

# TEXAS DUAL OFFICE HOLDING LAWS MADE EASY

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*Answers to the most frequently asked questions  
about the Texas Dual Office Holding Laws*

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# Dual Office Holding Limitations Made Easy

Seventy percent of Texas cities, in addition to some counties, have a population of under 5,000 residents. Therefore, it is not surprising that when individuals are actively involved in their communities, they are often asked not only to hold one public office but to serve in several different public capacities. However, in certain situations, state law does not permit dual office holding. It is important that local officials understand in which circumstances they can agree to serve in another public office. This knowledge is particularly important because the acceptance of a second public office can result in an automatic resignation from a person's current public office. The following questions and answers provide a lay person's explanation of the dual office holding limitations that apply to local officials in Texas. The Municipal Affairs and County Affairs sections of the Office of the Attorney General are available to answer questions about this from public officials, who should nonetheless consult with their local legal counsel regarding the application of the law to the facts of each particular situation. This handbook offers guidance to officials of other public entities as well.

The chart attached to the end of this summary is an overview of Attorney General opinions and cases that have ruled on specific questions of whether two offices may be held simultaneously. It does not address each example entirely, since facts may be slightly different, nor does it address other dual office holding situations.

## 1. What is dual office holding?

Dual office holding refers to certain limitations that prevent a person from holding two or more public offices at the same time. The restrictions on dual office holding are primarily derived from two sources:

1. Texas constitutional restrictions on holding two civil offices of emolument (see question # 2, below); and
2. Attorney general opinions and court cases that have found the dual holding of certain offices to be incompatible and therefore invalid.

As noted above, this issue is particularly important because the acceptance of a second public office can result in an automatic resignation from a person's current public office.

## 2. What does it mean to hold "more than one civil office of emolument"?

In basic terms, to hold "more than one civil office of emolument" means to hold two paid public offices. The prohibition against holding two civil offices of emolument is contained in Article XVI, section 40 of the Texas Constitution. It provides in part:

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

### **3. What is considered an “office” for purposes of dual office holding?**

To understand the prohibition against holding two civil offices of emolument, one must first understand what positions are considered “public offices.” A public officer, unlike a public employee, exercises a sovereign function of government largely independent of the control of others for the public benefit.

This distinction recognizes the essential elements of public office: first, the officeholder’s authority to exercise governmental power for the benefit of the public; and second, the officeholder’s independence from the control of other governmental entities or officials. A mere employee does not hold a public office. Also, a person who holds a position with a private nonprofit association (e.g. a board member of a nonprofit association) is not considered a public officer for purposes of dual office holding.<sup>1</sup>

### **4. How can one determine whether a person is considered a public “employee” or a public “officer”?**

Since only public offices raise constitutional dual office holding concerns, it is important to distinguish between positions that are considered a public office and positions that are simply public employment. The factor which differentiates an officer from an employee is whether the person is empowered to exercise a “sovereign” function of government that is largely independent of the control of others.<sup>2</sup> For example, city council members and county commissioners are clearly officers since they exercise sovereign functions of government (e.g., they adopt policies and rules regarding public policy) that are largely independent of the control of others. However, an assistant district attorney,<sup>3</sup> a jailer,<sup>4</sup> a chief deputy of a county tax assessor-collector,<sup>5</sup> and a volunteer fireman<sup>6</sup> have all been found not to hold a public office because their duties are not exercised largely independent of the control of others. Similarly, city attorneys have been held not to be “officers” for purposes of dual office holding.<sup>7</sup>

A person does not have to be elected to a position to be considered an officer. For example, the Texas Local Government Code and most home rule charters state that the city manager, city secretary, and certain other city department heads are considered officers. However, the city should visit with its local legal counsel to determine whether such positions would be considered offices for purposes of the constitutional limitation on dual office holding.

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<sup>1</sup> Op. Tex. Att’y Gen. DM-303 (1994).

<sup>2</sup> *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955).

<sup>3</sup> *State ex rel., Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994); Tex. Att’y Gen. LO No. 96-148 (1996).

<sup>4</sup> Op. Tex. Att’y Gen. JM-1047 (1989).

<sup>5</sup> Op. Tex. Att’y Gen. JM-1083 (1989).

<sup>6</sup> Op. Tex. Att’y Gen. JC-385 (2001).

<sup>7</sup> Op. Tex. Att’y Gen. JC-54 (1999).

**5. What is considered to be an “emolument” for purposes of holding “civil offices of emolument”?**

The constitutional provision regarding dual office holding generally prevents a person from holding two civil offices of emolument. In basic terms, an “emolument” is either pay or some other benefit, compensation or thing of value received in exchange for the person’s service as an officer. For example, an emolument could involve the provision of free or reduced utility service charges, a set per diem for each meeting that is attended, complimentary health insurance, or some other type of compensation or benefit for serving in a public office. However, the mere reimbursement of a local officer for actual government-related expenses (e.g., the cost of meals or actual mileage) is not considered to be an emolument if the reimbursement is limited to the amount contained in actual receipts or other proof of expenditures. If a person is paid a set amount and that amount is not limited to actual expenditures, it would constitute an emolument for dual office holding purposes.<sup>8</sup>

**6. May a person refuse the “emolument” (the pay or benefits of an office) to avoid holding two civil offices of emolument?**

No, if a state statute or a city ordinance fixes a salary or other form of compensation for an office, the compensation attaches to and is inseparable from the office.<sup>9</sup> Generally, an officer cannot return the pay or benefits of the second office, or simply refuse to accept them, to avoid being considered to hold two civil offices of emolument. Likewise, a governmental entity cannot simply eliminate the pay or benefit to a local officer to avoid a dual office holding issue.<sup>10</sup>

**7. If a public officer takes on additional duties, does this create a second office in violation of dual office holding limitations?**

No, simply taking on additional duties does not necessarily create a second office in violation of dual office holding limitations.<sup>11</sup>

**8. Is a person considered an “officer” if he serves for only a temporary period as an officer?**

If a person takes a position that is merely temporary, it is usually not considered to be a second office for dual office holding purposes.<sup>12</sup> In order for a position to be considered an office, it must

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<sup>8</sup> Op. Tex. Att’y Gen. JM-594 (1986), *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964); Op. Tex. Att’y Gen. JM-704 (1987); Tex. Att’y Gen. LO No. 93-33 (1993).

<sup>9</sup> *Markwell v. Galveston County*, 186 S.W.2d 273 (Tex. Civ. App.–Galveston 1945, no writ); Op. Tex. Att’y Gen. JM-704 (1987). *But see* Op. Tex. Att’y Gen. GA-250 (2006) (Texas Government Code section 574.005(b) allows local officer to serve on state agency governing body without compensations and thus detaches compensation from office).

<sup>10</sup> *Broom v. Tyler County Comm’rs Court*, 560 S.W.2d 435 (Tex. Civ. App.–Beaumont 1977, no writ).

<sup>11</sup> Op. Tex. Att’y Gen. DM-55 (1991).

<sup>12</sup> Tex. Att’y Gen. LO No. 96-81 (1996); Op. Tex. Att’y Gen. JM-847 (1988).

have duties that are continuing in nature rather than temporary or intermittent. For example, a court ruled that the temporary performance of the mayor's duties by a mayor pro tem during an interim period before a special election to fill the mayor's position did not constitute dual office holding.

## **9. Is a person considered an “officer” if they serve on a purely advisory board that has no final power?**

A person who serves in a merely advisory capacity or on a purely advisory board is not considered an officer for purposes of the dual office holding limitations. However, it is important to note that if the board has any rule making or quasi-judicial powers, or the board's recommendations are generally approved in whole by another governmental entity, it is not likely that the board would be found to be purely advisory.

## **10. Are certain public officers exempt from the dual office holding limitations?**

The Texas Constitution provides that certain public officers are exempt from the constitutional dual office holding limitations.<sup>14</sup> Such officers include:

- 1) Justices of the peace;
- 2) County commissioners;
- 3) Directors of certain soil and water conservation districts<sup>15</sup>; and
- 4) Notaries public;

The officers listed above are not subject to the constitutional limitation against holding two civil offices of emolument.<sup>16</sup> However, the constitution is only once source of the limitations on dual office holding. Another limitation, called the “doctrine of incompatibility,” might still prevent an officer from holding a second office if the second public office would be considered incompatible with the first office.<sup>17</sup> For example, a county commissioner cannot serve as a city council member at the same time. The standards for determining whether two public offices are incompatible are discussed further in questions # 18-23 of this article.

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<sup>13</sup> *De Alejandro v. Hunter*, 951 S.W.2d 102, 107 (Tex. App.—Corpus Christi 1997, no pet.).

<sup>14</sup> TEX. CONST. art. XVI, § 40.

<sup>15</sup> This is a very limited exception and only applies to districts covered by Chapter 201 of the Agriculture Code. Neither a river authority, nor a drainage district, nor a water conservation and reclamation district are covered by this exception. Op. Tex. Att’y Gen. JM-172 (1984); Tex. Att’y Gen. LA No. 150 (1978).

<sup>16</sup> For example, a justice of the peace could serve as a municipal court judge at the same time. Op. Tex. Att’y Gen. JM-819 (1987).

<sup>17</sup> Tex. Att’y Gen. LO No. 96-4 (1996).

## **11. Is an ordinary law enforcement officer considered an “officer” for purposes of dual office holding?**

Under most circumstances, an ordinary law enforcement officer is not considered an officer for purposes of constitutional dual office holding limitations.<sup>18</sup> Therefore, it is possible that a city police officer or deputy sheriff could hold another public office if the two offices were not considered incompatible. For example, a city police officer is not prevented from serving as an elected city council member for a different city within the same county.<sup>19</sup> A police officer employed by a municipality also is not prohibited from serving as a municipal judge in a different city, either within the same county or in another county.<sup>20</sup> However, the State Commission on Judicial Conduct (“Commission”) issued a public statement stating that though it might be legal for a judge to also be a police officer or law enforcement officer, ethically it is not.<sup>21</sup>

“In issuing this Public Statement, the Commission recognizes the existence of Attorney General Letter Opinion NO. 92-35 (1992), which discusses the legality of serving in both roles. However, the Commission notes that an act that is legal is not necessarily an act that is ethical. Judges are members of the judicial branch of our government. Law enforcement officers are part of the executive branch. Each branch is separate from, but co-equal with, the other. Therefore, the Commission concludes that any judge who attempts to serve both branches cannot accomplish the task without impairing the effectiveness of one or both positions.”<sup>22</sup>

## **12. Is a city attorney an “officer” for purposes of dual office holding?**

Under most circumstances, a city attorney is not considered an officer for purposes of constitutional dual office holding limitations.<sup>23</sup> Therefore, it is possible for a city attorney to hold another public office if the two offices are not considered incompatible. For example, a lawyer may serve as the city attorney for several Texas cities at the same time without violating dual office holding provisions.

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<sup>18</sup> Op. Tex. Att’y Gen. DM-212 (1993); Tex. Att’y Gen. LO Nos. 95-48 (1995); 93-27 (1993).

<sup>19</sup> Tex. Att’y Gen. LO Nos. 93-27 (1993); 95-48 (1995).

<sup>20</sup> Tex. Att’y Gen. LO No. 93-59 (1993).

<sup>21</sup> State Commission on Judicial Conduct PS-2000-1.

<sup>22</sup> *Id.*

<sup>23</sup> Op. Tex. Att’y Gen. JC-54 (1999).



### **13. Is a municipal court judge an “officer” for purposes of dual office holding?**

A municipal court judge is considered an “officer” for purposes of dual office holding.<sup>24</sup> However, appointed municipal court judges may hold more than one such appointment, provided the holding of the second office is “of benefit to the State.”<sup>25</sup> In 1997, the legislature specifically provided in Government Code Section 574.001 (b) that a person may hold an appointed office of municipal judge for more than one city at the same time. To hold multiple municipal court judgeships, each office must be one that is filled by appointment. The legislature found that the holding of multiple municipal court judgeships was of benefit to the state.<sup>26</sup>

### **14. May a school district employee (such as a school teacher) also serve as a member of a local governing body?**

Dual office holding limitations do not prevent a school district employee from serving as a member of a local governing body.<sup>27</sup> However, the Texas Constitution does limit the ability of some school district employees to accept any compensation for serving as a board member. Article XVI, section 40 of the Texas Constitution provides that if the compensation of a public employee is directly or indirectly funded in whole or in part from state funds, the public employee may not receive any compensation for his service as a member of the governing body of a city, school district or other local government district. This section was amended in 2001 to allow school teachers, retired school teachers, and retired school administrators to receive compensation for serving as a member of a governing body of a school district, city, local governmental district, and certain water districts. The term “school teacher” does not include a state university professor or instructor.<sup>28</sup> As for other school district employees, since their pay is received in part from state funds, such employees would be prohibited from accepting any compensation for serving as board members (other than reimbursement for actual expenses).<sup>29</sup> However, a person who receives only state retirement benefits is not required to renounce his or her salary for service on a board.<sup>30</sup>

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<sup>24</sup> Ops. Tex. Att’y Gen. JM-333 (1985); DM-428 (1996).

<sup>25</sup> Op. Tex. Att’y Gen. DM-428 (1996).

<sup>26</sup> TEX. GOV’T CODE ANN. § 574.001 (b) (Vernon 2004).

<sup>27</sup> See Ops. Tex. Att’y Gen. DM-55 (1991); JC-74 (1999) (school teacher or school administrator is not an office). *Ruiz v. State*, 540 S.W.2d 809, 811 (Tex. Civ. App.—Corpus Christi 1976, no writ).

<sup>28</sup> Op. Tex. Att’y Gen. JC-577 (2002). In 2003, a constitutional amendment allowed active and retired faculty members of public institutions of higher education to receive compensation while serving on the governing body of certain water districts.

<sup>29</sup> Tex. Att’y Gen. LO Nos. 95-1 (1995); 93-33 (1993); Op. Tex. Att’y Gen. JC-74 (1999).

<sup>30</sup> Tex. Att’y Gen. LO No. 93-041 (1993).

## 15. May a state employee also serve as a member of a local governing body?

Dual office holding limitations do not prevent state employees from serving as members of a local governing body. However, the Texas Constitution does limit the ability of a state employee to accept any compensation for serving as a board member. Article XVI, section 40 of the Texas Constitution provides that if the compensation of a public employee is directly or indirectly funded in whole or in part from state funds, the public employee cannot receive any compensation for his or her service as a member of the governing body of a city, school district or other local government district.<sup>31</sup> Since the pay of a state employee is received from state funds, such an employee would be prohibited from accepting any compensation for serving as a board member (other than reimbursement for actual expenses).<sup>32</sup> Nonetheless, a person that receives only state retirement benefits is not required to renounce his or her salary for service on a local board.<sup>33</sup>

## 16. May an elected member of the Texas Legislature be hired to work for a local government?

The final sentence in article XVI, section 40 of the Texas Constitution states:

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 ...”

The above limitation prevents a member of the Texas Legislature from holding an office or “position of profit” with the State or with the United States. A position of profit is defined as a “salaried non-temporary employment.”<sup>34</sup> Accordingly, a member of the Texas Legislature could not serve as a local officer or be hired as a local employee. He could also not simply take a leave of absence from local office or employment during the legislative session.<sup>35</sup> However, this constitutional provision would not prevent a local entity from contracting with a Texas legislator to serve as an independent contractor for the city.<sup>36</sup> For example, in certain cases, the entity may contract with a Texas legislator to provide certain consulting services.

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<sup>31</sup> It should be noted that an elected member of the commissioners court is not covered by this constitutional provision and could therefore receive both compensation from the state and a salary for serving on the commissioner’s court. *County of Maverick v. Ruiz*, 897 S.W.2d 843 (Tex. App.–San Antonio 1995, no writ).

<sup>32</sup> Tex. Att’y Gen. LO Nos. 95-1 (1995); 93-33 (1993).

<sup>33</sup> Tex. Att’y Gen. LO No. 93-41 (1993).

<sup>34</sup> Ops. Tex. Att’y Gen. JC-430 (2001); H-1304 (1978).

<sup>35</sup> Tex. Att’y Gen. LO No. 90-55 (1990).

<sup>36</sup> Op. Tex. Att’y Gen. H-1304 (1978); Tex. Att’y Gen. LO Nos. 95-22 (1995); 93-31 (1993).

## **17. May an elected member of Congress or other federal “officer” serve as a local officer or employee?**

Article XVI, section 12 of the Texas Constitution states:

No member of Congress, nor person holding or exercising any office of profit or trust under the United States . . . shall . . . exercise any office of profit or trust under this state.

The above limitation prevents a member of Congress or other federal “officer” from holding an office of profit or trust in this state. An office of profit or trust would include local offices. Accordingly, a member of Congress or a federal officer could not serve as a local officer. The officer could also not simply take a leave of absence from office during the congressional session. However, this constitutional provision would not prevent a local entity from hiring a member of Congress or a federal officer as an employee. Likewise it would not prevent a local entity from contracting with a member of Congress or a federal officer to serve as an independent contractor for the entity.<sup>37</sup> For example, in certain cases, the entity may contract with a congressman or a federal officer to provide certain consulting services.

## **Determining Whether Two Offices are Incompatible**

### **18. What is common-law incompatibility?**

Common-law incompatibility refers to the prohibition against a person holding certain public offices at the same time because of the practical conflicts of interest that might arise. For example, the doctrine of incompatibility prevents a person from holding two public offices if a person could use the power in one office to impose policies that impact the other office. Common-law incompatibility also may be implicated if there is the potential that a person’s actions in one office could control the other office. The concept of common-law incompatibility is derived from a series of court cases and attorney general opinions that have prohibited the holding of multiple public positions in particular situations. Whether the holding of two public offices would violate common-law incompatibility requires a factual consideration of the duties of each position and must be considered on a case-by-case basis.

### **19. How is incompatibility different from constitutional dual office holding limitations?**

Common-law incompatibility is a restriction on dual office holding, just like the particular restrictions contained in the Texas Constitution. The difference between the two is their source – one is from “common law,” which is a series of court cases and Attorney General opinions, while the other is from the Texas Constitution, a single document describing the function and structure of state government. The simultaneous holding of two public offices may be prohibited under either

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<sup>37</sup> Op. Tex. Att’y Gen. H-1304 (1978); Tex. Att’y Gen. LO Nos. 95-22 (1995); 93-31 (1993).

the constitutional restriction against holding two civil offices of emolument or under common-law incompatibility standards that apply to holding two incompatible positions.

## **20. How is incompatibility different from conflict of interest limitations?**

Common-law incompatibility occurs when there are inherent conflicts in one person holding two particular public positions at the same time. Conflict of interest limitations, on the other hand, do not involve the holding of two positions at the same time. Rather, conflict of interest limitations simply involve one's authority to deliberate or vote on an issue when that person has a financial interest in a particular item.

## **21. Does common-law incompatibility apply only if both of the positions are public offices or public employment?**

Yes, common-law incompatibility applies only if both of the involved positions are considered public offices or public employment.<sup>38</sup>

## **22. Does common-law incompatibility apply to the authority of a local officer to hold outside private employment?**

Common-law incompatibility does not apply to the authority of a local officer to hold outside private employment.<sup>39</sup> In other words, the fact that a person is employed by a company that does business with a local entity does not prevent a person from holding an office with that entity. Nonetheless, such an officer would generally need to comply with Local Government Code chapter 171 conflict of interest requirements prior to deliberating or voting on certain items that have a special economic effect on that business entity and chapter 176 which requires local officials and vendors to fill out proper disclosure forms.<sup>40</sup>

## **23. What are the three general types of common-law incompatibility?**

The three types of common-law incompatibility are:

- 1) **self-appointment prohibition**: Prevents a governing body from appointing one of its own members to a public office;
- 2) **self-employment prohibition**: Prevents a governing body from employing one of its own members as a public employee; and
- 3) **conflicting-loyalties prohibition**: Prevents a person from holding two public offices when the interests of the two entities may conflict and when voting on behalf of one public entity would possibly compromise the interests of the other

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<sup>38</sup> Ops. Tex. Att'y Gen. DM-303 (1994); DM-194 (1992).

<sup>39</sup> Tex. Att'y Gen. LO No. 96-109 (1996); Op. Tex. Att'y Gen. JM-93 (1983).

<sup>40</sup> TEX. LOC. GOV'T CODE ANN. §§ 171.001–171.010 (Vernon 2008); *Id.* §§ 176.001–176.010.

public entity. In other words, the official would have to choose between the conflicting interests of the two public entities, giving rise to conflicting loyalties.

## **Self-Appointment**

### **24. May a local governing body appoint one of its own members to a public office or position?**

The prohibition against self appointment prevents a local governing body from appointing one of its own members to a public office or position.<sup>41</sup> Attorney General opinions have held this to apply to school boards<sup>42</sup> and county commissioners courts.<sup>43</sup> Additionally, the Attorney General has interpreted this principle to prohibit a city council from appointing or approving the appointment of one of its own members as a police reserve officer.<sup>44</sup> Although the reserve officer is initially appointed by the police chief, the city council must ultimately approve his appointment. Because of the city council's power to appoint the reserve members, a member of the city council may not serve on the city's police reserve.

### **25. May a local governing body appoint one of its own members to a public office or position if the appointment is authorized by the city charter or by a state or federal statute?**

The prohibition against self appointment may be overcome by a city charter provision or a state or federal law that allows a city to appoint one its own members to a particular public office. For example, the Development Corporation Act allows a city council to appoint up to four city officers to serve as directors of a Section 4B development corporation.<sup>45</sup> Therefore, the city council could appoint its own members to these positions without creating a self-appointment problem. Additionally, chapter 311 of the Tax Code allows members of the governing body to be appointed to the board of directors of a tax increment financing corporation by that same body.<sup>46</sup>

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<sup>41</sup> *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928).

<sup>42</sup> Op. Tex. Att'y Gen. GA-377 (2005). The application of this doctrine was modified in the case of cities to allow a city council to appoint one of its members to be mayor in case of vacancy, provided the member appointed does not vote on the appointment. Tex. S.B. 653, 80<sup>th</sup> Leg., R.S. (2007) (amending sections 22.010, 23.002, 24.026 and 26.047 of the Texas Local Government Code).

<sup>43</sup> Op. Tex. Att'y Gen. C-452 (1965).

<sup>44</sup> Op. Tex. Att'y Gen. JM-386 (1985).

<sup>45</sup> TEX. REV. CIV. STAT. ANN. art. 5190.6, § 4B (c) (Vernon Supp. 2008) (to be codified as TEX. LOC. GOV'T CODE ANN. § 505.052 (Vernon Supp. 2008), effective April 1, 2009).

<sup>46</sup> Op. Tex. Att'y Gen. GA-169 (2004).

**26. May a local governing body appoint one of its own members to a public office or position if the appointment is authorized by an ordinance or local policy?**

A local entity may not rely on an ordinance or its own adopted policy to overcome the prohibition against self appointment. The entity must be able to point to a state or federal law or a city charter provision (in the case of home rule cities) that allows the local governing body to appoint its own members to a public office.<sup>47</sup>

**27. Does the self-appointment prohibition limit a local governing body from appointing its own officer to a position that is not a “public office”?**

The prohibition against self appointment does not limit the authority of a local governing body to appoint its own officer to a position that is not a public office. For example, a city council or county commissioners court could appoint its own members to serve on an advisory committee if the advisory committee members are considered volunteers and not officers. However, there is another doctrine called the prohibition against self employment that would prevent these governing bodies from appointing their own members to a position that amounted to employment by the local entity.

**28. May a local governing body appoint one of its own members to a public office or position of another political subdivision if the appointment is authorized by an ordinance or local policy?**

No, an ordinance or local policy may not authorize a local governing body to appoint one of its own to public office or position of another political subdivision.<sup>48</sup> Even though a home-rule city may overcome the common-law doctrine of incompatibility through a city charter provision, it cannot overcome the common-law principle when one of the offices is that of another political subdivision.<sup>49</sup> Only the legislature may exempt a city’s appointment to the board of another governmental unit from the common-law doctrine of incompatibility.<sup>50</sup>

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<sup>47</sup> See Op. Tex. Att’y Gen. JM-1087 (1989) (holding a city charter provision which was not contrary to a specific state law was sufficient to overcome the doctrine of incompatibility).

<sup>48</sup> Op. Tex. Att’y Gen. JC-225 (2000).

<sup>49</sup> *Id.*; Tex. Att’y Gen. LO No. 94-20 (1994).

<sup>50</sup> Op. Tex. Att’y Gen. JC-225 (2000).

## Self-Employment

### **29. May a member of a local governing body also serve as an employee of the local entity?**

A member of a local governing body may not simultaneously serve as an employee of her entity.<sup>51</sup> For example, a city council could not appoint one of its current members to also serve as the city manager, city department head, or even a rank and file city employee (unless specifically permitted by the city charter). However, since a volunteer fireman is not an employee of the city, a volunteer fireman may generally serve on the city council.<sup>52</sup> (A city council member would not be able to serve as both fire chief and city council member.<sup>53</sup>) Additionally, a city council member of a general law city may not also serve as a member of the city's police reserve.<sup>54</sup>

### **30. May a person hold two local staff positions if one position would report to the other position?**

The self-employment prohibition would prevent a person from holding two local staff positions if one position would report to the other position. For example, a city manager may not also serve as the city's police chief if the city manager has supervisory authority over the chief.<sup>55</sup> However, the self-employment provision does not prohibit a local official from taking on certain duties that a subordinate staff member would normally perform. For example, in certain cities, the municipal court judge also handles administrative functions that would generally be handled by a municipal court clerk. If the judge only has one title and is compensated for only one position, this scenario would not violate the prohibition against self employment.

### **31. May an individual hold two local staff positions if one position would not report to the other position?**

A person may hold two local staff positions that would not report to each other if the person is compensated for only one position. For example, in certain smaller cities, a person sometimes serves as both the city secretary and the city treasurer. Similarly, it is permissible for a city secretary to also serve as the city tax assessor/collector. Because the offices do not report to each other, there is no self-employment problem. Also, such dual capacities would not present a dual office-holding

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<sup>51</sup> Tex. Att'y Gen. LO No. 97-34 (1997).

<sup>52</sup> Tex. Att'y Gen. LO Nos. 94-70 (1994); 93-54 (1993). However, if the volunteer fireman was also the chief of the volunteer fire department and in this capacity has responsibility for producing the budget, the chief may not under certain circumstances be permitted to also serve on the city council. If volunteer firemen are deemed employees of the city, then the city council must adopt a resolution allowing a city council member to serve as a fireman. *See* Op. Tex. Att'y Gen. JC-199 (2000); TEX. LOC. GOV'T CODE ANN. § 21.003 (Vernon 2008) (adopted in response to JC-199).

<sup>53</sup> Op. Tex. Att'y Gen. MW-432 (1982).

<sup>54</sup> Op. Tex. Att'y Gen. JM-386 (1985).

<sup>55</sup> Tex. Att'y Gen. LO No. 89-2 (1989).

problem because neither position is an “office” for purposes of article XVI, section 40 of the Texas Constitution.

## **Conflicting-Loyalties**

### **32. If a person holds two positions or offices, what circumstances could cause a conflicting-loyalties problem?**

Conflicting loyalties prevent a person from simultaneously holding two public offices when the interests of the two public entities may conflict and when voting on behalf of one public entity would possibly compromise the interests of the other public entity. In other words, the official would have to choose between the conflicting interests of the two entities and, thus, would have conflicting loyalties. For example, a person may not serve on the city council at the same time that he serves as a school board trustee because both the city council and the school board may be adopting policies on some of the same issues.<sup>56</sup> If the city council exercises its authority over school district property within the city, the council member must be free to vote on what is the best interests of the city, which may not coincide with the best interests of the school district. Accordingly, the courts and the Office of the Attorney General have generally ruled that a person may not hold two public offices where the inherent policy objectives between the two offices are likely to conflict in certain areas. The incompatibility doctrine protects the integrity of government institutions by promoting impartial service by public officials.<sup>57</sup>

### **33. Must both positions be considered “public offices” for there to be a conflicting-loyalties issue?**

Yes, for there to be a conflicting loyalties issue, both positions must be “public offices.”<sup>58</sup> Therefore, the fact that a public officer holds a particular outside employment would not present a conflicting loyalties issue. Similarly, the fact that a person may work as an employee for a different public entity would not present a conflicting loyalties issue that would prevent the person from holding a public office.

### **34. May an individual hold offices on two governing bodies if the entities are authorized to contract with each other?**

If the governing bodies of two entities are authorized to contract with each other, one person generally may not serve as a member of the governing body of both entities.<sup>59</sup> It was partly on this

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<sup>56</sup> *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm’n App.1927, judgment adopted).

<sup>57</sup> Op. Tex. Att’y Gen. JM-203 (1984).

<sup>58</sup> Op. Tex. Att’y Gen. JM-1266 (1990); Tex. Att’y Gen. LO Nos. 96-148 (1996); 95-52 (1995); 95-29 (1995); 93-27 (1993).

<sup>59</sup> Ops. Tex. Att’y Gen. GA-15 (2003); JM-1266 (1990); JM-133 (1984); Tex. Att’y Gen. LO Nos. 95-52 (1988); 92-4 (1992); 90-18 (1990); 88-49 (1988).



basis that the Attorney General ruled that a county commissioner may not serve as a city council member<sup>60</sup> and that a county auditor may not serve as a city council member.<sup>61</sup>

### **35. May an individual hold offices on two governing bodies if the geographical boundaries of the two governmental bodies overlap?**

An individual often may not hold offices on two governing bodies if the geographic boundaries of the two governmental bodies overlap.<sup>62</sup> The fact that the boundaries of the two entities overlap raises the potential for conflicting loyalties. If both entities have the power of taxation, the Attorney General has held that the potential for conflict is insurmountable.<sup>63</sup> Whether any particular conflict would prohibit the holding of both offices is a fact issue that must be considered on a case-by-case basis. For example, a justice of the peace is not barred from serving as a municipal court judge for a city merely because the city is located in the same precinct.<sup>64</sup> A local entity should seek advice from its legal counsel regarding whether the overlapping boundaries and other relevant facts regarding the duties of the two offices are likely to lead to conflicting loyalties.

### **36. May an individual hold offices on two governing bodies if one governmental body has some authority to impose its will on the other governmental body?**

An individual often may not hold offices on two governing bodies if one governmental body has some authority to impose its will on the other governmental body.<sup>65</sup> Whether one public entity could impose its will on the other public entity is a fact issue that must be determined on a case-by-case basis. In such situations, a local entity should seek advice from its local legal counsel regarding whether the potential for one body to impose its will on the other is likely to lead to conflicting loyalties.

### **37. May an individual serve on a county commissioners court and a city council at the same time?**

A county commissioner may not also serve as a city council member because the incompatibility of holding the two positions at the same time.<sup>66</sup>

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<sup>60</sup> Op. Tex. Att’y Gen. GA-15 (2003); Tex. Att’y Gen. LO 88-49 (1988).

<sup>61</sup> Op. Tex. Att’y Gen. JM-133 (1984).

<sup>62</sup> Ops. Tex. Att’y Gen. GA-307 (2005); GA-224 (2004); GA-32 (2003); JC-557 (2002); JM-1266 (1990); JM-129 (1984).

<sup>63</sup> Op. Tex. Att’y Gen. JC-557 (2002).

<sup>64</sup> Op. Tex. Att’y Gen. JM-819 (1987).

<sup>65</sup> *Thomas*, 290 S.W. at 153; Op. Tex. Att’y Gen. JM-129 (1984).

<sup>66</sup> Op. Tex. Att’y Gen. GA-15 (2003); Tex. Att’y Gen. LO 88-49 (1988).

**38. May an individual serve as a school district trustee or a junior college district trustee and a city council at the same time?**

A school district trustee may not serve as a city council member at the same time if the two political subdivisions share any overlapping geographical jurisdiction. In such cases, the Attorney General has concluded that the doctrine of incompatibility prevents one person from holding both positions.<sup>67</sup> Similarly, a trustee of a junior college district generally cannot serve on the governing body of a city in which the junior college is located or in which property is owned or operated by the junior college.<sup>68</sup> Additionally, a single individual may not serve as county attorney and as a member of the board of trustees of an independent school district located in the same county.<sup>69</sup>

**39. May an individual serve as a member of a special district and a member of a local governing body at the same time?**

In most situations, it is incompatible for a board member of a special district to serve as a member of a local governing body at the same time. In such situations, the local entity should work with its legal counsel to determine whether a conflict may exist due to the existence of overlapping boundaries, the authority to contract with each other, or the potential for one body to impose its will on the other. Whether holding both offices is likely to present a conflict and would prohibit the holding of both offices is a fact issue that must be determined on a case by case basis.

**40. If an individual holds a public office but is not on the governing body, are they subject to a conflicting-loyalties prohibition?**

If a person holds a public office but is not a member of the governing body, it is still possible that there may be a conflicting-loyalties prohibition. For example, the Attorney General ruled that a county attorney (even though they are not on the governing body of the county commissioners court) could not also serve on the school board as a trustee. This conclusion was based in part on the likelihood of conflicting loyalties that would be present because the county attorney is authorized to investigate matters involving school board trustees.<sup>70</sup> Similarly, it has been held that a county auditor may not serve on the city council of a city within the county because the auditor's duties regarding real property and the transfer of funds may present a conflicting loyalties problem.<sup>71</sup> Conversely, it has been held that a county treasurer may serve as a school board trustee despite some potential areas of conflict, in part because the treasurer does not have exclusive authority to sue the school district for debts.<sup>72</sup>

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<sup>67</sup> Op. Tex. Att'y Gen. JM-634 (1987).

<sup>68</sup> Tex. Att'y Gen. LO No. 92-5 (1992).

<sup>69</sup> Tex. Att'y Gen. LO No. 95-29 (1995).

<sup>70</sup> *Id.*

<sup>71</sup> Op. Tex. Att'y Gen. JM-133 (1984).

<sup>72</sup> Op. Tex. Att'y Gen. JC-490 (2002).

**41. May a state statute or city charter provision permit what would otherwise be considered incompatible offices under common law? May it forbid otherwise permissible arrangements?**

The common-law doctrine of incompatibility may be overcome by a state statute or by a city charter provision that allows the person to hold two different positions. For example, the Texas Tax Code specifically allows a tax assessor/collector to also serve on the board of directors of an appraisal district. Without such statutory authority, the two offices would likely be considered incompatible because of potential conflicting loyalties. Similarly, a city charter provision could provide that the mayor may also serve as the city manager.<sup>73</sup> On the other hand, a city charter may forbid a municipal judge from serving as a justice of the peace, even though this arrangement is normally compatible with state law.<sup>74</sup>

## **Consequences of Seeking/Accepting A Second Office**

**42. Does acceptance of a second incompatible office operate as an automatic resignation from the first office?**

Qualification and acceptance of a second incompatible office generally operates as an automatic resignation from the first office.<sup>75</sup> In other words, if a person accepts and is sworn into a second office that would conflict with the first public office, the person is deemed as a matter of law to have resigned from the first public office. It should be noted that automatic resignation only operates as a matter of law when either: 1) a public officer accepts a second public office that is a paid position (in contravention of the constitutional prohibition against holding two offices of emolument); or 2) a person accepts a second public office that would present a conflicting loyalties problem under common-law incompatibility. There is no automatic resignation from the first office, however, when a dual office holding problem is due to self appointment. In that case, the acceptance of a second position that amounts to self appointment would be considered void as a matter of law but it would not affect one's ability to remain in the original public office.<sup>76</sup>

**43. Does automatic resignation only apply to two conflicting positions that are both “public offices”?**

Yes, the automatic resignation applies only to two conflicting positions that are both public offices. In other words, if a person accepts and is sworn into a second office that would conflict with the first public office, the person is usually deemed as a matter of law to have resigned from the first public

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<sup>73</sup> Op. Tex. Att’y Gen. JM-1087 (1989).

<sup>74</sup> Op. Tex. Att’y Gen. GA-362 (2005). Other legal considerations may affect such charter provisions, however. *Id.* n.2.

<sup>75</sup> *Pruitt v. Glen Rose Indep. Sch. Dist.*, 84 S.W.2d 1004 (Tex. 1935).

<sup>76</sup> *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928).

office. However, if the person accepts a second position that is a mere employment, no automatic resignation would occur.<sup>77</sup>

#### **44. May an elected official retain their office if they announces their candidacy for another public office?**

Whether an elected official can retain their office when they announce their candidacy for another office depends on the law that applies to the office that is being vacated and the office that is being sought. In certain cases, the Texas Constitution provides that announcement for one office results in an automatic resignation from a person's current office. For example, if a city council member has a term of office of more than two years and he announces for another public office, the announcement would result in their resignation as a council member if they still had more than a year left in their city council term.<sup>78</sup> The resigned official holds over in office, however, until a successor is appointed.<sup>79</sup>

#### **45. May a local employee retain their job if they announces their candidacy for public office?**

Whether a local employee may retain their job while running for public office depends upon a consideration of certain factors. Courts in addressing this issue have to balance the employee's right to run for office against the local governmental body's interest, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>80</sup> In certain situations, requirements that an employee must resign in order to run for office have been held to be invalid by the courts. This analysis is in reality a sliding scale upon which "public concern" is weighed against disruption of the work environment. Before a local employee runs for office, they may want to visit with their employer and with legal counsel on this issue.

#### **46. May a local official run for the Texas Legislature if that office term overlaps with the upcoming legislative term ?**

Article III, section 19 of the Texas Constitution provides:

No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

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<sup>77</sup> Tex. Att'y Gen. LO No. 89-57 (1989).

<sup>78</sup> TEX. CONST. art. XI, § 11; Ops. Tex. Att'y Gen. JM-553 (1986); JC-293 (2000); JC-318 (2000); JC-403 (2001).

<sup>79</sup> TEX. CONST. art. XVI, § 17; Ops. Tex. Att'y Gen. DM-377 (1996); JC-293 (2000); JC-318 (2000); JC-403 (2001).

<sup>80</sup> *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Vojvodich v. Lopez*, 48 F.3d 879 (5<sup>th</sup> Cir. 1995); *Click v. Copeland*, 970 F.2d 106, 111 (5<sup>th</sup> Cir. 1992).

This Constitutional provision applies to any holder of a “lucrative office” who wants to run for the Texas Legislature. Courts interpreting this provision have held that Article III, section 19, of the Texas Constitution will not disqualify a local official from running for the Texas Legislature even though the local office term overlaps with the legislative term. Nonetheless, the local official must resign from his office before filing for the legislature.<sup>81</sup> Failure to resign from the local position prior to filing for the legislature will result in the official being ineligible to run for the legislative seat.

In a recent case, the Texas Supreme Court held that a school board officer who received no compensation except reimbursement for expenses such as meals did not hold a lucrative office.<sup>82</sup>

**47. Are there criminal penalties for holding two conflicting public offices or other types of prohibited dual office holding?**

State law does not provide criminal penalties for holding two conflicting public offices or for other types of prohibited dual office holding. The means for challenging such violations would be through a civil action in a district court.

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<sup>81</sup> *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992); Tex. Att’y Gen. LO No. 95-69 (1995).

<sup>82</sup> *In re Carlisle*, 209 S.W.3d 93 (Tex. 2006).

# MAY PARTICULAR DUAL OFFICE BE HELD BY AN INDIVIDUAL?

## CITY COUNCIL

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
City council	Member of fire department	No	Incompatible	LO 97-034
City council	Police officer (different city)	Yes	Not incompatible	LO 93-27
City council	Teacher at state college	Yes	Article XVI, § 40 does not preclude if council member's salary is renounced	LO 93-37
City council	Chairman, board of director of university research foundation (non-profit corporation) (same city)	Yes	Allowed under Article XVI, § 40	JM-1065
City council	County commissioner	No	Incompatible	GA-15; LO 88-49
City council	School trustee, state college	No	Incompatible	LO93-22; Thomas v. Abernathy County Line Indep.Sch.Dist.,290 S.W. 152
City council	Volunteer fire department (same city)	Yes	Not incompatible because city funds do not control	LO 94-070; JC-199; <i>see</i> TEX. LOC. GOV'T CODE ANN. § 21.003 (adopted in response to JC-199).
City council	Director of a flood control district	Yes	Not incompatible	LO 96-064
City council	School board trustee (same city)	No	Incompatible	JM-634; JC-403
City council	Director of a county water authority	No	Incompatible	LO 92-68
City council	County special district employee	Yes	County special district employee is not a civil office under Article XVI, § 40	JM-1266
City council	School district employee	Yes	May serve if do not receive compensation for council position	JM-118,MW-230,JM-1266
City council	Director of a navigation district	Yes	May serve if do not receive compensation for council position, not incompatible	JM-1266
City council	Reserve police officer	No	Incompatible	JM-386
City council	County auditor	No	Incompatible	JM-133
City council	Fire chief (same city)	No	Incompatible	MW-432
City council	Selective service board member	Yes	Article XVI, § 12	GA-57; allowed as long as selective service system is on standby (no draft)
City council	Justice of the peace	No	Article XVI, § 65	JM-395

## FIRE DEPARTMENT

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
Assistant fire chief	Deputy constable	Yes	Not incompatible & assistant fire chief is not a civil office under Article XVI, § 40	DM-156
City council	Fire chief (same city)	No	Incompatible	MW-432
City council	Volunteer fire department (same city)	Yes	Not incompatible because city funds do not control	LO 94-070; JC-199; see TEX. LOC. GOV'T CODE ANN. § 21.003 (adopted in response to JC-199)
Member fire department	City commissioner	No	Incompatible	LO 97-034
Building inspector	Fire chief (same city)	Yes	Allowed under Article XVI, § 40	State ex rel. Beicker v. Mycue 481 S.W. 2d 476

## JUDGES

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
Municipal judge	Board of directors river authority	No	Article XVI, § 40	LO 97-027
Police officer	Municipal judge (different city)	Legally yes, but no	Not incompatible by law but unethical	LO 93-59. However, see State Commission of Judicial Conduct PS-2000-1
Municipal judge	Municipal judge (different city)	Yes	Article XVI, § 40	DM-428 said no; <i>but see</i> TEX. GOV'T CODE ANN. § 574.001(b)
Municipal judge	Elected junior college trustee	Yes	Not incompatible	JC-216
Part-time Municipal judge	Justice of the peace	Yes	Not incompatible	JM-819
City finance director	Temporary municipal judge	Yes	Not incompatible	GA-199
County commissioner	Municipal judge	Yes	Not incompatible	GA-348
Polygraph examiner for district attorney's office	Municipal judge	Unclear	State Commission of Judicial Conduct PS-2000-1 may control	GA-551
County EMS employee	Municipal judge	Yes	Not incompatible	GA-569

## POLICE AND LAW ENFORCEMENT OFFICERS

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
City council	Reserve police officer	No	Incompatible	JM-386
Police officer	Part-time security officers	Yes	Allowed under Article XVI, § 40	DM-212
Police officer	Municipal judge (different city)	Legally yes, but no	Not incompatible	LO 93-59. However, <i>see</i> State Commission of Judicial Conduct PS-2000-1

Police officer	City commissioner (different city)	Yes	Not incompatible	LO 93-27
Police officer	County road & bridge dept. employee	Yes	Not incompatible	JM-862
Asst. fire chief	Deputy constable	Yes	Not incompatible & assistant fire chief is not a civil office under Article XVI, § 40	DM-156
Marshall	Constable	No	Article XVI, § 40	Torno v. Hochstetler 221 S.W. 623
Constable	Municipal fire fighter	Yes	Not incompatible	JC-270
Peace officer	Peace officer for different agency	Yes	Not incompatible	GA-214
Police chief	School board trustee	Yes	Not incompatible	GA-393
Constable	Deputy sheriff	Yes	Not incompatible	GA-402
Constable	Groundwater district board	No	Article XVI, § 40	GA-214
Assistant police chief	City administrator	No	Incompatible, self-employment	GA-536

### SCHOOL EMPLOYEES AND OFFICERS

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
Teacher at state college	City commissioner	Yes	Article XVI, § 40 does not preclude if commissioner's salary is renounced	LO 93-37
Election clerk	Off-duty school district employee	Yes	Neither positions considered civil offices under Article XVI, § 40 & not incompatible	JM-862
City council	School district employee	Yes	May serve if do not receive compensation for council position	JM-118, MW-230, JM-1266
City council	School board trustee (same city)	No	Incompatible	JM-634
School district board trustee	Volunteer teacher	No	Incompatible	JC-371
School board trustee	County or precinct chair of political party	Yes	Not prohibited by section 161.005 of Election Code	JC-537
School board trustee	Groundwater conservation district	No	Incompatible	JC-557
School board trustee	County treasurer	Yes	Not incompatible and not under Constitution	JC-490
School board trustee	Teacher	No	Incompatible	LO 97-034, LO 90-045, LO 89-057, LO 89-002, LA-114
School trustee college district	Municipal utility director	No	Incompatible	GA-32
School trustee state college	City council	No	Incompatible	LO 93-22, Thomas v. Abernathy County Line Indep. Sch. Dist., 290 S. W. 152
School trustee	Water improvement district board	No	Incompatible	GA-224



School trustee	County improvement district board	No	Incompatible	GA-307
Sheriff	School trustee	No	Incompatible	GA-328
Police chief	School trustee	Yes	Not incompatible	GA-393

### MISCELLANEOUS CITY/COUNTY POSITIONS

OFFICE	OFFICE	YES/NO	REASON	AUTHORITY
City official	Political party precinct chair	Yes	Not incompatible	JC-562
City Att'y	County att'y (same county)	Yes	City att'y is not a civil office. Some county att'ys are prohibited, however, by Ch. 46 of Tex. Gov. Code from outside practice of law	JC-054
Mayor	Hospital district director	No	Incompatible	JC-363
Director of a municipal utility district	Member of planning and zoning commission	No	Incompatible	JC-339
County attorney	Assistant county attorney of neighboring county	Yes	Not incompatible	GA-350
City manager	Transit board	Yes	Not incompatible	GA-538