



JENNY P. DORSEY
COUNTY ATTORNEY

NUECES COUNTY COURTHOUSE
901 LEOPARD STREET, ROOM 207
CORPUS CHRISTI, TX 78401-3689
361.888.0391 • FAX: 361.888.0577

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Via Certified Mail RRR# 7015 1730 0001 812 2725

Office of the Attorney General
Attention Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion

Dear Attorney General Paxton:

The Nueces County Attorney requests the opinion of the Texas Attorney General. The question relates to the application of the doctrine of incompatibility and dual employment of a county commissioner.

I. QUESTIONS:

1. **May a County Commissioner simultaneously serve as a County Commissioner and as a general manager of a water authority?**
2. **Alternatively, may a County Commissioner through his LLC simultaneously contract as a general manager of a water authority and serve as a County Commissioner?**
3. **Are the above positions incompatible under common law incompatibility?**
4. **As a matter of public policy (or public policy against dual agency), is a County Commissioner through his LLC prohibited from contracting as a general manager of a water authority and serving as a County Commissioner?**
5. **By accepting employment – or having his LLC enter into an independent contractor agreement with the water authority – does the County Commissioner, ipso facto, resign from office?**
6. **Is there is a conflict of interest under Chapter 171 of the Government Code?**
7. **Is there is a conflict with the County Commissioner’s Oath?**

II. BACKGROUND:

1. *Role of STWA; Relationship Between Nueces County and STWA*

The South Texas Water Authority (“STWA” or the “Authority”) is a conservation and reclamation district created under section 59, article XVI of the Texas Constitution. STWA was created by special act of the Texas Legislature in 1975 and its creation statute is currently codified at chapter

11006, of the Special District Local Laws Code.¹ STWA provides “a dependable supply of water to communities, residents and entities” in central Kleberg County and western Nueces County.² Its territory encompasses about one-half of Nueces County and major portions of Kleberg County, with the Authority’s headquarters located in Kingsville, the county seat of Kleberg County.³ STWA “purchases surface water from the City of Corpus Christi” and delivers it to Kingsville and western Nueces County through pipelines to provide water to area communities.⁴ The Authority also manages the Nueces Water Supply Corporation (NWSC) and the Ricardo Water Supply Corporation (RWSC) through contracts with those entities.⁵

STWA is governed by a board of nine directors with five appointed by Kleberg County Commissioners Court and four appointed by Nueces County Commissioners Court.⁶ Directors serve for staggered two-year terms with the commissioner court appointments occurring every March.⁷ The directors must be a resident of the authority and the county from where the person is appointed and may not hold another public office or be an officer or employee of STWA.⁸

STWA is authorized to “exercise any power necessary or appropriate” to achieve its purposes including acquiring, leasing, or disposing of an interest in property, managing or improving property, issuing bonds, operating or maintaining an office, and exercising powers under Chapter 30 of the Water Code pertaining to regional waste disposal.⁹ STWA has the authority to contract with any “public agency or political subdivision of this state,” which includes Nueces County, for any purpose relating to the authority’s powers or functions or to supply water to them.¹⁰ Any public agency or political subdivision may convey land or an interest in land to STWA.¹¹ The authority has the power of eminent domain.¹² The authority may issue bonds payable from or secured by revenue or ad valorem taxes.¹³ STWA has the power to collect ad valorem taxes for maintenance and operation and debt service.

STWA is governed in part by chapter 49 of the Water Code.¹⁴ Chapter 49 authorizes water districts to “employ or contract with a person to perform such services as general manager for the district as the board may from time to time specify.”¹⁵ A district can delegate “full authority to manage and operate the affairs of the district subject only to orders of the board,” including the authority to hire employees and determine their compensation.¹⁶ The board of directors is still responsible

¹ See TEX. SPEC. DIST. CODE, Ch. 11006, et. seq; See Act of April 23, 1979, 66th Leg., R.S., ch. 436, § 1 et seq.

² About STWA, SOUTH TEXAS WATER AUTHORITY, <https://www.stwa.org/about.html> (last visited Aug. 12, 2021).

³ *Id.* (displaying boundary map). See also TEX. SPEC. DIST. CODE § 11006.051 (describing authority territory).

⁴ Pipeline STWA Newsletter, SOUTH TEXAS WATER AUTHORITY, 2, (2014), <https://www.stwa.org/pdf/Pipeline143qd.pdf>.

⁵ *Id.*

⁶ TEX. SPEC. DIST. CODE § 11006.101(a).

⁷ *Id.* § 11006.101(c).

⁸ *Id.* § 11006.102(a).

⁹ *Id.* § 11006.151.

¹⁰ *Id.* § 11006.153, .154.

¹¹ *Id.* § 11006.156.

¹² *Id.* § 11006.158.

¹³ *Id.* § 11006.251.

¹⁴ TEX. WATER CODE § 49.002.

¹⁵ *Id.* § 49.056(a).

¹⁶ *Id.* § 49.056(a), (b).

for the management of the district's affairs but by resolution the general manager can be authorized to execute documents on behalf of the district.¹⁷ A general manager may also be an agent for the purpose of service.¹⁸

STWA employs an executive director who supervises a full-time staff of 14.¹⁹ The executive director also answers to the RWSC and NWSC boards and serves as general manager of RWSC and NWSC. The executive director is "responsible for overseeing operations of [STWA], [RWSC], and [NWSC] through strategic, proactive, and innovative service."²⁰ The executive director must be able to "identify and present to the Boards of Directors the pros and cons of alternative actions and advocate for what s/he thinks is best for the region as a whole."²¹

2. *County Commissioner's Relationship to STWA*

The STWA recently ratified the hiring of a new executive director who is also currently serving as a Nueces County Commissioner (herein "County Commissioner").²² At this same meeting, the SWTA discussed changes to its organizational chart and job titles.²³ We note that STWA later changed the position's title from executive director to administrator on their webpage.²⁴ However, the County Commissioner was interviewed on July 13, 2021 for the position of executive director and was hired for the executive director position on July 15, 2021.²⁵ On August 3, 2021, the STWA ratified a management service agreement (herein "MSA") between the STWA and an LLC where the County Commissioner is the President of the LLC (herein also "Contractor").²⁶

3. *MSA Between STWA and LLC*

The MSA states, "The Authority agrees to retain Contractor and Contractor agrees to be retained by the Authority as an independent contractor to provide management services.... Contractor shall exercise independent judgment in performing the management services.... Contractor shall be solely responsible for determination of the procedures and methods of providing such services under this Agreement."²⁷

¹⁷ *Id.* § 49.057(a), (g).

¹⁸ *Id.* § 49.066(c).

¹⁹ *The South Texas Water Authority seeks Executive Director*, RAY ASSOCIATES INC., at 1.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *August 3, 2021 Agenda Packet*, SOUTH TEXAS WATER AUTHORITY, 2, https://www.stwa.org/agendas/2021_packets/080321_packet.pdf (see Agenda item 5 with attachment 3 therein, Ratify and Confirm Board President's approval and execution of Management Services Contract with JMAR Management Consulting); see *id.* at 21 (July 15, 2021 Minutes Agenda item 4).

²³ *Id.* (see Agenda item 7, Discussion with possible action on South Texas Water Authority Organizational Chart and job titles).

²⁴ *About STWA*, SOUTH TEXAS WATER AUTHORITY, <https://www.stwa.org/about.html> (last visited Aug. 12, 2021).

²⁵ *August 3, 2021 Agenda Packet*, SOUTH TEXAS WATER AUTHORITY, 18, 21 https://www.stwa.org/agendas/2021_packets/080321_packet.pdf (see July 13, 2021 Minutes and July 15, 2021 Minutes).

²⁶ *Id.* at 31 - 34, (see Agenda item 5 with attachment 3 therein, Ratify and Confirm Board President's approval and execution of Management Services Contract with JMAR Management Consulting).

²⁷ *Id.*

The STWA contract with the LLC also states the following:

1. The Contractor will “manage the operations of the Authority, execute the policies of the Board of Directors, and supervise the staff and office personnel of the Authority in full compliance with the Texas Water Code... as well as the policies and procedures adopted by the Authority.”²⁸
2. The Contractor will “be subject to the general supervision of and act pursuant to the orders, advice and direction of the Authority by and through its Board of Directors, including the requirements of the management contracts between the Authority and the Nueces Water Supply Corporation....”²⁹
3. The Contractor “shall manage the operations of the Nueces Water Supply Corporation and Ricardo Water Supply Corporation subject to approval by those corporations.”³⁰
4. The Contractor “shall be provided at [*sic*] office at the Authority’s administrative offices.... The office shall be equipped with a desk, chair, and computer with internet access.”³¹
5. The “Contractor will not directly, or indirectly, engage or participate in any other business activities that the Authority, in its reasonable discretion, determines to be in conflict with the best interest of the Authority without written consent of the Authority.”³²
6. The Contractor will be compensated \$50,000 per six months, commencing July 27, 2021 with automatic renewal on a semi-annual basis.³³

Upon review of past agenda documents, the executive director performs similar duties to those of a general manager—the overall coordination of STWA’s operations. Despite the change of the position’s name, the County Commissioner was hired for the executive director position at a Special Board of Directors Meeting on July 15, 2021.³⁴

III. Discussion

1. Common Law Incompatibility

The Texas Constitution expressly prohibits dual office holding and states “[n]o person shall hold or exercise at the same time, more than one civil office of emolument”³⁵ However, county commissioners and several other offices are excluded from this prohibition.³⁶ Nonetheless a county commissioner may still be barred from holding a second office if the second office is incompatible with their duties under the common law doctrine of incompatibility. For example, a commissioner may not serve as a justice of the peace or a city council member in the same county.³⁷

²⁸ *Id.* at 31 (Section 3 of MSA).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 31-32 (Section 5 of MSA).

³² *Id.* at 31-32 (Section 8 of MSA).

³³ *Id.* at 31 (Sections 2 and 4 of MSA).

³⁴ *Id.* at 21 (July 15, 2021 Minutes).

³⁵ Tex. Const., art. XVI, § 40(a).

³⁶ *Id.*

³⁷ Tex. Att’y Gen. Op. No. PD-1192 (1951); Tex. Att’y Gen. Op. No. GA-0015 (2003).

The common law doctrine of incompatibility has three aspects: conflicting loyalties, self-appointment, and self-employment.³⁸ The first aspect, conflicting loyalties was first recognized in Texas by *Thomas v. Abernathy County Line Independent School District*, which held that the position of a school trustee and municipal alderman were incompatible as both offices could come into conflict with the other while executing their duties or one office would be subject to the direction of the other.³⁹ In sum, this doctrine “prohibits an individual from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions.”⁴⁰ Generally, “where geographical boundaries of two governmental bodies overlap, there is always the potential for conflict, particularly where both entities collect taxes.”⁴¹ It is also well established that “when two governmental bodies are authorized to contract with each other, one person may not serve simultaneously as a member of both.”⁴² Here, Nueces County and STWA both have overlapping boundaries, both collect taxes, and both contract with each other. Additionally, Nueces County and STWA have overlapping powers regarding water, such as the county’s power to sell surplus water.⁴³

The first type of incompatibility is conflicting loyalties; however, conflicting loyalties incompatibility only applies where each position constitutes an office.⁴⁴ The test to distinguish a public officer from a public 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.”⁴⁵ The attorney general has determined that an analysis involves a determination of whether the actions and decisions of the officer are subject to the control of others, and whether the employment can be terminated at will by a superior body.⁴⁶ Here, there is no dispute that a County Commissioner is a public officer. Additionally, the general manager of a water district is subject to control by the district board.⁴⁷ Accordingly, the general manager position is not an office and the conflicting loyalties doctrine would not apply in this instance.

The second type of incompatibility, self-appointment incompatibility, derives from *Ehlinger v. Clark*, which stated that there was an “obvious incompatibility of being both a member of a body making the appointment and an appointee of that body” and held that “all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.”⁴⁸ The

³⁸ Tex. Att’y Gen. Op. No. KP-0119 (2016) at 2; *see also* Tex. Att’y Gen. Op. No. GA-0015 (2003) at 1.

³⁹ *Thomas v. Abernathy Cty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm’n App. 1927).

⁴⁰ Tex. Att’y Gen. Op. No. GA-0169 (2004) at 2.

⁴¹ Tex. Att’y Gen. Op. No. GA-0015 (2003) at 2; *see* Tex. Att’y Gen. Op. Nos. KP-0119 (2016) at 3, GA-0169 (2004) at 3, JC-0455 (2002) at 5, DM-0047 (1991) at 1-2.

⁴² Tex. Att’y Gen. Op. GA-0015 (2003) at 2; *see* Tex. Att’y Gen. Op. Nos. GA-0169 (2004) at 3, JC-0455 (2002) at 5, GA-0786 at 4.

⁴³ Tex. Loc. Gov’t Code Ann. § 412.002(a); *see* Tex. Att’y Gen. Op. No. JC-0455 (2002) at 5-6 (discussing county powers regarding water and holding that due to potential conflict, an individual may not simultaneously serve as a county commissioner and as a director of a groundwater conservation district with overlapping boundaries).

⁴⁴ *See* Tex. Att’y Gen. Op. Nos. JC-0270 (2000) at 2, GA-0849 (2011) at 2, KP-0032 (2015) at 1-2.

⁴⁵ *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955).

⁴⁶ Tex. Att’y Gen. Op. Nos. KP-0032 (2015) at 1-2, GA-0849 (2011) at 2.

⁴⁷ Tex. Water Code § 49.056(a); *See also City of Groves v. Ponder*, 303 S.W.2d 486, 488 (Tex. Civ. App.—Beaumont 1957, writ ref’d n.r.e.) (holding that a general manager of a water control and improvement district was an employee, not an officer).

⁴⁸ *Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928).

attorney general has held that self-appointment bars a sitting member of a body from being appointed to fill a vacancy on the body itself.⁴⁹ This aspect seems to only apply to “offices.”⁵⁰

Here, the County Commissioner was elected in 2016 and his current term will end in 2024. During his terms in office, he voted on the appointment of directors to STWA, some of which have since been reappointed and are currently serving on the STWA board. Of note, the Commissioner abstained from these directors’ reappointment in 2021. However, STWA’s agendas reflect that a director the Commissioner voted to appoint voted in favor of the agreement between the STWA and the Commissioner’s LLC.

In this case, the self-appointment aspect of incompatibility may apply as the County Commissioner has appointed directors to the STWA and could appoint directors that he would report to as an employee. Since early 2021, the County Commissioner has abstained from the appointment of the directors to the STWA and from matters directly related to the STWA; however, many matters are still related to the STWA due to the geographical overlap of the entities.

Finally, the doctrine of self-employment incompatibility derives from *Ehlinger* and was first applied by the attorney general to situations where a person holds an office and an employment.⁵¹ Self-employment incompatibility “bars an individual from holding two positions, one of which is answerable, immediately or ultimately, to the other.”⁵² Prior attorney general opinions have determined that the fundamental test of this aspect of the doctrine is one of “supervision.”⁵³ The attorney general has determined that a city council member cannot serve as a member of a municipal volunteer fire department where the city council approves the appointment of the fire chief, that a board member of a water district may not serve as an employee of the same water district, and that a school district trustee may not serve as a volunteer teacher.⁵⁴ In this case, the commissioners court, after appointing members to the board of STWA, exerts no supervisory authority over a director. However, after appointing a board member the commissioner would then be supervised by the board of directors, including directors he had appointed in past years. While we have not been able to locate a similar case, we again believe that the current situation warrants examination by your office.

2. *No Automatic Relinquishment*

We do not believe that the acceptance of the position as executive director of STWA operates as an *ipso facto* resignation from the Commissioner’s Office. The attorney general has said that “automatic relinquishment does not apply when one of the positions is a mere employment.”⁵⁵ As

⁴⁹ Tex. Att’y Gen. Op. Nos. GA-0377 (2005) at 2 (school board trustee cannot fill another vacancy on the board); JC-0225 (2000) at 2.

⁵⁰ *Ehlinger*, 8 S.W.2d at 674; see Tex. Att’y Gen. Op. No. GA-0132 (2003) at 2.

⁵¹ Tex. Att’y Gen. LA-75-114 (1975) (a public-school teacher could not also serve as a school board trustee in same district).

⁵² Tex. Att’y Gen. Op. No. JC-0199 (2000) at 1.

⁵³ Tex. Att’y Gen. Op. Nos. JC-0371 (2001) at 3, GA-0077 (2003) at 2; GA-0536 (2007) at 4.

⁵⁴ Tex. Att’y Gen. Op. Nos. JC-0199 (2000), GA-0077 (2003), JC-0371 (2001).

⁵⁵ Tex. Att’y Gen. Op. No. JC-0199 (2000) at 2.

discussed previously, the executive director operates as the general manager for STWA and serves at the will of the board of directors.⁵⁶ However, we seek clarification on this matter.

3. *Additional Statutes*

Additionally, a county commissioner takes the commissioners' oath which prohibits a member of the commissioners court from having any interest either "directly or indirectly in a contract with or a claim against the county" except in certain circumstances.⁵⁷ Chapter 171 of the Local Government Code also regulates local public official's conflicts of interests.⁵⁸ Chapter 171 permits local governmental bodies to enter into contracts in which a member of the body has a "substantial interest in a business entity or in real property."⁵⁹ The "interested" local public official must comply with section 171.004 which requires the filing of an affidavit and abstaining from participation in the matter. The attorney general's office has previously harmonized section 82.002(a) and chapter 171 by construing chapter 171 to allow a "county to enter into contracts or take actions in which a member of the commissioners court is pecuniarily interested to the same extent that other local governmental bodies may take such actions."⁶⁰ Therefore, chapter 171 applies to all contracts involving a business interest or real property interest for a county commissioner, even one where the commissioner has a substantial interest, so long as the commissioner complies with chapter 171's requirements.⁶¹

STWA currently has hired the county commissioner through his LLC of which he is the President and employee. We believe that the agreement between the Commissioner's LLC and STWA would constitute a substantial interest under section 171.004(a) and would not be a violation of section 81.002(a). We note that the County Commissioner has abstained from voting for the appointment of directors to STWA and has indicated he will recuse himself from any other matters involving STWA, as well as complying with the affidavit requirement of chapter 171. We believe that these steps would comply with the provisions of chapter 171 but seek clarification.

IV. **Conclusion**

We seek clarity whether the County Commissioner may serve as commissioner and as a general manager of a water district concurrently. An opinion addressing these particular issues would be appreciated as soon as it may be obtained as it is an issue of great importance to the citizens of Nueces County.

Thank you for your consideration of this issue.

⁵⁶ Tex. Water Code § 49.056(a).

⁵⁷ TEX. LOC. GOV'T CODE § 81.002(a).

⁵⁸ See TEX. LOC. GOV'T CODE §§ 171.001-.010.

⁵⁹ *Id.* at § 171.004(a).

⁶⁰ Tex. Att'y Gen. Op. No. DM-0279 (1993) at 4.

⁶¹ See *id.*; see also Tex. Att'y Gen. Op. Nos. GA-0645 (2008) at 3-4; GA-0671 (2008) at 3; JC-0061 (1999) at 3.

Respectfully submitted,



Jenny P. Dorsey
NUECES COUNTY ATTORNEY