarding the separation of powers; and

2. Whether the common law doctrine of incompatibility prevented a person from holding two offices simultaneously. [See *Ops Tex. Att'y Gen. JM-213 (1984)* and *JM-519 (1986)*]

With respect to the first question, the Texas Constitution requires:

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 others, except in the instances herein expressly permitted.

Tex. Const. art. II, sec. 1.

One Attorney General's opinion wrestled futilely in applying Article II, section 1, to the situation of a county court-at-law judge serving simultaneously as an independent school district trustee, finally resolving the matter on a different issue. See *Op. Tex. Att'y Gen. JM-213 (1984)*. However, the policy behind this provision is to prohibit one branch of government from interfering with functions constitutionally committed to other branches of government. It is clear that the role of municipal judge falls easily within the Judicial Branch, and a trustee of a college board is probably a member of the Executive branch. *Turner v. Trinity Independent School District Board of Trustees*, 700 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1983, no writ). In *Turner*, the issue involved a justice of the peace serving simultaneously as an independent school district trustee. The appellate court recognized that the two roles each fell into different branches of government, but that there was no violation of the requirements of Article II, section 1, in that the functions of one office would not interfere with the functions of the other. See also *Op. Tex. Att'y Gen. JM-519 (1986)* (a constable could serve simultaneously as a member of a school board).

The same reasoning can be applied to the simultaneous holding of the office of municipal judge and that of trustee of a junior college board. It would be difficult to determine how the functions of those offices could interfere with each other, if that is the test. One appellate court felt that the constitutional prohibition of Article II, section 1, stated a principle of government, "not a rigid classification as in a table of organization."

... This provision must be interpreted along with other constitutional provisions, and when this is done it is clear that the Constitution does three things: (1) it provides for three polar functions of government; (2) it delegates certain powers to each of the three departments in a distribution of all governmental powers; and (3) it blends legislative, executive and judicial powers in a great many cases. The proper interpretation of Article II, section 1 is therefore dictated by its context. The proper interpretation is that this provision prohibits a person of one branch from exercising a power historically or inherently belonging to

another department...

Coates v. Windham, 613 S.W.2d 572, 576 (Tex. Civ. App.—Austin 1981, no writ). Thus, *Turner* and *JM-519* could determine that there would be no confusion of authority or function between positions in two separate branches and no constitutional conflict existed. That would seem to be the same in the instant issue.

The next issue, that of incompatibility, is a common law doctrine which holds 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, judgm't 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. *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. In *Turner*, the offices of school board trustee and justice of the peace, who has limited jurisdiction, were not incompatible. However, because of the very broad authority present and potential for conflict in duties, a school trustee was precluded from serving as the county attorney in the county that included the school district, *Tex. Att'y Gen. LO 95-029*, and for the same reason the office of district judge, who also has an extensive jurisdiction, is incompatible with that of trustee of an independent school district. *Tex. Att'y Gen. LO 98-094*. There have been other opinions dealing with the compatibility issue:

- *State of Texas v. Martin*, 51 S.W.2d 815 (Tex. Civ. App.—San Antonio 1932, no writ) (offices of school board trustee and city tax collector were not incompatible)
- *Op. Tex. Att'y Gen. O-3308 (1941)* (the office of deputy sheriff is not incompatible with the office of school trustee of a common school district)
- *Op. Tex. Att'y Gen. O-3586 (1941)* (the office of county treasurer was not incompatible with that of trustee of an independent school district)
- *Op. Tex. Att'y Gen. M-842 (1971)* (The office of judge of a domestic relations court was not incompatible with that of the director on a university board)
- *Op. Tex. Att'y Gen. JM-519 (1986)* (the office of constable is not incompatible with the office of a school board member)

Thus it would seem that because of the limited jurisdiction held by a municipal judge, there is little

likelihood that the duties of that office would conflict with functions as a junior college trustee. The duties would not interfere with each other, and such dual role would not be detrimental to the public interest. Two Attorney General's opinions relied on the Texas Code of Judicial Conduct to determine that, in spite of the above test, Canon 4.H of the Code itself prohibited either a county court-at-law judge or a district judge from serving simultaneously as an independent school board trustee. See *Ops. Tex. Att'y Gen. JM-213 (1984)* and *LO 98-094*. However, that Code specifically exempts municipal court judges from prohibition of any extra-judicial appointment. *Supreme Court of Texas Code of Judicial Conduct*, Canon 6.C (located in pocket part for Volume 3 of the Texas Government Code, in title 2, subtitle G, app. B, following section 84.004 of the Government Code).

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

Yours very truly,

A handwritten signature in cursive script, appearing to read "Rick Miller".

Rick Miller
Bell County Attorney

RM:tg