TEXAS DEPARTMENT OF PUBLIC SAFETY

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March 29, 2005

FILE # ML-44174-05
I.D. # 044174

The Honorable Greg Abbott
Attorney General
Opinion Committee
209 W. 14th Street
Austin, Texas 78701

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RQ-0333-GA

Re: Request for attorney general opinion regarding whether a peace officer commissioned by the Texas Department of Public Safety is an "appointed public officer" and therefore required to comply with Article XVI, Section 30 of the Texas Constitution.

Dear General Abbott:

The Texas Department of Public Safety ("Department") requests your formal opinion on the following question:

Is a peace officer employed by the Texas Department of Public Safety an "appointed officer" and a holder of a public office, and therefore required to comply with Article XVI, Section 1 of the Texas Constitution every two years as required by Article XVI, Section 30(a).

Currently, Department commissioned officers take the official oath of office, as set out in Article XVI, Section 1 of the Texas Constitution, every two years in compliance with TEX. A.G. OP. H-1027 (1977) in which the Attorney General found that Department commissioned officers and Rangers are designated as 'peace officers' by TEX. CODE CRIM. PROC. ANN. Art. 2.12, and therefore hold a 'public office' and a 'civil office' which requires them to take the constitutional oath of office before entering upon their duties. In reaching this conclusion, the Attorney General relied upon REV. TEX. CIV. STAT. ANN. Arts. 6701d-11, § 16 and 4413(12), both of which were subsequently repealed and not reenacted, along with *Sawyer v. City of San Antonio*, 234 S.W.2d 398 (Tex. 1950) in which the Texas Supreme Court concluded that a "policeman occupies a civil office." *Id.* at 401. In a later opinion, TEX. A.G. OP. MW-149 (1980), the Attorney General relied on TEX. REV. CIV. STAT. ANN. Art. 4413(9), § 2 to determine that a Texas Department of Public Safety employee could not run for any office other than those specified in Article XVI, Section 40 of the Texas Constitution.

Prior to MW-149 and H-1027, the Texas Supreme Court had established a new test for determining when a person is a public officer or a public employee in *Aldine Independent School District v. Standley*, 280 S.W.2d 758 (Tex. 1955). In *Aldine*, the Court addressed whether a tax assessor-collector employed by a school board was a "state officer." 280 S.W.2d at 580. According to the Court, "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public *largely independent of the control of others.*" *Id.* at 583 (emphasis by Court). This test was applied by the Texas Court of Criminal Appeals in *State ex rel Hill v. Pirtle*, 887 S.W. 2d 921 (Tex. Crim. App. 1994) which also concerned Article XVI, Section 40. The Court concluded that an assistant attorney general is a public employee, but not a public officer because he or she operates under the direct supervision of the Attorney General and exercises no independent executive power; therefore, the constitutional provisions in Section 40 against holding more than one "civil office of emolument" do not apply. *Id.* at 923.

In TEX. A.G. OP. DM-381 (1996), the Attorney General cited *Aldine Independent School District v. Standley*, 280 S.W.2d 758 (Tex. 1955) and ruled that home-rule city police officers were "public officers" subject to the requirements of Article XVI, Section 1 of the Texas Constitution, although not as a matter of law, civil officers of emolument. The Attorney General also cited the wording of former Articles 36 and 50 of the Texas Code of Criminal Procedure, now Articles 2.12 and 3.03. Article 2.12 defines who is a "peace officer" in Texas, while Article 3.03 provides that the term "officers" includes magistrates and peace officers. Although the Attorney General acknowledged that court opinions relying on former Code of Criminal Procedure Articles 36 and 50 as a basis for finding that a city police officer is a public officer are old, the Attorney General also noted that these cases had not been overruled. The Attorney General concluded: "we therefore advise you to err on the side of caution, and to assume that a police officer must take the oath required by Article XVI, Section 1 of the Texas Constitution until the courts answer this question." *Id.*

In a more recent opinion, the Attorney General addressed whether a peace officer can simultaneously hold a commission from more than one law enforcement agency. TEX. A.G. OP. GA-0214 (2004). Citing DM-381, he concluded that a police officer is not barred from being employed and commissioned by two law enforcement agencies unless the officer holds a "civil office" within the meaning of Article XVI, Section 40. According to the Attorney General, "[a] peace officer holds an office within Article XVI, Section 40, if a sovereign function of the government is conferred upon him to be exercised for the benefit of the public largely independent of the control of others," and is a test which must be applied "*on a case by case basis considering facts relevant to the specific peace officer's authority.*" *Id.* (emphasis added). In that opinion, the Attorney General stated in Footnote 2: "[a] statute may describe the person holding a public position as an 'officer,' but that title does not necessarily mean the person holds a public office" with the meaning of Article XVI, Section 40. *Id.*

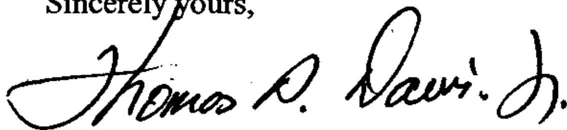
Unpublished opinions in three more recent cases briefly address the status of a DPS commissioned officer as a public officer. Two were issued by the Dallas Court of Appeals in related cases (husband and wife), *Colameco v. State*, No. 05-97-01496, 1999 Tex. App. LEXIS 4836 (Tex. App.—Dallas June 30, 1999, no pet.) and *Colameco v. State*, No. 05-97-04195-CR,

1999 Tex. App. LEXIS 4835 (Tex. App.—Dallas June 30, 1999, no pet.) (both cases contain almost the exact same wording). The third case is *Sykes v. State*, No. 03-02-00783-CR, 2004 Tex. App. LEXIS 2042 (Tex. App.—Austin Mar. 4, 2004, no pet.). Without providing any analysis, in the two *Colameco* cases the Dallas Court of Appeals stated that both parties had "properly cited" the "applicable government code and constitutional provisions requiring the taking and filing of an oath by a DPS officer—TEX. CONST. art. XVI, § 1 and TEX. GOV'T CODE ANN. § 411.007. *Colameco v. State* at *8. In *Sykes*, the court appeared to accept Sykes' argument that certain Texas Rangers were not qualified peace officers because they had failed to renew their constitutional oaths as set out in Article XVI, § 1(a) of the Texas Constitution nor had they taken the anti-bribery oath required by Section 1(b). The court found that the failure of the officers to take their anti-bribery oaths or renew their constitutional oaths did not affect their status as de facto public officers. *Sykes v. State* at *4-6.

The key in all three of these cases is that neither the parties nor the courts ever directly addressed the issue: Is a peace officer employed by the Texas Department of Public Safety a "public officer" for purposes of Article XVI, §1? Instead, the court and parties presumed that DPS officers are "public officers" and proceeded from that assumption. Yet, there is *State ex rel Hill v. Pirtle* in which the Texas Court of Criminal Appeals found that an assistant district attorney was not a public officer because an assistant district attorney is subject to the control and supervision of his district attorney. The same is true for all DPS officers below the rank of Colonel. While they may function independently in their actual job duties, DPS officers are subject to the supervision, guidelines, and policies set out by the Public Safety Commission and the Director, as implemented by their chain of command. No more than an assistant district attorney makes and sets policy, can a rank and file DPS officer make and set policy.

As previously stated, the Attorney General has recently recognized that not all "peace officers" are public office holders. *See* TEX. A.G. OP. GA-0214. The Texas Department of Public Safety believes that in light of the test for a "public officer" defined in *Aldine Independent School District v. Aldine*, the Court of Criminal Appeals' opinion in *State ex rel Hill v. Pirtle*, and the language of TEX. A.G. OP GA-0214, all DPS officers below the rank of Colonel should not be considered "appointed officers" within the scope of Article XVI, § 1 of the Texas Constitution.

Sincerely yours,



Thomas A. Davis, Jr.
Director