

March 2006 TTC
Legal Q & A
By Raika Hammond, TML Legal Counsel

Q. Does a councilmember automatically resign when announcing a candidacy for another elected office?

A. It depends. Article 11, Section 11, of the Texas Constitution (often called the “resign-to-run” provision) applies to cities with council terms of more than two years. In cities with terms of more than two years, a city official who has more than one year left in the current term of office when announcing a candidacy for another office must automatically resign from the first office. See Tex. Att’y Gen. Op. No. JM-553 (1986).

A home rule charter provision may also require resignation from office before running for another office, even if the city council term of office is two years or less. Tex. Att’y Gen. Op. No. GA- 0217 (2004).

Q. What is an “announcement of candidacy” under Article 11, Section 11?

A. The attorney general has opined that, if a reasonable person would conclude from a statement made by the individual that the individual intends without qualification to run for an office, then an announcement for the purposes of Article 11, Section 11, of the Texas Constitution has been made. Tex. Att’y Gen. LO- 95-071 (1995).

A statement that a person would “seriously consider running” if the incumbent resigns or decides not to seek re-election was determined by the attorney general to not invoke an automatic resignation. *Id.* However, if a person states publicly that he or she will run for a particular office, then candidacy has been announced. See Tex. Att’y Gen. Op. No. WW-1253 (1962).

Q. May an officer who announces candidacy for another office decide to reconsider and avoid resignation?

A. No. Once a valid announcement of candidacy is made, the resignation is automatic. Withdrawing from candidacy for another office does not affect the resignation, because the resignation occurs immediately upon the announcement of candidacy. See Tex. Att’y Gen. LO- 94-059 (1994). An officeholder who automatically resigns holds over in the office until a successor is appointed and qualified for office. TEX. CONST. Art. 16, section 17. “Holding over” means that the officer may continue to perform the duties of office until his or her successor has taken office.

Q. Are city police officers subject to the “resign-to-run” provision?

A. The automatic resignation provisions only apply to municipal “officers.” TEX. CONST. Art. 11, section 11(a). Attorney general opinion DM-212 discusses Texas case law and concludes that an officer is one who is invested with the sovereign functions of the government, for the benefit of the public, largely independent of the control of others. The attorney general has

applied this test to city police officers and concluded that they generally perform their duties under the direction and control of others. See Tex. Att'y Gen. Op. No. DM-212 (1993). Consequently, a police officer will not usually be subject to the “resign-to-run” provision. Tex. Att'y Gen. Op. No. GA-0217 (2004).

Q. Is a councilmember who runs for the office of precinct chair of a political party subject to the “resign-to-run” provision?

A. No. The precinct chair of a political party is not considered a “public officer.” Thus, the provision does not apply. Tex. Att'y Gen. Op. No. JC-0562 (2002).

Q. Is a councilmember who decides to run for the office of consolidated school district trustee subject to the “resign-to-run” provision?

A. The office of school district trustee is considered an office of profit or trust, and a consolidated school district is considered the legal equivalent of the board of an independent school district. Tex. Att'y Gen. Op. No. JC-0403 (2001). Thus, a councilmember with a term of office of more than two years, who has more than one year left on the term of office when announcing candidacy for a consolidated school district trustee, is subject to the “resign-to-run” provision. *Id.*

Q. How must a vacancy created by the “resign-to-run” provision be filled?

A. The vacancy must be filled by a special election within one hundred and twenty days after the date the vacancy occurs. TEX. CONST. Art. 11, section 11(b); See Tex. Att'y Gen. Op. No. JC-0318 (2000). The hold over provision in the Constitution provides that a councilmember may continue to serve until the office is filled by a qualified candidate. TEX. CONST. Art. 16, section 17.

Q. Can one person run for more than one office at a time?

A. Not in most cities. Section 141.033 of the Election Code prohibits a person from filing applications for a place on the ballot for two or more offices that are not permitted by law to be held by the same person, and are to be voted on at one or more elections held on the same day. If a person does file more than one application for a place on a ballot in violation of the Election Code, only the first one filed is valid.

Q. Can a person hold two public offices at the same time?

A. Article 16, section 40, of the Texas Constitution, generally prohibits dual office holding. That section provides that “no person shall hold or exercise at the same time, more than one civil office of emolument...” The term “office” has been interpreted by the courts and attorney general to mean public officer, not merely an employee. See *Aldine Independent School District v. Standley*, 280 S.W. 2d 578 (Tex. 1955); Tex. Att'y Gen. Op. No. GA-0032 (2003). The courts and attorney general define the term “emolument” as “a pecuniary profit, gain, or advantage.” See *Irwin v. State*, 177 S.W. 2d 970 (1944); Tex. Att'y Gen. Op. Nos. GA-0032 (2003) at 2, JC-

0490 (2002) at 1. In other words, the Constitution generally prohibits one person from holding two paid, public offices.

Q. What should a councilmember consider when taking an additional, but unpaid office?

A. A public officer is prohibited from holding certain additional offices, even when one or both are unpaid. The concept of incompatibility of certain offices comes from Texas case law recognizing a conflict of interest when a person could use the power in one office to make decisions that impact the other office. Consequently, a person cannot hold two offices involving (1) self appointment, (2) self employment, or (3) conflicting loyalties. Tex. Att’y Gen. Op. Nos. GA-0015 (2003) at 1, JC-0564 (2002) at 1-2. Following are brief descriptions of the types of incompatibility:

- 1) **Self employment** – A governing body should not appoint one of its own members to a public office. See *Ehlinger v. Clark*, 8 S.W. 2d 666 (Tex. 1928).
- 2) **Self employment** – A governing body may not employ one of its own members as a public employee. See Tex. Att’y Gen. LO-97-034.
- 3) **Conflicting loyalties** – A person may not hold two positions when a decision in one office may negatively impact the other. See *Thomas v. Abernathy County Line Independent School District*, 290 S.W. at 153 (Tex. Com. App.1927). While there are many exceptions, if two offices have overlapping jurisdictions, there is a possibility for a conflict of loyalties. Tex. Att’y Gen. Op. Nos. JC-0339 (2001), JM-1266(1990), JM-129 (1984).