

Legal Q&A

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Q. What is dual office holding?

A. Dual office holding refers to an aspect of Texas law that prevents 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; 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, it is important to be aware of these issues because the acceptance of a second public office can result in an automatic resignation from a person's current public office.

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

A. 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, which provides in part: "No person shall hold or exercise at the same time, more than one civil office of emolument...."

Q. What is considered an "office" for purposes of dual office holding?

A. 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. *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955); Op. Tex. Att'y Gen No. GA-365 (2005). 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. A local governmental entity should consult with its legal counsel to determine whether such positions would be considered offices for purposes of the constitutional limitation on dual office holding.

Q. What is an "emolument" for purposes of holding a civil office of emolument?

A. 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, compensation, thing of value, or some other benefit 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 might well constitute an emolument for dual office holding purposes. Op. Tex. Att’y Gen. Nos. JM-594 (1986); JM-704 (1987); Tex. Att’y Gen. LO-93-33; *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964).

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

A. 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. *Markwell v. Galveston County*, 186 S.W.2d 273 (Tex. Civ. App.—Galveston 1945, no writ); Op. Tex. Att’y Gen. JM-704 (1987). 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. *Broom v. Tyler County Comm’rs Court*, 560 S.W.2d 435 (Tex. Civ. App.—Beaumont 1977, no writ); Op. Tex. Att’y Gen. No. JM-333 (1985).

Q. Are certain public officers exempt from the dual office holding limitations?

A. The Texas Constitution provides that certain public officers are exempt from the constitutional dual office holding limitations. Tex. Const. art. XVI, § 40. Justices of the peace and county commissioners are a few of the officers that are not subject to the constitutional limitation against holding two civil offices of emolument. However, the constitution is not the only source of limitation on dual office holding. Another limitation, called the “common law 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.

Q. What is common-law incompatibility?

A. 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.

Q. How is incompatibility different from constitutional dual office holding limitations?

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

Q. How is incompatibility different from conflict of interest limitations?

A. 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.

Q. What are the three general types of common-law incompatibility?

A. The three types of common-law incompatibility are 1) self-appointment prohibition, 2) self-employment prohibition, and 3) conflicting loyalties prohibition.

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

A. The prohibition against self-appointment prevents a local governing body from appointing one of its own members to a public office or position. *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928). Attorney general opinions have held this to apply to school boards and county commissioners courts. Op. Tex. Att’y Gen. Nos. GA-377 (2005); C-452. 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. Op. Tex. Att’y Gen. No. JM-386 (1985). However, city councils are allowed to appoint one of its members to be mayor in case of vacancy, provided the member does not vote on the appointment. Tex. Loc. Gov’t Code §§ 22.010(a-1); 23.002(b); 24.026(a); 26.047.

Q. 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?

A. The prohibition against self-appointment may be overcome by a city charter provision (for a city position, not an office in another entity) or a state or federal law that allows a city to appoint one of 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 Type B economic development corporation. Therefore, the city council could appoint its own members to these positions without creating a self-appointment problem. Tex. Loc. Gov't Code § 505.052(c).

Q. 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. 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. Op. Tex. Att'y Gen. No. JM-1087 (1989).

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

A. The self-employment prohibition would prevent a member of a local governing body from simultaneously serving as an employee of his entity. Tex. Att'y Gen. LO-97-34. This means 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). For example, a city council member would not be able to serve as both fire chief and city council member. Op. Tex. Att'y Gen. No. MW-432 (1982).

Q. May a local official hold two positions if one position would report to the other?

A. The self-employment prohibition would prevent a local official from holding two positions if one position would report to the other. 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. Tex. Att'y Gen. LO-89-2. 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.

Q. If a person holds two positions or offices, what circumstances could cause a conflicting loyalties problem?

A. 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. *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgment adopted). 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 or she 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. 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 interest of the city, which may not coincide with the best interest 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.

Q. May an individual hold office on two governing bodies if the geographical boundaries of the two governmental bodies overlap?

A. Generally, an individual may not hold offices on two governing bodies if the geographic boundaries of the two governmental bodies overlap. Op. Tex. Att'y Gen. Nos. GA-307 (2005); GA-224 (2004); GA-32 (2003); JC-557 (2002); JM-1266 (1990); JM-129 (1984). 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. Op. Tex. Att'y Gen. No. JC-557 (2002). For example, a city council member may not serve as a county commissioner at the same time because the two political subdivisions have overlapping geographical jurisdiction, as well as, both are taxing entities. Op. Tex. Att'y Gen. No. GA-15 (2003); Tex. Att'y Gen. LO-88-49. 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. A local official should seek advice from his or her 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.

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

A. Qualification and acceptance of a second incompatible office generally operates as an automatic resignation from the first office. *Pruitt v. Glen Rose Indep. Sch. Dist.*, 84 S.W.2d 1004 (Tex. 1935). 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 operates as a matter of law only 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.

However, there is no automatic resignation from the first office when an incompatibility 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. *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928).

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

A. 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 office. However, if the person accepts a second position that is a mere employment, no automatic resignation would occur. Tex. Att’y Gen. LO-89-57.

Q. May an elected official retain an office if he or she announces a candidacy for another public office?

A. Whether an elected official can retain his office when he announce his 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. Tex. Const. art. XI, § 11; art. XVI, § 65. 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 his resignation as a council member if he still had more than a year and 30 days left in his city council term. *Id.*; Op. Tex. Att’y Gen. Nos. JM-553 (1986); JC-293 (2000); JC-318 (2000); JC-403 (2001). However, the resigned official holds over in office, until a successor is appointed. Tex. Const. art. XVI, § 17; Op. Tex. Att’y Gen. Nos. DM-377 (1996); JC-293 (2000); JC-318 (2000); JC-403 (2001).

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

A. State law does not provide criminal penalties for holding two conflicting public offices or for other types of prohibited dual office holding. Such a violation would have to be challenged through a civil action in a district court.