O..ice of the County Atto..ney

Rains County, Texas

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July 23, 2002

RQ-0581-JC

The Honorable John Cornyn
Attorney General - State of Texas
Attention: Susan Gusky, Chair of Opinion Committee
209 W. 14th Street
P.O. Box 12548
Austin, Texas 78711-2548

FILE #ML-42721-02
I.D. # 42721

Re: Incompatibility of Elected Positions

Dear Mr. Cornyn,

I, Robert Vititow, County Attorney with Felony Responsibilities, respectfully submit the following questions to your office on behalf of Rains County and request that you issue an opinion on the same.

I am making this request on behalf of our county judge. The commissioner at issue here has recently accepted a position as a city council member and is ending his 16-year tenure as a commissioner on December 31, 2002. Thus, the judge has requested I get a response as soon as possible so he can appoint another person as commissioner before the current commissioner's term ends and before the judge's term also ends on December 31, 2002.

Consequently, I have, in an effort to possibly expedite your response, attached for your convenience a discussion of the law and submitted the questions in a fashion which may eliminate the need for a response to every question, and I withdraw any questions as specified below based upon the answers provided. Please answer the questions in accordance with the instructions provided after various questions.

QUESTIONS:

INCOMPATIBILITY AS A MATTER OF LAW

No. 1. When every current county commissioner subsequently accepts, and then concurrently holds, an unpaid council position in a city located within the county (and the city is also where the commissioner lives and has lived all his life) and neither position is subordinate to nor under the control of the other, is there an incompatibility "as a matter of law" (i.e., in every instance) or is incompatibility a determination which must be done on a case by case basis?

NOTE: [If the answer to No. 1. is "Incompatibility must be determined on a case by case basis," I withdraw question No. 2., do not answer it, instead skip to No. 3. and continue there]

SEAT VACATED BY A.G. OR JUDICIAL RULING

No. 2. If the position of the Attorney General's Office is that these two positions are always incompatible "i.e., as a matter of law"—without regard to their respective duties, local ordinances, statutes, disclosure of holding office (and intent to hold dual offices) to voters before elections are held, whether road work is at the discretion of commissioners or a unit road administrator, and abstinence or recusal in voting—is the commissioner's seat vacated as a matter of law or must there still be a suit filed in a court of appropriate jurisdiction (i.e., a district court) to get a judgment declaring the seat is vacated?

No. 3. If the incompatibility must be determined on a case by case basis, is this determination made by the Attorney General's Office or is it determined via a suit filed in a court of appropriate jurisdiction (i.e., a district court) seeking a judgment declaring the positions incompatible and vacated?

NOTE: [If the answer to No. 3. is "determined by a district court," I withdraw question No. 4., do not answer it, instead skip to No. 5. and continue there]

No. 4. If the incompatibility must be determined on a case by case basis by the Attorney General's Office, once this determination of incompatibility is made by the A.G.'s Office, must there be a suit filed in a court of appropriate jurisdiction (i.e., a district court) seeking a judgment declaring the position vacated?

APPOINTMENT BEFORE JUDGMENT

No. 5. If a judgment of a district court is necessary to establish a commissioner's seat has been vacated, is a county judge authorized by law to appoint another person as commissioner before having a final judgment declaring the seat vacated or must he wait?

[If the answer to No. 5. is "No, a county judge is not authorized by law to make an appointment before having a final judgment declaring the seat vacated," I withdraw questions Nos. 6. through 9., do not answer them, instead skip to No. 10. and answer it]

No. 6. If a county judge appoints another person as commissioner before the judgment is rendered and the duly elected commissioner continues attending commissioners' court,

which vote counts—that of the duly elected commissioner or that of the appointee?

No. 7. If a county judge appoints another person as commissioner before the judgment is rendered, the appointee's votes are used, and a district court later makes a finding that the seat was not vacated, what are the effects of the actions taken by commissioners' court when the appointee's vote was the deciding (or pivotal) vote—are they valid or invalid?

SALARIES ARE PAID TO WHOM

No. 8. If a county judge appoints another person as commissioner before the judgment is rendered and the duly elected commissioner continues attending commissioners' court, is the commissioner entitled to salary?

No. 9. If a county judge appoints another person as commissioner before the judgment is rendered, is the appointee entitled to salary?

GIVING AWAY OF COUNTY FUNDS

No. 10. If a county judge appoints another person as commissioner before the judgment is rendered, a district court later makes a finding that the seat was not vacated and the appointee was improperly appointed, and the appointee has been paid by the commissioners' court, has the commissioners' court given away county funds?

Thank you in advance for your cooperation in these matters. If you have any questions, please feel free to give me call.

Respectfully,

Robert J Vititow

Robert Vititow
Rains County Attorney

I.

DISCUSSION OF LAW AND ATTORNEY GENERAL OPINIONS

In general, dual officeholding is prohibited by the Texas Constitution and the judicially created doctrine of incompatibility.

However, there is an exception provided for county commissioners by the Texas Constitution.

Additionally, there is also a statutory provision to eliminate ***actual*** conflicts of interest (certain business interest and real estate holdings) of local public officials in Chapter 171 of the Local Government Code. That Chapter expressly provides that it preempts the common law of conflict of interests (i.e., that portion of the doctrine of incompatibility which is at issue in our current scenario). Granted that Chapter does not address conflicts of interest between elected officials, it appears that it could be very persuasive authority for a court to create judicial law applying it to elected officials.

The established judicial law which is most analogous to our set of facts allows dual officeholding for county commissioners and mayors.

A.G. opinions are not law, however, they are very persuasive and commonly used by local government for guidance. While some AG opinions assert any two positions are incompatible when they "may" contract with each other or a conflict "might" arise in the future, other opinions point out that:

a) the AG cannot state "as a matter of law" whether two positions are incompatible—instead it is up to a court of competent jurisdiction to make a decision on a case by case basis;

b) even when actual conflicts exists, there will not be incompatibility unless one position is subordinate to the other;

c) conflicts and incompatibilities can be avoided by abstaining from voting; and

d) the common law doctrine of incompatibility may be overcome, or otherwise abrogated, by ordinances, statutes, and city charters.

Consequently, based on my analysis of the law below, it appears that all commissioners are not automatically prohibited from simultaneously holding the position of a city council member—instead, it depends on all the facts and circumstances. Likewise, it appears that any two positions are not—"as a matter of law"—always incompatible, instead, it depends on all the facts and circumstances which must be determined in a court of appropriate jurisdiction.

Similarly, it appears that all conflicts of interest do not necessarily effect an incompatibility—instead, it depends on all the facts and circumstances. For example, it appears that even ***actual*** conflicts can be avoided by: local ordinances, statutes, description of duties, whether road work is at the discretion of commissioners or a unit road administrator, abstinence or recusal in voting, and possibly even disclosure of holding office (and intent to hold dual offices) to voters before elections are held and abstinence or recusal in voting.

A. LEGISLATIVE LAW

i. Legislative Law Directly on Point--Exception for County Commissioners

The only legislative law directly on point in this case is the Texas Constitution wherein our forefathers recognized the need to allow county commissioners to hold two offices simultaneously. Article XVI, section 40 of the Texas Constitution states in part:

> (a) No person shall hold or exercise at the same time, more than one civil office of emolument, ***except that of*** Justice of the Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and the officers and directors of soil and water conservation districts, unless otherwise specially provided herein.
>
> Texas Constitution, Article XVI, Section 40(a). (*Emphasis added*).

Thus, the Texas Constitution expressly provides that a County Commissioner may hold more than one office of emolument.

There is no legislative law which precludes a county commissioner from simultaneously holding the position of a city council member.

ii. Legislative Law on Conflict of Interest (i.e., A Reason for Incompatibility)--Abstinence and Disclosure Cures Conflict

Conflicts inevitably arise at the local level of political subdivisions. The conflicts are typically between some private interest of an elected official and a political entity. It is these conflicts that have the most potential to affect an elected official's vote because he stands to benefit directly. In these scenarios, the benefit may be financial or otherwise.

Legislators Acknowledge Impossibility of Prohibiting Conflicts and Remedy the Problem for "Local Public Officials"

Consequently, the legislators—acknowledging the practical impossibility of flatly prohibiting such conflicts—have specifically recognized this problem (conflicts between the public interest and a local public official's private interest). They have remedied the problem with respect to local public officials by setting out procedures in the local government code for disclosing private interests and abstaining from voting. (*See* Tex. Loc. Gov. C. § 171.000 et. seq.). "'Local public official' means a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any . . . county, municipality, precinct, . . . or other local governmental entity who exercises responsibilities beyond those that are advisory in

nature." (Tex. Loc. Gov. C. § 171.001(a)). Thus, this includes commissioners and city council members.

This Chapter of the Local Government Code provides for disclosure of private interest of the local public official and abstention from voting—unless a majority of the governing body also have conflicts. (Tex. Loc. Gov. C. § 171.004(c)). Remarkably, the legislators in their infinite wisdom noticed that there may even be times where all members of a governing body have conflicts. In such an instance, all members are allowed to vote—despite their conflicts. *Id.*

Two Rules to Eliminate Problems with Conflicts of Interest

In addressing conflict of interest and incompatibility, the legislature has provided us with guidance via Chapter 171 of the Local Government Code which applies to city and county officials. Again, while these statutes do not address the common law doctrine of incompatibility, they have set forth two general rules for dealing with conflicts of interest. First, a local public official must disclose any substantial interest he or she has in a business entity or in real property. Second, a local public official must abstain from voting in certain instances.

It appears that a commissioner seeking to hold the dual offices of county commissioner and city council member, could comply with Chapter 171 by filing an affidavit, but more importantly by disclosing to all voters before the elections that he or she intends to run for a second office, hold both offices concurrently, and abstain from voting on any issue where there is an actual or even a perceived conflict. If the voters have knowledge of this fact and vote for the person anyway, it would appear that they have acknowledged, and accepted any potential or perceived conflicts and manner of voting by the elected official.

Chapter 171 Preempts Common Law of Conflict of Interest

Moreover, if a court were to decide Chapter 171 is sufficient to cure the subject potential conflicts of interests and because Chapter 171 "preempts the common law of conflict of interests as applied to local public officials," it would also preempt that portion of the common law doctrine of incompatibility which is based upon conflicts of interest. (Tex. Loc. Gov. C. § 171.007(a)). This would not do away with the doctrine, but only leave it applicable in cases where it could be shown that one governing body is subordinate to the other.

Application of Chapter 171

Looking at conflict of interests on a sliding scale, the type of conflict present when an elected official stands to benefit directly as the owner of a sole proprietorship or owner of real property would be much greater than any potential conflict of interests present when an elected official simultaneously holds two positions on governmental entities and the voters of one entity is a subset of the other. For example, in our case, the voters of the city council members are also voters of the county commissioners.

Hence, if there is a conflict of interest even when one group of voters is a subset of the other set of voters, it would appear that a court could decide if actual conflicts can be cured by compliance with Chapter 171 of the Local Government Code, certainly any perceived or potential conflicts present when holding dual offices should be cured by compliance with Chapter 171.

B. JUDICIALLY CREATED LAW

The case law most analogous to our present situation is Gaal v. Townsend, 145 S.W. 365 (Tex. 1890). In Gaal, the Texas Supreme Court held that a county commissioner may simultaneously hold the office of Mayor. Although the duties of a mayor and city council member are not identical, each position may vote and provides input into the operation and decision-making process of a city, granted it can be argued that a Mayor has more power than a council member. It follows that a county commissioner should be allowed to simultaneously hold the office of a city council member.

However, notwithstanding the foregoing, there is the common law doctrine of incompatibility which "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." *See* David B. Brooks, 35 *Texas Practice: County and Special District Law* § 7.11 at 221 (1989) (*emphasis added*).

To my knowledge, no court has ever held that as a "**matter of law**" a county commissioner cannot simultaneously hold the position of a city council member. Accordingly, there is no judicial finding prohibiting a county commissioner from simultaneously holding the position of a city council member.

C. ATTORNEY GENERAL OPINIONS

As stated earlier, while A.G. opinions are not law, they are extremely persuasive and an immeasurably useful resource for guidance in local government. Without A.G. opinions, local government could become deadlocked in quandary of dilemmas.

i. Opinions Possibly Indicating Positions Incompatible as a Matter of Law

A.G. opinions LO-88-49 (1988), JM-133 (1984), JM-129 (1984), and MW-170 (1980) seem to provide a basis for appointing a new commissioner.

Attorney general opinion LO-88-49 (1988) opined that the position of county commissioner and city councilman in Beeville, Bee County, Texas were incompatible because the city and county may contract with each other. This opinion cites no law but references prior attorney general opinions JM-133 (1984), JM-129 (1984), and MW-170 (1980) and it is the only opinion which addresses the two positions of commissioner and city councilman.

Attorney General opinions JM-133 (1984) and JM-129 (1984) each cite the landmark case of Thomas v. Abernathy County Line Independent School District, 290 S.W. 152 (Tex. Comm. App. 1927) for the proposition that "the common law doctrine of incompatibility prevents one person from accepting two offices where one office might thereby impose its policies on the other or subject it to control in some other way." They further state that a city and county may contract with each other for county commissioners to have a county perform work on city streets via an inter-local agreement.

Attorney General opinion MW-170 (1980), while not dealing with either the position of county commissioner or that of city council member, adds another reason for incompatibility of two positions—that being when "persons [are] . . . subject[ed] to inconsistent public responsibilities, [they] . . . would find it necessary to sacrifice the interest of one in order to serve the other."

Demonstration of How Factors Can Vary Application Opinions

These A.G. opinions use the following three reasons to determine that positions are incompatible:

1) when a city and county may contract with each other for county commissioners to have a county perform work on city streets via an inter-local agreement.;

2) where one office might thereby impose its policies on the other or subject it to control in some other way; and

3) when "persons [are] . . . subject[ed] to inconsistent public responsibilities, [they] . . . would find it necessary to sacrifice the interest of one in order to serve the other."

It would seem to me that these reasons may not be applicable in certain scenarios as discussed below.

First, there are instances when county commissioners do not have any control over whether or not the streets in a city are worked by the county. For example, there may be an inter-local agreement which provides for such work, but the county commissioners may not have any authority to approve or disapprove such work because it is all at the discretion of a unit road administrator.

Second, neither office (i.e., the city council or commissioners' court) is able to impose its policies upon the other nor exercise control over the other.

Third, the commissioner's responsibilities might not be subjected to inconsistent public responsibilities, but instead consistent ones. That is, a commissioner should do what is best for citizens of the city of the county. If he makes any decisions which are detrimental to citizens of the city, he has also made decisions which may be detrimental to county residents, and vice versa. Similarly, a decision which benefits citizens of the city may also benefits county residents, and vice versa. Moreover, when a commissioner is, and has been, a life-long a citizen of the city and the county, each decision he has ever made, or ever will make, as a county commissioner affects him as a citizen of the city. Consequently, there should be no more or no less potential

for conflict when the commissioner is also a city council member than there is when he is a simply a resident of the city (standing to benefit directly from decisions made as a commissioner).

Should the doctrine of incompatibility be expanded to exclude a person from being a county commissioner simply because the person is a citizen of a city which can contract with the county and the person could have the ability to vote beneficial to the city and detrimental to the county? The potential conflict is still present.

ii. Newer and Other Attorney General Opinions

Newer and other A.G. opinions have expressed opinions which differ from those discussed above. In fact, they have articulated that: they are not law; it is up to a court to make the determination of whether or not two positions are incompatible and a position vacated; two positions may be compatible even if there are conflicts; conflicts may be cured by abstinence; and the common law doctrine of incompatibility may be abrogated by ordinances, statutes, and city charters.

Court Order Required to Find Seat Vacated

The Attorney General has issued more recent opinions after those discussed above which indicate Commissioner Briggs has not vacated his position until a court of competent jurisdiction make such a finding.

For example, the Attorney General has opined that it cannot say as a matter of law whether or not two positions are incompatible. JM-1266 (1990). Consequently, this opinion clarifies that the Beeville opinion does not apply to Rains County, unless all facts are identical.

Another example is in Attorney General Letter Opinion No. 95-029 (1995), where it opined what it thought would happen *if a court agreed with their opinion*.

Positions Not Incompatible Even if Conflicts May Arise

In 1996, the Attorney General in Letter Opinion No. 96-078 (1996), opined that two positions, a justice of the peace and a part-time juvenile law master, were not incompatible because neither controlled the other nor was subordinate to the other. It also noted that it depended upon how the duties were defined. However, it is very important to note that here, in contrast to the older opinions, the Attorney General stated conflicts may arise between the two positions. This is opposite of the older opinions discussed earlier where the AG held because conflict "might" arise, the positions were incompatible.

Incompatibility and Conflicts May be Cured by Abstaining from Voting

Another Attorney General opinion, MW-39 (1979), provides that a person holding two

positions may cure any incompatibility or conflict by abstaining from voting. Although, this is an older AG Opinion, it does appear to be more in line with legislative law by recognizing that conflicts may arise between two positions, but that does not necessarily make the two positions incompatible. It specifically states that "not every conflict of interest, or possibility thereof, results in legal incompatibility. Conflicts can be avoided on occasion by . . . abstention or recusal." Attorney General opinion, MW-39 (1979).

Also, in Attorney General opinion LO94-055 (1994), involving a county commissioner who was also an attorney getting paid by commissioners's court for representing indigent defendants (granted the conflict was not between two elected official positions), the AG opined that any conflict in payment of the invoices for services provided by the attorney/county commissioner could be cured provided the commissioner "follow[ed] the procedure for notice and recusal [abstaining from voting] as required by Chapter 171 [of the Local Government Code]." Attorney General Opinion LO94-055 (1994).

Thus, it appears that a court could rule that a commissioner may be able to cure any potential or ***actual*** conflict or incompatibility by disclosing, or otherwise making known, to the citizens of the city and county that he intends to hold dual positions concurrently, and simply abstaining from voting on issues which could have a special economic effect benefitting the citizens of one political subdivision at the detriment to citizens of the other political subdivision if is elected to each position.

Incompatibility May Statutes or Ordinances

Finally, in Attorney General opinion JM-1087 (1989) and Letter Opinion 96-064 (1996), the AG opined that the common law doctrine of incompatibility may be overcome, or otherwise abrogated, by ordinances, statutes, and city charters.

II.

CONCLUSION

It appears to me that "courts are not required to abide by any attorney general opinions." *See* David B. Brooks, 35 *Texas Practice: County and Special District Law* § 3.19 at 131 (1989). My research seems to indicate that each determination of incompatibility must be done on a case by case basis, and whether or not a position is vacated must be determined by a court of appropriate jurisdiction—instead of the Attorney General's Office.

Consequently, it seems to follow that in any given case, it appears that the proper procedure for removing someone from office because they are holding two elected positions is to file a suit in district court seeking a judgment declaring the positions incompatible and the seat of the first position vacated.

This is the process for removal from office; to my knowledge, there is no other process.

To appoint someone before going through this process, is getting the cart before the horse and unnecessarily subjects a county, a county judge, and all persons acquiescing to such action to liability.