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WEBB COUNTY ATTORNEY'S OFFICE

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May 4, 2018

(Via E-Mail: opinion.committee@oag.texas.gov)

Attorney General Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for an Attorney General Opinion

Dear Honorable Attorney General Paxton:

Please accept this as a request pursuant to Texas Government Code § 402.042 for an Attorney General Opinion with respect to the following question:

Whether a member of a District's Board of Trustees may simultaneously serve as county judge?

I submit the following legal brief on the issues for your consideration.

FACTUAL BACKGROUND

On Tuesday, March 6, 2018, the Board President of the Jim Hogg County Independent School District, Juan Carlos Guerra, was elected County Judge for Jim Hogg County, Texas. Mr. Guerra's four-year term as Board President of Jim Hogg County I.S.D. began in the year 2016 and will end in the year 2020. Mr. Guerra will take office as County Judge on January 2019.

LEGAL AUTHORITY

A. Article XVI, section 40 of the Texas Constitution

The doctrine of dual office holding arises when one individual holds two or more positions at the same time. One aspect of the doctrine is constitutional, and relates primarily to article XVI,

section 40 of the Texas Constitution. Article XVI, section 40 of the Texas Constitution prohibits dual office holding, providing that “[n]o person shall hold or exercise at the same time, more than one civil office of emolument.” Tex. Const. art. XVI, § 40(a). First, it must be determined whether both county judge and school district trustee are “offices” for purposes of Article XVI, section 40. Under *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d. 578 (Tex. 1955), an officer is an individual upon whom a “sovereign function of government [has been] conferred... to be exercised by him for the benefit of the public largely independent of the control of others. *Id.* at 583. The Office of the Attorney General has construed the Aldine test to mean that an individual is an “officer” if his or her actions are not subject to control by a superior office. Tex. Att’y Gen. Op. No. GA-0032 (2003) citing Tex. Att’y Gen. Op. No. JM-1266 (1990) at 2. Here, both positions likely constitute an “office.” Members of the school district board of trustees and a county judge are elected by the voters of their districts and their actions are not subject to control of a superior body. Therefore, the members of each office meet the definition of “officer” formulated by the Texas Supreme Court in Aldine.

Second, it must be determined whether the office of school district trustee is an office of emolument. An “emolument” for purposes of article XVI, section 40 is any “pecuniary profit, gain or advantage.” *Irwin v. State*, 177 S.W.2d 970, 973 (Tex. Crim. App. 1944). Including any amount received in excess of actual expenses, see Tex. Att’y Gen. Op. No. GA-0032 (2003) at 2, such as an expense allowance or per diem, see *id.*, Tex. Att’y Gen. Op. No. JM-704 (1987) at 2. An “emolument” does not include the reimbursement of actual expenses. See Tex. Att’y Gen. Op. Nos. DM-55 (1991) at 2, MW-21 (1979). It has previously been established in Attorney General Opinion JM-213 (1984) that no compensation attaches to the office of school trustee. See Tex. Educ. Code § 11.061(d). Because the office of school trustee receives no compensation, it is not an office of emolument and article XVI, section 40 does not bar a school trustee from holding a second office. Thus, the common-law doctrine of incompatibility must be addressed.

B. Common-Law Doctrine of Incompatibility

The common-law doctrine of incompatibility has three aspects: 1) self-appointment; 2) self-employment, and 3) conflicting loyalties. Tex. Att’y Gen. Op. No. GA-0468 (2006). The first two aspects: self-appointment and self-employment do not apply here because a county judge neither appoints or employs a school district trustee, and a school district trustee neither appoints or employs a county judge. Both offices are offices obtained through election. The third aspect of the doctrine of incompatibility, conflicting loyalties, was first recognized in *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm’n App. 1927, judgment adopted). The court held that the offices of school trustee and city alderman were incompatible, because, if both were held by a single individual, one office might impose its policies on the other or subject it to control in some other way. Tex. Att’y Gen. Op. No. JC-0270 (2000). The Court reasoned that if the same person could hold both offices contemporaneously, “school policies, in many important respects, would be subject to direction of the council or alderman instead of to that of the trustees.” *Id.* at 153. The attorney general has denominated this branch of incompatibility “conflicting loyalties.” See, e.g., Tex. Att’y Gen. Op. No. DM-311 (1994), JM-1266 (1990). In order for the conflicting loyalties doctrine to be applicable, both positions must be “offices.” See Tex. Att’y Gen. Op. No. JC-0270 (2000), JC-0054 (1999), JM-1266 (1990). As

discussed supra, both positions meet the definition of “officer” formulated by the Texas Supreme Court in *Aldine*. In determining whether two offices are incompatible, “the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.” Tex. Att’y Gen. Op. No. KP-0054 (2015) citing *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). Thus, the duties of both a school district trustee and county judge shall be discussed.

Duties of School District Trustees:

Trustees of an independent school district hold elective office. See, e.g., Tex. Educ. Code Ann. §11.052 (West); § 11.059(b) (West) (elections for trustees with three-year terms shall be held annually);. § 11.059(c) (elections for trustees with four-year terms shall be held biennially). Tex. Att’y Gen. Op. No. JC-0537 (2002). “The trustees of an independent school district constitute a body corporate....” Id. § 11.151(a) (West). “The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district.” Id. § 11.151(b). An independent school district is a “quasi-municipal corporation... entrusted with the duty of managing the schools to the extent of the power delegated... and is a part of the State Government.” *Southwestern Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230, 233 (Tex. Civ. App—El Paso 1947, writ ref’d n.r.e); see also *Univ. Interscholastic League v. Midwestern Univ.*, 255 S.W.2d 177, 183 (Tex. 1953) (public schools are quasi-public entities and are subject to direct statutory control by the Legislature). “Under the Constitution, our public schools are essentially state schools, and authority to control their operation, except as otherwise prescribed, is included among the powers conferred upon the Legislature.” *Mumme v. Marrs*, 40 S.W.2d 31, 35 (Tex. 1931).

Duties of County Judge:

A commissioners’ court is the “governing body” of a county, and the county judge its “presiding officer.” Together, the commissioners and the county judge “compose the County Commissioners Court.” Tex. Const. art. V, § 18(b). The main duties of the county judge are to serve as presiding officer of the county commissioners’ court and judge of the county court. Tex. Cons. Art. V, Sec 18 and 15. Additionally, the county judge has been granted a myriad of statutory duties regarding elections, finance, bonds and sureties, court operations, mental health, special districts, and general administration. See Gallardo, et al, “2018 Guide To Texas Laws for County Officials,” Texas Association of Counties, at pp. 63-72 (denoting the numerous statutory charges entrusted to a county judge by the Texas Constitution, Government Code, Local Government Code, Election Code, Water Code, Agriculture Code, Health and Safety Code, Transportation Code, Occupations Code, Human Resources Code, Alcoholic Beverage Code, and Family Code).

Do the Duties of a School District Trustee and County Judge Conflict?

Upon review of the duties of both school district trustee and a county judge, the undersigned is of the preliminary opinion that no conflict exists. For instance, there are no overlapping statutory duties, and the duties of a county judge largely deal with matters specifically delegated to

counties in this state. Likewise, the duties of a school board trustee are more closely aligned with the management and governance of public school districts and related to public education in this state in general.

Still, in the absence of a prior opinion by your office regarding this specific question, I respectfully request your legal advice. See Tex. Const. art. IV, § 22 (“The Attorney General shall...give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.”).

Please let me know if you require any further detailed information regarding this request. Thank you in advance for your assistance and consideration.

Sincerely,

MARCO MONTEMAYOR
Honorable Webb County Attorney

cc: Jim Hogg County ISD Board of Trustees
Juan J. Cruz