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August 24, 2005

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The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**RQ-0385-GA**

Re: Request for Attorney General Opinion

Dear Mr. Abbott:

I am writing to request your opinion on the following questions:

1. May the person employed and serving as president of a municipal management district operating under Chapter 375, Texas Local Government (the "District") simultaneously serve as a member of the Texas Legislature?
2. If the answer is yes to question 1, may such person receive compensation for both positions?
3. Alternatively, may a person working for the District as an independent contractor also serve as a member of the Texas Legislature and may he be compensated for both positions?

## A. Background

The District is a municipal management district and a political subdivision of the State of Texas operating under Chapter 375, Texas Local Government Code. The President is an employee of the District that manages the affairs of the District and handles the day-to-day business of the District. He is not a member of the Board of Directors. The Board approves all contracts and expenditures for the District. In addition, the Board approves a budget and delegates to the President the authority to make expenditures of a routine nature for administration of the District in accordance with the budget and approved contracts. The President's job performance is reviewed by the Board, and his compensation is set by the Board. The President participates in the benefits package for District employees, and his employment is subject to termination at will by the Board. There is no statute that creates or sets a term of office for the

President, nor is there any statute that provides for his removal from office. Further, there is no statute requiring that the President have a bond securing his performance or take the oath of office. The Board sets the qualifications for the position of President.

**B. Applicable Law**

Applicable law requires an analysis of the prohibition against holding two public offices of emolument, the prohibition against a legislator holding any other office or position of profit under this State, and the doctrine of incompatibility of office.

**I. Article XVI, Section 40**

**A. Article XVI, Section 40 provides in relevant part:**

No person shall hold or exercise at the same time, more than one civil office of emolument...

The threshold issue in determining if a person may hold two positions with governments simultaneously is whether the person in question serves as a "public officer" or "public employee." The law prohibits holding two "public offices." The Texas Supreme Court in Aldine Independent School District v. Standley, 280 S.W. 2<sup>nd</sup> 578 (Tex. 1955), held that:

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.

The Attorney General found that a person is not generally an "officer" unless he can be said to exercise his authority "largely independent from the control of others." Attorney General Opinion No. JM -1266. If a person's actions are subject to control by a superior body, that person is not an "officer."

**B. Article XVI, section 40 further provides:**

No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

Even if the two positions with government are not two offices, Article XVI, Section 40 further prohibits a legislator from holding another "position of profit under this State." The following Attorney General Opinions give enlightenment on what constitutes a position of profit under this state. Attorney General Opinion No. JC-0430 (2001) found that a position of profit is a salaried

nontemporary employment. On the other hand, Attorney General LO-90-55 held that an independent contractor does not hold a position of profit.

Attorney General Opinion No. C-221 (1964), confirmed by Opinion C-377 (1965), held that an employee of the Sabine River Authority of Texas, a state agency, could accept employment with the Authority while he was serving as a legislator but could not receive his salary as a legislator in accordance with Article XVI, Section 16, Texas Constitution, which provides:

The accounting officers in this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

Article XVI, Section 40 was amended in 1972 to add the prohibition against a legislator also holding a position of profit under the State.

In a recent case, Martinez v. City of Weslaco, No. C-057-05-D, in the District Court of Hidalgo County, Texas, 206<sup>th</sup> District Court, the trial court held for the plaintiff in a case directly on point to the issue in this opinion request. Mr. Martinez was a fire fighter employed by the Weslaco Fire Department. He was elected in 2004 as a State Representative in House District No. 39. The City of Weslaco took the position that Mr. Martinez resigned his position as fire fighter when he took his oath of office as a representative because Article 3, Section 19 and Article 16, Section 40 of the Texas Constitution precluded him from serving in the State Legislature and as a fire fighter employed by the City of Weslaco. Although the trial court's judgment (copy attached) does not give any reasoning for the judge's decision, it appears that the judge was persuaded by Mr. Martinez' arguments.

Attached is a copy of the Plaintiff's Trail Memorandum, which lays out those arguments. Plaintiff argued that the position of a fire fighter is not a "public office"; therefore, that position did not implicate any issue of dual office holding. He further argued that the position of a fire fighter is not a position of profit under the State, leading to the conclusion that Article 16, Section 40 of the Constitution does not prohibit a legislator from holding this position at the same time he serves as a legislator. Mr. Martinez pointed out that the Texas Attorney General issued Texas Attorney General Letter Opinion No. LO-90-55 in 1990 that provided that a position held under a local government is a position held under this State based on a decision by the Alaska Supreme Court interpreting a virtually identical phrase. The Alaska case on which the Attorney General relied was Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

August 22, 2005

But Mr. Martinez stated that the Attorney General of Texas withdrew such opinion in Texas Attorney General Letter Opinion No. LO-90-55A (1991) noting that he failed to consider whether a fire fighter occupied a position of profit under this State and further noting that the Alaska case dealt with a state employee rather than an employee of a political subdivision of the State. Mr. Martinez in his trial memorandum further outlined the law dealing with similar constitutional provisions in other states and concluded that "the weight of the case law in other states interpreting similar provisions is that such provisions were not meant to preclude simultaneous employment by a political subdivision." Martinez v. City of Weslaco, Plaintiff's Trial Memorandum, page 12.

We request your guidance in reconciling earlier Attorney General opinions interpreting this Constitutional provision with this new trial court decision as it would appear that the trial court decision has clarified what this provision means.

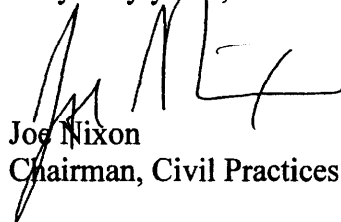
## II. Common Law Doctrine of Incompatibility of Office

The common law doctrine of incompatibility of offices is one facet to consider in the prohibition against holding dual offices of emolument. An incompatibility of office is found in (1) situations involving self-appointment, (2) situations involving self-employment and (3) situations where the two positions can create conflicting loyalties.

Situations 1 and 2 do not appear to be applicable in the situation in question as the President of the District is not appointed by the Legislature, nor is he hired by the Legislature. The Board of Directors hires the President. As to situation 3, the Attorney General has found that both positions must be "public offices" for this issue of conflicting loyalties to apply. Texas Att'y Gen. Op. No. JM 1266 (1990); Tex. Att'y Gen. LO-96-148, LO 95-052, and LO 95-029. Therefore, if the position of President is one of a "public employee" and the position of legislator is a "public office," the doctrine of conflicting loyalties is not implicated.

Thank you for your consideration of this matter.

Very truly yours,



Joe Nixon  
Chairman, Civil Practices Committee