

RECF

APR 09 2007

OPINION COMMITTEE

P. O. Box 745  
Sanderson, Texas 79848  
Telephone: (432) 345-2248  
Facsimile: (432) 345-2205

MARSHA MONROE

Attorney at Law

3902 Veterans Blvd.  
Del Rio, Texas 78840  
Telephone: (830) 774-3671  
marsha@bigbend.net

April 2, 2007

FILE # AL-45190-07

I.D. # 045190

The Honorable Greg Abbott  
Attorney General of Texas  
Opinions Section  
Supreme Court Building  
P. O. Box 12548  
Austin, Texas 78711

Certified Mail #70031680000055994708  
Return Receipt Requested

RQ-0580-GA

Re: Request for Opinion

Dear General Abbott:

Pursuant to Section 402.043 of the Texas Government Code, the Commissioners Court of Terrell County, Texas, has requested that I seek an opinion from your office on the following specific questions which the Court propounded:

Questions

1. May an elected official work for the County in other employment positions?
2. Are all elected officials considered full-time positions and eligible for employee benefits?
3. May County employees work at more than one job for the County?

Factual Background

According to the Terrell County Handbook currently in effect, full-time employees of the County are those employees regularly employed for 30 hours or more per week. Part-time employees are those regularly employed for less than 30 hours per week. Part-time employees are not eligible for personnel benefits other than social security and worker's compensation. Full-time employees are eligible for yearly holidays, vacation, sick leave, business/emergency leave, citizenship leave, maternity leave, retirement, and hospitalization insurance.

The Honorable Greg Abbott  
April 2, 2007  
Page Two (2)

Terrell County employs Emergency Medical Service (EMS) personnel who are on call 24 hours per day for 20 days per month. Because of the remoteness of Sanderson, the county seat, and the sparseness of the population, EMS personnel average making five (5) ambulance trips per month to the Fort Stockton Hospital, 65 miles from Sanderson. EMS personnel receive the same benefits as full-time employees. The EMS Director, who is responsible for scheduling, ordering supplies, billing, and filling in on ambulance runs in the absence of other EMS personnel, is a contractual position.

One member of the EMS staff was elected to the office of Justice of the Peace. Historically, the Justice of the Peace position has not required that the JP work 30 hours per week. The EMS Director also works as a full-time dispatcher in the Terrell County Sheriff's office.

#### Legal Authorities and Analysis

With respect to Question 1, Article XVI, Section 40 of the State Constitution, provides that 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 . . . unless otherwise specifically provided herein. Vernon's Ann. Tex. Const. Art. XVI, §40. Section 40 of the Constitution prohibits a person from simultaneously occupying two offices of civil emolument. This provision is not applicable if one of the two positions is not a "public office" (i.e. one office is simply an employment situation or there is not compensation or other pecuniary advantage attached to one of the offices). Brooks, 35 Tex. Prac. Series §7.10

The first issue to be addressed is to determine whether or not both positions are public offices. If both positions are not public offices, then the prohibition of dual office holding is not applicable. Some of the characteristics of the public officer include election by the voters for a fixed term of office, the requirement that the officer subscribe to the official oath and secure a bond, the imposition of statutory duties and the exercise of authority in such a manner that he employ some sovereign function in his own right and independent of others. Brooks, 35 Tex. Prac. Series §7.1

In the instance of the EMS employee serving as Justice of the Peace, it seems clear that one position is a public office, and the other merely an employee position.

The Honorable Greg Abbott  
April 2, 2007  
Page Three (3)

Additionally, Section 40 also exempts certain officials from its dual office holding prohibition, one of these being Justice of the Peace. Though these officials may be barred from holding a second office if the duties of the second officer are incompatible with the duties of the other office, they are not barred based on the dual office holding prohibitions of the Constitution. Op. Tex. Att'y Gen. No. JM-519 (1986)

The second bar to dual office holding is the common law doctrine of incompatibility. The three aspects of incompatibility are self-employment, self-appointment, and conflicting loyalties. Op. Tex. Att'y Gen. No. JC-0490 (2002)

The incompatibility doctrine prohibits one person from occupying two offices where one office might impose its policies on the other or be subjected to control in some other way. Op. Tex. Att'y Gen. No. JM-0129 (1984) This "conflicting loyalties" type of incompatibility has never been held to apply to a situation in which one position is an office and the other an employment. Op. Tex. Att'y Gen. No. JM-1266 (1990) That 1990 Attorney General's opinion also provides that there must be a finding that such conflict of duties exists as a matter of law and not as a mere possibility from time to time that may be cured by recusal.

With respect to Question 2, there is no statute of general applicability requiring that county offices be open to the public during certain hours although the common practice is to make the offices available 8:00 a.m. to 5:00 p.m. on weekdays, although some offices, such as the sheriff, would be required to be open for some purposes (emergency calls and prisoners) on a 24-hour basis. Independently elected county officials have the discretion to keep their offices open as they see fit. If the matter were litigated, a court could find restrictive office hours to be an abuse of discretion, and the office could be subject to mandamus forcing him to keep his offices open a reasonable period of time. Brooks, 35 Tex. Prac. Series §7.24 (1986)

The Commissioners Court lacks the specific authority to dictate office hours to be observed by independently elected county officials. Op. Tex. Att'y Gen. No. JM-440 (1986); Op. Tex. Att'y Gen. No. JM-182 (1984). If the JP can conduct her business in a 20-hour work week, only the voters can determine her effectiveness. The Commissioners Court cannot reduce benefits as a means of controlling the number of hours that she works.

The Honorable Greg Abbott  
April 2, 2007  
Page Four (4)

With respect to Question 3, concerns have arisen as to whether or not the Sheriff's office dispatcher can leave her post to make an ambulance run in the event of an emergency. The direct supervisor of the dispatcher is the County Sheriff. The Attorney General has found that the Commissioners Court does not have any power over a decision of an independently elected official to let his employees off from work for reasons other than bad weather, vacation, sick leave, etc. Op.Tex. Att'y Gen. No. JC-0239 (2002)

As to working hours, the Attorney General has ruled that a Justice of the Peace had authority to allow a clerk to take the day off in mourning for President Reagan, and that the county auditor had a ministerial duty to approve payment and not charge the absence to leave time. Op.Tex. Att'y Gen. No. GA-303 Following this opinion, it would appear that the Sheriff has authority to allow a dispatcher to take time off to make an ambulance run, and receive her full salary from the dispatcher position. A county official has "implied authority to set the working conditions for his or her own employees." Op. Tex. Att'y Gen. No. JC-0131 (1999)

It is for an elected county official to decide how to use the employees who work in his or her office to accomplish the officer's constitutional and statutory duties. Further, it is for the officer to determine what activities constitute a legitimate use of an employee's official time, (i.e. work time rather than vacation time). Op.Tex. Att'y Gen. No. JC-0239 (2002)

An elected county officer generally has a "sphere of authority" with which neither the County Commissioners, nor any other county official, may interfere. *Abbott v Pollock*, 946 SW 2d 513, 517 (Tex. App.-Austin 1997, writ denied)

The dismissal of employees must serve a public purpose, one that complies with Article 3 Section 52 of the Texas Constitution. Whether a particular office closure serves a public purpose must be determined in the first instance by the public official, whose decision is subject to judicial review. Op.Tex. Att'y Gen. No. JC-0119 (1999)

Sincerely,  


Marsha Monroe  
Terrell County Attorney

MM/tm