



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1992

Honorable Gonzalo Barrientos
Chairman
Nominations Committee
Texas State Senate
P. O. Box 12068
Austin, Texas 78711

Letter Opinion No. 92-36

Re: Whether article XVI, section 40 of the Texas Constitution precludes a person from simultaneously holding the position of police officer for two different cities and related questions (ID# 17053)

Dear Senator Barrientos:

You inform us that the City of Austin, through its city manager, has tentatively offered the position of chief of police to Ms. Betsy Watson,¹ who is currently serving as assistant chief of police for the city of Houston. In order for Ms. Watson to be eligible for full retirement benefits under the city of Houston's police pension fund, she must remain on that city's payroll until December 4, 1992.² You ask a number of questions about Ms. Watson's eligibility to serve simultaneously in both positions.

Article XVI, section 40 of the Texas Constitution prohibits an individual from holding more than one "civil office of emolument." Texas courts have consistently held that a city police officer, of whatever rank, is a "public officer" for purposes of the constitutional provision. *See, e.g., Sawyer v. City of San Antonio*, 234 S.W.2d 398, 401 (Tex. 1950) (city police officer occupies "office of emolument"); *Irwin v. State*, 177 S.W.2d 970, 973 (Tex. Crim. App. 1944) (city policeman and deputy sheriff hold "offices of emolument"). Although this office has been moving toward an "accountability" test for dual office holding under article XVI, section 40,

¹Under the civil service statutes, Local Gov't Code ch. 143, the position of police chief must be confirmed by the city council.

²You indicate that Ms. Watson will use her accrued leave to remain on the city of Houston's payroll until December 4, 1992.

see, e.g., Attorney General Opinion JM-499 (1986), we have been precluded from applying that test to "peace officers" because of the existing unambiguous judicial language that denominates every "peace officer" a "public officer" under the constitutional prohibition. *See Sawyer*, 234 S.W.2d 401; *Irwin*, 177 S.W.2d 973; Attorney General Opinion JM-588 (1986) (commissioned officers of the Department of Public Safety are "public officers" under article XVI, section 40 of the Texas Constitution).

Thus, in answer to your first question, we are obliged to conclude that a person may not simultaneously hold the position of police officer, of whatever rank, for the city of Houston, and the position of police officer, of whatever rank, for the city of Austin. Qualification for and acceptance of one of these positions results in an *ipso facto* relinquishment of the other. *Centeno v. Inselmann*, 519 S.W.2d 889 (Tex. Civ. App.--San Antonio 1975, no writ); Attorney General Opinion MW-170 (1980).

You also ask whether the city of Austin may designate Ms. Watson a "consultant" for the period between August 20 and December 4, 1992, while she simultaneously holds the position of assistant chief in Houston. Under even the broadest reading of article XVI, section 40, a "consultant" does not hold an office. Attorney General Letter Advisory No. 22 (1973); *see also* Attorney General Opinion H-1304 (1978). So long as Ms. Watson does not qualify for and accept any "peace officer's" position with the city of Austin, she may retain her position with the city of Houston.

Finally, you inquire whether the city council may *immediately* confirm Ms. Watson's position as police chief, to be effective, however, only on December 5, 1992. In *Purcell v. Carrillo*, 349 S.W.2d 263 (Tex. Civ. App.--San Antonio 1961), the court held that a person does not "hold" an office until he "qualifies or enters upon the duties of [the] office." *Id.* So long as the city council makes clear in its resolution of confirmation that Ms. Watson's occupancy of the position of police chief will not commence until December 5, 1992, she will not be deemed to have relinquished her position in Houston prior to that time: since the offer is specifically conditioned on an effective date of December 5, Ms. Watson cannot either "qualify for," "accept," or "enter upon the duties of" the Austin position until that date.

SUMMARY

Article XVI, section 40 of the Texas Constitution, prevents one person from simultaneously holding the position of assistant police chief for the city of Houston and police chief for the city of Austin. An individual may, however, under the facts presented, act as a "consultant" for the city of Austin without thereby vacating the Houston position, so long as the individual is not a "peace officer" in the city of Austin. A person may prospectively accept a second office without thereby vacating the first, so long as the terms of the offer and acceptance specify a future "effective date."

Yours very truly,

A handwritten signature in black ink that reads "Rick Gilpin". The signature is written in a cursive style with a long, sweeping tail on the "n".

Rick Gilpin
Deputy Chief
Opinion Committee