THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
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April 15, 1977

This Opinion Overrules Opinion No. La-65 where conflicts

The Honorable Richard W. Carter
Hunt County Attorney
P. O. Box 1097
Greenville, Texas 75401

Letter Advisory No. 137

Re: Employment as a probation officer and college instructor.

Dear Mr. Carter:

You have asked the following question:

> Is the employment as a Chief Adult Probation Officer of a person currently employed as a part-time instructor for pay at East Texas State University constitutionally prohibited?

There are two general constitutional limitations on the holding of dual offices: (1) the separation of powers of article 2, section 1 of the Texas Constitution; and (2) the limitations imposed by sections 33 and 40 of article 16 of the Texas Constitution. In addition, there is a third limitation in the common-law doctrine that one person may not hold two incompatible offices. Attorney General Letter Advisory No. 114 (1975). One person may hold two positions only if none of the three limitations apply to the proposed combination.

In Attorney General Letter Advisory No. 65 (1973), we decided that article 2, section 1 of the Texas Constitution prevented a teacher from being employed as a probation officer. Article 2, section 1 reads as follows:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, those which are Judicial to another; and no person, or collection of persons, being of one of these departments,

> shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted. (Emphasis added).

We noted that a teacher, "being of" the executive department of the State, could not exercise a judicial power. A county probation officer, appointed by the district judge, exercises powers of the Judicial Department. Code Crim. Proc. art. 42.12, § 10. Thus, we concluded that a teacher was forbidden by article 2, section 1, from working as a probation officer. Since we had previously concluded that college instructors and professors were also of the executive department, the reasoning of Letter Advisory No. 65 would prevent them from working as probation officers. See Attorney General Opinion H-6 (1973).

However, we cannot regard these prior opinions as dispositive of your question. A recent Court of Civil Appeals decision, in determining whether a teacher was of the executive branch, used a different test from the one we have used. In Ruiz v. State, 540 S.W.2d 809 (Tex. Civ. App. -- Corpus Christi 1976, no writ), the court was called upon to decide whether a teacher employed by an independent school district could serve as a justice of the peace. In considering whether article 2, section 1 precluded him from serving in both capacities, the court stated that a justice of the peace was a member of the judicial branch of government. In order to decide whether a school teacher was a member of any other branch of government, the court applied a test used in Aldine Independent School District v. Standley, 280 S.W.2d 578 (Tex. 1955) to distinguish a public officer from an employee. It concluded that a teacher was not an officer but an employee of the executive department, and hence he was not "of" the executive department within the terms of article 2, section 1. Thus, as the court read article 2, section 1, it precludes an officer but not an employee of one department from holding a second position that requires him to exercise powers belonging to another department.

The words "public officer" do not appear in article 2, section 1, and the court did not give its reasons for virtually reading them into the provision. A possible rationale for the court's decision is that article 2, section 1 confides each department "to a separate body of magistracy" and that magistracy" can include "the whole body of public functionaries,

whether their offices be legislative, judicial, executive, or administrative." Black's Law Dictionary 1103 (4th ed. 1968). Thus, the magistracy consists of public officers. It can be argued that the reference to magistracy qualifies the rest of article 2, section 1, so that "person or collection of persons, being of one of these departments" refers only to members of the magistracy. It is logical that a provision which confides powers to separate bodies of magistracy should go on to limit the exercise of powers by each magistry to those properly attached to its department. The court's assumption that this constitutional provision concerns the powers of officers has some support in the language. See also City of Houston v. Stewart, 87 S.W. 663, 665 (Tex. 1905).

Whatever the reasons are that underlie Ruiz v. State, we as an advisory body cannot at this point in time ignore its holding that article 2, section 1 does not preclude public school teachers from exercising judicial functions. See Attorney General Opinion H-373 (1974). We believe that college instructors would not be of the executive branch under the test applied by the Ruiz court, and hence could exercise judicial functions consistently with article 2, section 1. Thus, in the present state of the case law the separation of powers limitation would not preclude the dual employment in this case.

We next must determine whether the person mentioned in your request would violate article 16, section 40, which provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument" and makes certain exceptions not applicable to the present case. Article 16, section 33, reads as follows:

> The accounting officers in this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

In Letter Advisory No. 65, we stated that a probation officer occupies a civil office of emolument. We have not decided whether a college instructor also holds a civil office of emolument. Attorney General Opinion H-6 (1973); Attorney General Letters Advisory Nos. 114 (1975), 65, 55 (1973). Compare

Boyett v. Calvert, 467 S.W.2d 205 (Tex. Civ. App. -- Austin 1971, writ ref'd n.r.e.) with Tilley v. Rogers, 405 S.W.2d 220 (Tex. Civ. App. -- Beaumont 1966, writ ref'd n.r.e.).

In Letter Advisory No. 63 (1973), we said that a civil office in article 16, section 40 is something more than a public employment, and something less than a public office. Moreover, it is something more than and distinct from a position of honor, trust or profit. See also Letter Adviosry No. 81 (1974). One court of civil appeals has held that a faculty member was an employee for purposes of article 16, section 40, Tilley v. Rogers, supra, while another determined that he was an agent of State officers and held a position of "honor, trust, or profit" within the terms of article 16, section 33, which has since been amended to remove the quoted language. Boyett v. Calvert, supra. The court in Ruiz v. State noted the holding of Tilley v. Rogers that a teacher was an employee and cited several decisions in other states that also found teachers to be state employees. A majority of courts that have considered the matter have found teachers to be employees and not officers. 75 ALR 1352; 15A Am. Jur.2d Colleges and Universities, § 16. See, e.g., Pardue v. Miller, 206 S.W.2d 75 (Ky. 1947). Under these authorities, it is our opinion that an instructor at a State university does not occupy a civil office of emolument, and article 16, section 40 does not bar him from also holding the position of probation officer.

We finally consider whether the common-law doctrine of incompatibility bars the holding of these two positions. Attorney General Letter Advisory No. 114 (1975). In State v. Martin, 51 S.W.2d 815 (Tex. Civ. App. -- San Antonio 1932, no writ), the court found that this doctrine did not bar one person from simultaneously holding the posts of school trustee and city tax assessor. The court reasoned:

> The duties of the two offices are wholly unrelated, are in no manner inconsistent, are never in conflict. Neither officer is accountable to the other, nor under his dominion. Neither is subordinate to the other, nor has any power or right to interfere with the other in the performance of any duty. The offices are therefore not inconsistent or incompatible . . . .

None of the facts with which you have provided us indicate any incompatibility under the reasoning of State v. Martin. An instructor at East Texas State University is employed by and accountable to the regents of that institution. Education Code §§ 100.11, 100.31; see also §§ 95.21, 95.22. A probation officer is employed by and accountable to the district judge. Code Crim. Proc. art. 42.12; Attorney General Opinion H-619 (1975). There is no relationship of accountability, dominion or subordination between the two positions. See Attorney General Letter Advisory No. 114 (1975). The duties of the two positions are unrelated and not inconsistent. In fact, experience in certain fields is a prerequisite to appointment as a probation officer, and two years employment as a teacher will satisfy this requirement. Code Crim. Proc. art. 42.12, § 10. Scheduling conflicts that may arise from dual office holding do not amount to legal incompatibility, and in any case, the part time nature of the instructorship should minimize the possibility of such conflicts. Boyett v. Calvert, supra; Letter Advisory No. 114 (1975). Although without more knowledge about the duties of each position, we cannot conclusively say that no incompatibility exists, on the basis of the stated facts and the relevant statutes, we see no incompatibility between the positions. Attorney General Letter Advisory No. 65 is overruled to the extent inconsistent with this opinion.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

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