



**THE ATTORNEY GENERAL
OF TEXAS**
August 30, 1990

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Hugh Parmer
Chairman, Senate Committee on
Intergovernmental Relations
P. O. Box 12068, Capitol Station
Austin, Texas 78711

LO-90-55

Dear Senator Parmer:

You request our opinion regarding whether a firefighter employed by the City of Houston may serve as a member of the Texas House of Representatives.

The individual in question is a representative-elect, and he asks whether he must, upon assuming office, vacate his paid position as a City of Houston firefighter. If he may not hold both positions, he asks whether he may assume leave-without-pay status or some other status that does not require complete termination from his city employment.

Article 16, section 40 of the Texas Constitution provides, in pertinent part:

No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

We need not determine here whether a fireman holds an "office," because we believe it is clear that he holds a "position of profit."

In Attorney General Opinion H-1304 (1978), the Attorney General noted that the term "position of profit" has not been construed by Texas courts, but that a "virtually identical phrase in the Alaska Constitution" had been interpreted by the Supreme Court of Alaska. In Beqich v. Jefferson, 441 p.2d 27 (Alaska 1968), that court "concluded that a position of profit was a salaried nontemporary employment." The principal distinction with which Attorney General Opinion H-1304 was concerned was that of employee

and independent contractor. There was no question that a salaried employee holds a "position of profit." Likewise, in Letter Advisory No. 4 (1973), the Attorney General declared that "employment as a teacher at a State junior college" constitutes "an office or position of profit under this State." We conclude that a paid municipal firefighter similarly occupies a "position of profit" under this state and that, as a result, he is barred by article 16, section 40 of the Texas Constution from simultaneously serving as a member of the legislature.

You also inquire whether the firefighter may assume inactive or leave-without-pay status as an alternative to terminating his employment with the city during his service in the legislature. An almost identical question was presented to this office in Letter Advisory No. 153 (1978). There, it was asked whether a state legislator could take a leave of absence, without pay, from a position as administrative officer of a state-supported institution. The opinion stated:

We believe a person's occupation of a position which assures him of a salaried status at a definite future date constitutes a position of profit. Accordingly, it is our opinion that an individual employed by a statue university is precluded from taking an unpaid leave of absence during the time for which he was elected to serve in the Legislature.

In our opinion, this reasoning is sound. It seems clear that inactive or leave-without-pay status must confer some privilege to the individual which is preferable to simple termination. Whatever that advantage, we believe it is sufficient to constitute a "position of profit" under the rather exacting standards which have been employed. Furthermore, it is well settled that when a person who holds a position of profit is elected or appointed to another, and the two position cannot be held simultaneously, "acceptance of and qualification for the second . . . operates ipso facto as a resignation from the former . . ." Letter Advisory No. 4 (1973). See Pruitt v. Glen Rose I.S.D., 84 S.W.2d 1004 (1935). This requirement, in our view, precludes the individual in question from accepting leave-without-pay status as an alternative to termination.


We conclude, therefore, that an individual may not simultaneously serve as a member of the legislature and as a

paid firefighter for a municipality, and that, in addition, he may not occupy inactive or leave-without-pay status as a municipal firefighter while serving in the legislature.

Yours very truly,



Rick Gilpin, Chief
Opinion Committee



Sarah Woelk, Chief
Letter Opinion Section
Opinion Committee

RG/SW/lcd

Ref: ID# 10465