THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

RP 500

This Opinion
Overrules Opinion
C-125

November 5, 1974

The Honorable Oscar B. McInnis
Criminal District Attorney
Hidalgo County
Edinburg, Texas

Letter Advisory No. 85

Re: May a person holding a position as a city mail carrier legally hold at the same time an elective position as city councilman.

Dear Mr. McInnis:

Article 16, § 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, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.

In the context of this provision you have asked:

> Can a city mail carrier, who is employed by the United States Post Office Department, legally hold the position of city councilman, an elective office for which he received a salary of $1 per year?

A city councilman holds "an office of trust under the State." Willis v. Potts, 377 S.W.2d 622 (Tex. 1964); Boyett v. Calvert, 467 S.W.2d 205 (Tex. Civ. App. --Austin 1971, writ ref. n.r.e.); State v. Averill, 110 S.W.2d 1173 (Tex. Civ. App. --San Antonio 1937, writ ref'd.). If the position of city mail carrier is an office of profit or trust under the United States, the prohibition of Article 16, § 12 of the Constitution would apply.

A public "officer" is to be distinguished from a public "employee." The constitutional prohibition is not applicable to the latter. The Texas Supreme Court has quoted with approval the following standard:

> . . . the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the public largely independent of the control of others. Aldine Independent School District v. Standley, 280 S. W. 2d 578, 583 (Tex. 1955).

No Texas case has dealt with the issue of whether a United States mail carrier is an "officer" as opposed to an "employee". In Attorney General Opinion No. O-125 (1939), it was decided with little discussion that a rural mail carrier is an officer within the meaning of Article 16, § 40 of the Constitution as it then read. That Opinion cited as authority a 1915 decision of the North Carolina Supreme Court, Groves v. Barden, 84 S. E. 1042 (N. C. 1915).

The North Carolina Supreme Court relied in large part upon an 1899 decision of the Fifth Circuit Court of Appeals which held that a mail carrier is an officer of the United States. United States v. McCrory, 91 F. 295 (5th Cir. 1899). In McCrory, the Court based its decision primarily on the fact that the mail carrier was appointed to his position by the Postmaster General, a cabinet officer and head of a department.

This distinction between a federal officer and employee based on the source of the appointment was originally drawn in United States v. Germaine, 99 U.S. 508 (1878). There it was pointed out that under Article 2, § 2 of the United States Constitution, all officers of the United States must be appointed by the President, by and with the consent of the Senate, or by a court of law, or by the head of a department. In United States v. Mouat, 124 U.S. 303 (1888), the Supreme Court explained:

> Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. (at p. 307)

Letter carriers are no longer appointed to their positions by the head of a department, by virtue of the Postal Reorganization Act of 1970. That Act transferred all powers and duties of the Post Office Department to the new Postal Service, and transferred the powers and duties of the Postmaster General to a Board of Governors. Section 4(a), P. L. 91-375. The Postal Service is not a department, but "an independent establishment of the executive branch of the Government of the United States. . . " 39 U.S.C.A. § 201.

Thus, if the strict United States Constitutional test is applicable, the recent postal reorganization eliminates a major factor relied upon in the early Fifth Circuit case of United States v. McCrory, 91 F. 295 (5th Cir. 1899), and casts serious doubt on the continuing authority of that decision and those relying on it, such as Groves v. Barden, 84 S. E. 1042 (N.C. 1915), and in turn, Attorney General Opinion No. O-125 (1939).

However, even apart from the question of whether these early cases are without foundation by virtue of the postal reorganization, more recent and more persuasive authority exists on the issue of whether postal personnel are "officers" within a state constitutional prohibition against dual federal-state office holding.

The highest court of Kentucky recently overruled an earlier decision of that court and held that the position of mail carrier is not an "office" within the meaning of § 237 of the Kentucky Constitution. This provision is almost a duplicate of Article 16, § 12 of the Texas Constitution. Lasher v. Commonwealth, 418 S.W. 2d 416 (Ky. 1967), overruling Waddle v. Hughes, 84 S.W. 2d 75 (Ky. 1935).

Even prior to the postal reorganization, the Kentucky court rejected the source of appointment test of federal officers which had been used in their earlier decision, which had relied on United States v. McCrory, 91 F. 295 (5th Cir. 1899). Instead, the Kentucky court relied upon the same test of whether a position is an "office" as has been approved in Texas. Aldine Independent School District v. Standley, 280 S.W. 2d 578, 583 (Tex. 1955).

The Kentucky court stated their test as follows:

> Under our decisions a requisite of a position's being a public 'office' is that it possess a delegation of a portion of the sovereign power of government - authority to exercise some portion of the sovereign power - independent of any superior human authority other than a statutorily prescribed general control. Lasher v. Commonwealth, 418 S.W.2d 416, 417 (Ky. 1967).

Applying this standard, the court found:

> The record in the instant case shows that a mail carrier of Lasher's category has no supervisory powers or duties; he has no decision-making powers in respect to procedures; he exercises no discretionary powers; he is bound by detailed rules. In fact, it is a matter of common knowledge that some postal employes work under rules probably more rigid and unvariable than those of any other department of the federal government. In no sense can it be said that the carrier exercises any of the sovereign power of government or has any independent authority. He merely performs duties assigned to him under superior authority in accordance with a manual of rules. Id. p. 418 (Emphasis added)

In our opinion, this decision is the most persuasive authority on the issue, and assuming that the mail carrier about whom you inquire is in the same factual position as was the one in Lasher, supra, we do not believe he holds a federal "office" within the prohibition of Article 16, § 12 of the Texas Constitution.

With certain exceptions which are not applicable in this case, Article 16 § 40 of the Constitution provides that "no person shall hold or exercise at the same time, more than one civil office of emolument . . . . " In Willis v. Potts, 377 S.W.2d 622 (Tex. 1964), it was held that a city councilman who was entitled to $520 per year plus expenses occupied a "lucrative office under this State"within the meaning of §19 of Article 3 of the Constitution of Texas. Attorney General Opinion No. M-586 (1970) held that an office of mayor which carries with it the same salary and expenses as in

Willis v. Potts is a civil office of emolument within the meaning of Section 40 of Article 16. The Court in Willis v. Potts quoted with approval and emphasized a statement that "The amount of the salary or compensation is not material." 377 S.W.2d 622, 626 (Tex. 1964). In view of these authorities, a city councilman who receives an annual salary of $1.00 apparently holds a "civil office of emolument."

Thus, the question remains as to whether a United States mail carrier holds a "civil office of emolument" within the meaning of Article 16, § 40 of the Constitution even though he does not hold an office within the meaning of Article 16, § 12.

In Letter Advisory No. 63 (1973), we noted the uncertainty as to what positions are "civil offices" as used in § 40. There we said that it is something more than a "public employment" and something less than a "public office."

In Letter Advisory No. 81 (1974), we determined that part-time social service workers at a county hospital do not hold "civil offices" within the meaning of Article 16, § 40 because:

> Their duties do not involve an exercise of any portion of the sovereign power . . . . [T]heir official acts, decisions and judgments do not carry with them the authority of the sovereign. They are in advisory positions, not positions of authority.

While we do not have facts as to what discretion, decision making authority, or powers a mail carrier may exercise over matters of concern to the public, we do believe that insofar as the duties of the position involve only the receipt and delivery of mail, the position is not a "civil office" even though it is one of emolument.

Our answer to your question is that a city mail carrier employed by the United States Postal Service does not hold an "office of profit or trust" within the meaning of Article 16, § 12, Texas Constitution, nor does he hold a "civil

office of emolument" within the meaning of Article 16, § 40, Texas Constitution, and thus would not be barred by those provisions from holding the elective position of city councilman.

Opinion No. O-125 (1939) is overruled to the extent of conflict with this Letter Advisory.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

LARRY F. YORK, First Assistant

DAVID M. KENDALL, Chairman
Opinion Committee