

WHEELER COUNTY ATTORNEY

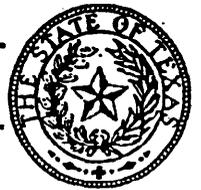
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RECEIVED

OCT 26 2001

OPINION COMMITTEE

FILE # ML-42262-01

I.D. # 042262

RQ-0458-JC

RE: Whether there is a conflict in holding the civil office of the County Treasurer and the civil office of School Board Trustee of an Independent School District under Article XVI, section 40 of the Texas Constitution.

Dear Sir:

I am forwarding a request for an opinion regarding dual office holding from the Wheeler County Treasurer. The Wheeler County Treasurer was appointed by the Wheeler County Commissioners Court to fill the 15 ½ month balance of a four year unexpired term. The County Treasurer receives a salary from the County for performing the duties of her office. On May 5, 2001, prior to the Treasurer's appointment to the county office, she was elected to fill the one year balance of a three year unexpired term of School Board Trustee of the Wheeler Independent School District. As trustee, she is reimbursed for expenses incurred by her for required travel to out of district meetings, but receives no salary.

Article XVI, section 40 of the Texas Constitution provides that "no person shall hold or exercise at the same time, more than one civil office of emolument. . . ." "Emolument" has been construed to mean a "pecuniary profit, gain, or advantage." Irvine v. State, 177 S.W.2d 970, 973 (Tex.Crim. App. 1944) To determine whether an office is one of emolument would be whether the office holder has a right as a matter of law to claim payment of his salary or compensation if one is established for the position. Id. The most common offices in Texas which are not ones of emolument are positions on school boards, whose holders may not be paid any form of compensation under State law. State ex rel. Brennan v. Martin, 51 S.W.2d 815 (Tex.Civ.App.--San Antonio 1932, no writ).

In addition, the common law doctrine of incompatibility of offices, does not apply here. The incompatibility doctrine prohibits one person from occupying two positions that cannot, as a matter of law, be faithfully filled by one person because the duties of the two positions are in conflict or one position is subordinate and accountable to the other. In Brennan, the court found that the offices of city tax assessor and trustee of an independent school district were not incompatible since the duties of the two offices:

are wholly unrelated, are in no manner inconsistent, are never in conflict. Neither

officer is accountable to the other, nor under his dominion. Neither is subordinate to the other, nor has any power or right to interfere with the other in the performance of any duty. The offices are therefore not inconsistent or incompatible, and, one of them not being a "civil office of emolument," both may be occupied and the duties thereof lawfully performed by the same person. Id., at 817.

Section 113.001 of the Texas Local Government Code provides: "the county treasurer, as chief custodian of county funds shall keep the funds in a designated depository and shall account for all money belonging to the county." Under various laws established by the Texas legislature, the county treasurer has the responsibility for county monies collected, disbursement of funds, record keeping and reporting those funds.

Section 11.511 of the Texas Education Code provides the trustees of an independent school district constitute a body corporate and as that body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. In addition to holding real and personal property, suing and being sued, and receiving bequests and donations or other moneys or funds coming legally into their hands, the trustees may adopt rules and bylaws necessary to carry out the power and duties in order to govern and oversee the management of the public schools in the district.

It appears that a trustee has a statutory duty to manage a school and a county treasurer has a statutory duty to account and hold funds for the county. It would also appear these duties are not incompatible because there is no statutory basis for a trustee of a school board to impose its policies on the county or the county treasurer. Likewise, the county treasurer is not a policy maker in regard to any events outside of the scope of the treasurer's office and has no statutory basis to impose its policy on an independent school or its board. I would like your opinion as to whether one person can hold both the office of County Treasurer and the office of School Board Trustee.

Sincerely



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Enclosure