



# The Attorney General of Texas

December 4, 1978

**JOHN L. HILL**  
Attorney General

Supreme Court Building  
P.O. Box 12548  
Austin, TX. 78711  
512/475-2501

701 Commerce, Suite 200  
Dallas, TX. 75202  
214/742-8944

4824 Alberta Ave., Suite 160  
El Paso, TX 79905  
915/533-3484

723 Main, Suite 610  
Houston, TX 77002  
713-228-0701

806 Broadway, Suite 312  
Lubbock, TX. 79401  
806/747-5238

4313 N Tenth, Suite F  
McAllen, TX 78501  
512-682-4547

200 Main Plaza, Suite 400  
San Antonio, TX 78205  
512-225-4191

An Equal Opportunity/  
Affirmative Action Employer

Honorable Hal H. Hood  
Firemen's Pension Commissioner  
503-F Sam Houston State Office Building  
Austin, Texas 78701

Letter Advisory No. 154

Re: Whether a city councilman may be a member of a volunteer fire department which participates in the Volunteer Fire Fighters Relief and Retirement Fund.

Dear Commissioner Hood:

You ask whether an individual may be a city council member, drawing remuneration, and at the same time a member of a volunteer fire department which participates in the Volunteer Fire Fighters Relief and Retirement Fund established pursuant to article 6243e.3, V.T.C.S. You inform us that the only compensation to be received for fire fighting will be a future retirement benefit. The individual is thus a volunteer fireman, rather than a regular fireman receiving monetary remuneration for his services. See V.T.C.S. art. 6243e.3, § 1(1); Attorney General Opinion H-665 (1975).

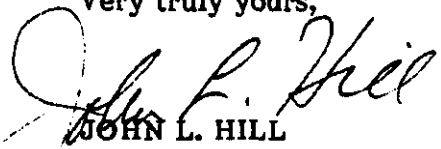
Your question raises the issue of dual office holding. There are three impediments to the holding of dual offices: (1) the separation of powers requirement of article 2, section 1 of the Texas Constitution; (2) the limitations imposed by sections 33 and 40 of article 16 of the Texas Constitution; and (3) the common law doctrine that one person cannot hold two incompatible offices. Attorney General Opinions H-665 (1975); H-7 (1973).

A city councilman holds an office in the legislative branch of government. Letter Advisory No. 112 (1975). A volunteer fireman is in the executive branch of government, but he occupies a public employment intermittent in nature rather than an office. Attorney General Opinion H-665 (1975). In Letter Advisory No. 137 (1977) we determined that article 2, section 1 of the Texas Constitution did not bar an officer of one branch of government from working as an employee in another. See Ruiz v. State, 540 S.W.2d 809 (Tex. Civ. App. — Corpus Christi 1976, no writ). We conclude that this provision does not forbid a city councilman from employment in the executive branch as a volunteer fireman.

Article 16, section 40 of the Texas Constitution prohibits one person from holding "more than one civil office of emolument," while article 16, section 33 bars the payment of State funds to anyone who is in violation of section 40. We determined in Attorney General Opinion H-665 (1975) that a volunteer fireman did not occupy a "civil office" within article 16, section 40. Thus, even though a compensated city councilman holds a civil office of emolument, see Letter Advisory No. 85 (1974), he is not prevented by article 16, section 40 from being a volunteer fireman.

The common law doctrine of incompatibility prohibits the holding of two positions with inconsistent or conflicting duties. State v. Martin, 51 S.W.2d 815 (Tex. Civ. App. — San Antonio 1932, no writ). The existence of incompatibility is a question of fact, to be resolved in the first instance by the city. Letter Advisory No. 86 (1974). You have provided no facts indicating that the duties of the two positions are inconsistent, and we cannot say as matter of law that this common law doctrine bars the contemplated employment. See Attorney General Opinion H-665 (1975); Letter Adivsory No. 30 (1973) (examples of compatible employments).

Very truly yours,



JOHN L. HILL  
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman  
Opinion Committee

jsn