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July 28, 2005

FILE # ML-44297-05

I.D. # 44297

The Honorable Greg Abbott
Attorney General of the State of Texas
300 West 15th Street
Austin, Texas 78701

RQ-0368-GA

Re: Request for Opinion

Dear General Abbott:

At the May 7, 2005, school board trustee election, the chief of police of the City of Hale Center was elected to a place on the Hale Center Independent School District Board of Trustees. The Hale Center ISD central administrative offices as well as all Hale Center ISD campuses are located within the city limits of the City of Hale Center. Additionally, most of the children attending the Hale Center ISD schools are residents of the City of Hale Center. Considering past attorney general decisions regarding the doctrine of incompatibility as well as your recent opinion in GA-0328, Hale Center ISD and the City of Hale Center have jointly asked me to present this issue to you for resolution. The police chief has not been seated as a school board member in anticipation of your response to this inquiry.

Questions Presented:

1. May the Hale Center chief of police serve simultaneously as a trustee on the Hale Center ISD school board?
2. If the two offices are incompatible, what are the consequences if the police chief is sworn in and seated as a school trustee?
3. If the governing body of the City of Hale Center were to create a separate officer position that was responsible for interacting with the school and reported directly to the mayor and city council, would that resolve the potential conflict?

Discussion:

1. Common Law Doctrine of Incompatibility.

The common law doctrine of incompatibility prohibits a person from holding two offices if the duties of the offices conflict with one another or if one office is subordinate to the other. *Thomas v. Abernathy County Line ISD*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgment not adopted); Tex. Att'y Gen. Op. JM-129 (1984). When determining whether a conflict exists under the common law doctrine of incompatibility, courts consider three potential conflicts: (1) self-appointment; (2) self-employment, and (3) conflicting loyalties.

Self-appointment is a conflict wherein one office provides the officer with the opportunity to appoint himself or herself to another governing board. *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928). Self-employment is a conflict wherein a board or officer is responsible for the hiring of the employee/officer. (For example, a teacher in a school district may not serve on the board of trustees, because the board has the responsibility of hiring employees,



including the teacher/officer. Tex. Att’y Gen. Op. JC-0371 (2001); Tex. Att’y Gen. LA-114 (1975). Given that the situation in Hale Center involves a person potentially holding the position of chief of police and the office of school trustee, the self-appointment and self-employment conflicts do not appear to be relevant to this analysis. However, the conflict involving conflicting loyalties may.

A conflict of loyalties arises if the interests of the two offices held may come into conflict with one another. In other words, does holding the two offices place the official in the position of having to choose between the conflicting interests of the two public entities, giving rise to conflicting loyalties? See 2004 Dual Office Holding Laws Made Easy, Office of the Texas Attorney General (2004), Question 23, page 11. If a conflict exists between the positions of school board trustee and police chief, it does so under this analysis.

In answering the two questions presented to you for resolution, the initial issue that must be determined is whether the chief of police of Hale Center holds an “office” for purposes of the common law conflict of loyalties. If he does hold an office, then the next step in the analysis is to determine whether the two offices are or may be incompatible with one another.

a. Is a Chief of Police an “Officer”?

In order for the common law conflicting loyalties to be applicable, both positions at issue must be “offices”; “mere employment” by a governmental entity is insufficient to invoke the doctrine. Common law incompatibility “has never been held to apply to a situation in which one position is an *office* and the other an *employment*.” Tex. Att’y Gen. LO No. 93-027 (1993) (emphasis in original). Therefore, whether a chief of police position is a position of “employment” or is an “office” is a key factor in reaching the correct conclusion to the matter before you.

In LO-93-027, your office was asked to determine if a city police officer could simultaneously serve as a paid city commissioner. Finding that a municipal police officer did not occupy an “office,” you held that the two positions were not incompatible under the Texas Constitution or common law, and thus could be held by the same person. However, in the same decision, your office stated that police officers might be “officers” for incompatibility purposes depending on the particular duties of the officer. Your office stated: “If [one’s] police duties are such that they elevate him to the status of “officer,” his dual employment may perforce be said to violate... the common-law doctrine of incompatibility.” *Id.* See also Tex. Att’y Gen. LO No. 95-048 (1995) (holding that a police officer may serve on a city council in a different city). The determination of whether one holds an office rests essentially on the following two factors: (1) whether the person in office is largely under control of others, or (2) whether the person in office exercises any sovereign function of the government. *Id.* Although your office has not applied these two factors directly to the position of police chief in past opinions, it does appear that your office has at least once determined that either or both of them exist in the position of chief of police. See Tex. Att’y Gen. Op. No. JM-422 (1986) (overruled in part). In JM-422, your office, without formally analyzing whether the position of police chief constitutes an office, nevertheless found that the “offices” of chief of police of a general law city and constable of a precinct were incompatible.

Thus, it appears that on at least one occasion your predecessors in office have found that both the positions of chief of police and school board trustee are offices within the context of the common law doctrine of incompatibility. If it is your position that a chief of police in Hale Center holds an “office” for purposes of the doctrine of incompatibility, the remaining issue is to determine whether serving as both chief of police and school board trustee creates a potential conflict of loyalties. (*For holdings regarding “office” of school board trustee See Tex. Att’y Gen. Op. JM-1266 (1990) and Tex. Att’y Gen. Op. JM-519 (1986).*)

b. Conflicting Loyalties.

As discussed above, conflicting loyalties exist if the duties of the two offices held are or may be inconsistent. Conversely, if the duties are wholly unrelated, in no manner inconsistent, and are never in conflict, a conflict of loyalties does not exist. In 1986 when examining a similar question, your office relied on a Missouri Supreme Court opinion addressing the common law incompatibility of school trustee and deputy sheriff.

Therein it was stated:

... We are unable to discover the least incompatibility or inconsistency in the public function of [the office of deputy sheriff and school board member], or where they could possibly come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility...

Tex. Att'y Gen. Op. JM-519 (1986) at 2384 (citing *State v. Bus*, 36 S.W. 636, 639-40 (Mo. 1896)). Your office then noted that the constable (the office at issue in that case) had many duties in common with a sheriff and deputy sheriff, and held that the offices of constable and school board member were not incompatible. However, beginning in 1995, your office began to take a stricter view of the doctrine, and indicated that the mere potential, and not the actual existence of conflict, may be the paramount issue in the conflict analysis.

In 1995, your office issued Letter Opinion No. 95-029, which addressed a county attorney wanting to serve simultaneously as a member of the board of trustees of an independent school district in the same county. Tex. Att'y Gen. LO No. 95-029 (1995). Because a county attorney must initiate action against school trustees under particular circumstances, investigate possible election fraud within his jurisdiction, and has the authority to bring removal actions involving school trustees, your office determined that a conflict existed between the offices of county attorney and school board member. *Id.* at 3-4. Thus, the county attorney was precluded from serving as both county attorney and trustee for the school district.

In the situation in Hale Center, it is possible that a chief of police would find himself in a position analogous to that of the county attorney—investigating fraud, abuse, or other illegal activities taking place at a school or by a school board. Any duties vested in the chief of police by law that could potentially involve adverse actions against a school district could conceivably create the potential for a conflict of loyalty. If criminal activity were alleged against a school board and the board sought counsel from its school attorney, the presence of the municipality's chief law enforcement official on the school board could radically compromise the attendant attorney-client relationship. Moreover, Chapter 37 of the Texas Education Code and Article 15.27 of the Code of Criminal Procedure require law enforcement to interact with the District and the superintendent on various issues involving juvenile justice matters. *See, e.g.*, TEX. EDUC. CODE § 37.015 (requiring principal to notify the police department of the municipality in which the school is located if the principal has reasonable grounds to believe certain criminal offenses occurred on campus or at school-related activities). Thus, it appears that your office is once again put to a similar question as it faced in GA-0328, except in this instance it is in the context of a chief of police of an incorporated city in which the campuses and offices of the school district are located. In GA-0328, you framed that matter as follows: “[W]e must determine whether the sheriff’s relationship to the school district is more like that of, on the one hand, the auditor to a city council member, the county attorney to a school trustee, and the district judge to a school trustee; or, on the other hand, like that of the constable to a school trustee and the county treasurer to a school trustee.” Tex. Att’y Gen. Op. No. GA-0328, at 3. It appears that the answers to our questions lie in this framework as well.

2. Automatic Resignation:

It appears from an examination of relevant authorities, that if an individual holds two incompatible offices, when he qualifies for and accepts the second office, that act operates as an automatic resignation from the first office. *Pruitt v. Glen Rose Independent School Dist. No. 1*, 84 S.W.2d 1004, 1007 (Tex. Comm’n App. 1935). This rule is based upon both the Texas Constitution and common law.

Having elected to accept and qualify for the second office, ipso facto and as a matter of law, he vacates the first office. This is true, where both offices are places of emolument, regardless of whether they are incompatible, and if they are incompatible there is a vacation of the first office regardless of whether both are offices of emolument within the meaning of the Constitution. In such circumstances the constitutional provision that all officers shall continue to perform the

duties of their offices until a successor has been qualified does not apply." *Id.* (citing 34 Tex.Jur. 354, §19).

As mentioned in the beginning of this request for an opinion, the chief of police of the City of Hale Center has not yet accepted the office of school trustee. However, it appears from the above cited authority that if the two offices at issue are incompatible, the effect of accepting the position of school trustee is an automatic resignation of the chief of police position.

3. Transfer

The City of Hale Center is a Type A General Law Municipality. Its governing body consists of a mayor and five aldermen elected at large. Pursuant to Section 22.071 of the Local Government Code, provision is made for several other "officers" including the "secretary, treasurer, assessor and collector, municipal attorney, marshal, municipal engineer and other officers or agents authorized by the governing body". The manner of appointment or election is to be established by the city council. The chief of police is not an office established by Section 22.071.

Section 22.072 (b) provides:

The governing body may prescribe the powers and duties of a municipal officer appointed or elected to an office under this code whose duties are not specified by this code.

The city council is considering amending the structure of the police department to create a new office and designate one of its police officers as a "School Resource Officer." The city council will provide that the position of "School Resource Officer" shall report directly to the mayor and city council. The chief of police then, shall no longer have authority or responsibility for providing law enforcement activities for the school district.

Would the creation of a separate position resolve the potential conflict?

Thank you for your careful consideration of the questions I have placed before you for review. Please contact me or my office if you need any further information.

Very truly yours,



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