



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 18, 1993

Honorable Luis V. Saenz
Cameron County District Attorney
974 East Harrison Street
Brownsville, Texas 78520

Letter Opinion No. 93-37

Re: Whether a teacher at Texas State Technical College is prohibited from serving as a Harlingen city commissioner (ID# 16363)

Dear Mr. Saenz:

You ask whether a teacher at Texas State Technical College ("TSTC") in Harlingen, a state institution,¹ is prohibited from serving as a city commissioner for the City of Harlingen (the "city") city commission. You explain that the city commissioner was elected to a three year term in 1989. On June 1, 1990, he became employed as a teacher at TSTC. You also state that members of the city commission, by city charter and ordinance, receive a salary of \$100.00 per month and expenses in the amount of \$50.00 per month. The city commissioner in question received a check for his salary every other week and a check for his expenses once a month, both before and after he became employed by TSTC. On March 31, 1992, the city commissioner signed an affidavit stating that "[a]ll monies received by me during my term of office from the City of Harlingen have been equalled or exceeded by expenses incurred by me in my service as Commissioner."

In addition, you state that after the city commissioner was re-elected to office in May 1992, "he renounced what had been his salary income before he went to work at TSTC and which monies he had been using for expenses connected with his performance as a City Commissioner after he went to work as an instructor at TSTC." Specifically, a letter you have submitted to us from the city commissioner to the city manager states, "I hereby decline to accept the \$100.00 per month remittance paid the members of the Harlingen Elective Commission." Based on the foregoing, we understand that the city commissioner has not received a salary since May 1992, but has continued to receive \$50.00 per month as expenses.

¹Texas State Technical College ("TSTC") in Harlingen is part of the Texas State Technical College System. See Educ. Code §§ 135.01, 135.02.

In essence, you ask whether the city commissioner has run afoul of the Texas Constitution's prohibitions against dual-office holding, in either of the two time periods from June 1990 to May 1992, or from May 1992 to the present. As you suggest, although article XVI, section 40 of the Texas Constitution generally provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument," this language is inapplicable since a teacher at TSTC does not hold an *office*, but is rather an employee of the state. *Tilley v. Rogers*, 405 S.W.2d 220, 224 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.) (professor at state supported college does not hold civil office of emolument); Attorney General Opinion M-297 (1968) at 2 (a college professor at a state university does not hold a civil office of emolument). See generally Attorney General Opinion JM-1266 (1990) at 2. In addition, the common-law doctrine of incompatibility of office is inapplicable for the same reason. Attorney General Opinion JM-1266 at 4 (the doctrine of incompatibility of office has never been applied where one position is an office and the other is mere employment). Article XVI, section 40 of the Texas Constitution also provides, however, in pertinent part:

State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies.

This language clearly bars a state employee from serving as a member of the governing body of a city if he or she receives a salary for doing so.

In Attorney General Opinion JM-1266, this office considered whether this language would preclude employees of school districts and other special districts, all of whom received some compensation from state funds, from serving as city council members, thereby receiving a monthly expense allowance from the city in the amount of \$40.00. This office concluded that this provision permitted such individuals to serve as city council members "only if they receive no salary for such service." Attorney General Opinion JM-1266 at 3. This office then considered whether the \$40.00 expense allowance constituted a salary:

"[S]alary" does not include legitimate reimbursement of expenses. . . . In the examples you cite, we do not believe that the [state employees] may receive compensation for serving as . . . city council member merely by denominating a \$40 . . . monthly payment an "expense allowance" rather than a "salary." At the very least, the official should submit an affidavit that the actual expenses he incurs

each month equal or exceed the allowance payment. The better practice is for the official to itemize his expenses each month in order to demonstrate that the allowance does not exceed expenses incurred. . . .

Id. (citations omitted).

In answer to your specific questions, article XVI, section 40 of the Texas Constitution precludes a state employee from serving as a city commissioner if he or she receives a salary. It does not preclude a state employee from serving as a city commissioner if he or she renounces the salary, even if the city charter provides for such salary and expenses. See Attorney General Opinions MW-230 (1980); H-6 (1973). We caution, however, that Attorney General Opinion JM-1266 makes clear that it may not be sufficient for the city commissioner merely to renounce his or her salary.² In addition, to conform with the constitution, the amount the city commissioner receives as expenses may not exceed the actual expenses he or she incurs.³ See Attorney General Opinion JM-1266 at 3.

You also ask if a city commissioner automatically forfeits his or her position by accepting employment with the state, or if he or she "can continue to hold both positions by refusing or renouncing the salary set out . . . in the City Charter or Ordinances." For the reasons stated above, we conclude that a city commissioner who accepts a position of employment with the state does not automatically forfeit his or her position and may continue in both positions if he or she renounces the city salary. See Attorney General

²We note that the city commissioner in question signed an affidavit stating that "all monies [he] received . . . during [his] term of office from the City of Harlingen have been equalled or exceeded by expenses [he] incurred . . . in [his] service as Commissioner." We note that from June 1990 to May 1992, the city commissioner received from the city on a monthly basis both expenses in the amount of \$50.00 and a salary of \$100.00. Section 2-37 of the Harlingen Code provides in pertinent part that "each commissioner [shall] be reimbursed upon expense vouchers being presented to the city, of actual expenses incurred on city business not to exceed [\$150.00] per commissioner per quarter." (Emphasis added.) The Harlingen Code appears to impose a monetary cap on the expenses for which a commissioner is entitled to be reimbursed. If this is the case, regardless of what his expenses were, the city commissioner was entitled to no more than \$50.00 per month as expenses, and therefore received the \$100.00 as salary rather than as reimbursement for expenses. For this reason, it does not appear that the affidavit is sufficient to bring the city commissioner's receipt of the \$100.00 monthly salary into conformance with the constitution.

We note that article XVI, section 40 of the Texas Constitution does not affect the compensation the city commissioner has received from the state. Attorney General Opinion MW-230 at 2.

³The determination whether any monies paid to the city commissioner for expenses from June 1990 to the present exceeded his actual expenses involves questions of fact which cannot be resolved in the opinion process.

Opinions MW-230; H-6.⁴ Again, we stress that, in addition, the monies the city commissioner receives as *expenses* may not exceed the actual expenses he or she incurs.

Finally, you ask if "a person who meets the profile set out in the facts above [is] in violation of Article XVI, Section 33 of the Texas Constitution." That provision states as follows:

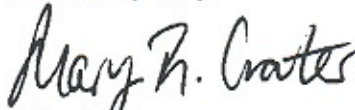
The accounting officers of this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

A teacher employed by TSTC does not hold a civil office of emolument for purposes of article XVI, section 40 of the Texas Constitution. See discussion and authorities cited at pages 1-2, *supra*. Therefore, the foregoing provision is inapplicable to the circumstances you describe.

S U M M A R Y

Article XVI, section 40 of the Texas Constitution bars a teacher employed by Texas State Technical College from serving as a city commissioner if he or she receives a salary from the city for doing so. Section 40 does not preclude such a state employee from serving as a city commissioner if he or she renounces the salary. A city commissioner who accepts a position of employment with the state does not automatically forfeit his or her position, and may continue in both positions, if he or she renounces the salary, and the monies the city commissioner receives as expenses do not exceed the actual expenses he or she incurs.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁴You do not ask and we do not address whether a city commissioner who accepts a position of employment with the state and does not renounce his or her city salary automatically forfeits his or her position.