



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

October 11, 1996

Mr. Dan Angel
President
Stephen F. Austin State University
P.O. Box 6078, SFA Station
Nacogdoches, Texas 75962-3065

Letter Opinion No. 96-109

Re: Whether a state university may prohibit its employees from engaging in outside employment (ID# 39125)

Dear Mr. Angel:

You request our opinion regarding the outside employment policy of Stephen F. Austin State University. You indicate that a rule, adopted by the board of regents in 1981, "requires all employees who wish to engage in outside employment to request approval" to do so from the president of the university. Among the "guidelines" adopted by the board to assist in making this determination is the following: "Proper performance of the employee's University assignment is paramount and outside work will assume a position secondary to University duties." You state that two current employees of the university are the nominees of their party for the offices of county commissioner and constable, and you ask whether their university employment may be terminated if they are elected to these positions.

Initially, we must endeavor to clarify an apparent misunderstanding. Article XVI, section 40, of the Texas Constitution prohibits an individual from holding "more than one civil office of emolument." Since neither individual in question holds a position with the university that could remotely be considered an "office," this prohibition might seem inapposite, except for a provision added in 1972:

State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts; provided, however, that such State employees or other individuals shall receive no salary for serving as members of such governing bodies.

The university employee who is running for the office of county commissioner has apparently argued that this provision *requires* the university to permit his dual service, and that, because commissioners are, in general, *excepted* from the *prohibitions* of article XVI, section 40, he may in addition be *compensated* for both positions.¹ While this conclusion is dubious,² it is irrelevant

¹The employee analogizes from *Ruiz v. State*, 540 S.W.2d 809 (Tex. Civ. App.—Corpus Christi 1976, no writ), which held, *inter alia*, that since a justice of the peace [like a county commissioner] was *excepted* from the (footnote continued)

to the question before us. The issue is not whether the university *may* permit this dual service, but whether it *must* do so.

That question in no way implicates article XVI, section 40. Whatever else it may be, the "state employee" proviso is not a guarantee of dual employment. The proviso means merely that *article XVI, section 40*, may not be used to defeat such employment. In the situation you pose, the only issue is the validity of the university's rule regarding outside employment.

In Attorney General Opinion JM-93, this office considered whether the Automated Information Systems Advisory Council, a state agency, could adopt "a policy . . . that an employee will not be allowed to hold another job without the approval of the executive director." The opinion declared that

a necessary concomitant of the authority to employ persons . . . is the power to adopt reasonable employment policies calculated to insure the achievement of this objective. . . . If the policies are carefully drafted and an adequate showing of need for them can be made, we believe that they would be found to be authorized under the agency's implied powers.

Attorney General Opinion JM-93 (1983) at 2. Likewise, we believe that the university's policy requiring prior approval of outside employment is clearly authorized by its general authority to employ.

Attorney General Opinion JM-93 also addressed the constitutionality of the proposed policy. It quoted at length from *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1979), in which the court held that a school district's blanket prohibition on outside employment did not contravene substantive due process:

[W]e find that such a rule, tested by the standard of rationality, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-88 [] (1955), is reasonably related to the legitimate state interest in assuring that public school employees devote their professional energies to the education of children. The policy takes steps to effectively remove from school employees the temptation to drain professional efforts into the furtherance of their own business interests on the rational premise that persons engaged in outside businesses will tend to have less time and interest and to be less responsive to the demands of their jobs than they would were school

prohibition of article XVI, section 40, he was therefore entitled to be paid as both a justice and as a public school employee.

²If county commissioners are entirely *excepted* from the operation of article XVI, section 40, the proviso that permits "state employees and other[s]" to serve on local governing boards would seem not to be applicable to the office of commissioner.

teaching or administration their sole occupation. The fact that the policy does not determine on an individualized, more precise basis whether the employee was in fact devoting his or her energies substantially to the school system does not mean that the objective of assuring such professional commitment was not rationally furthered by the no-outside-employment rule.

Id. at 526. See also *Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929 (10th Cir. 1989); *Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982).

Under the circumstances you have described, the university does in fact make its determination "on an individualized, more precise basis."³ The rule requires the decision-maker to evaluate a particular request for outside employment on the basis that "proper performance of the employees' University assignment is paramount and outside work will assume a position secondary to University duties." In our opinion, the president and the regents may, in applying this standard, take cognizance of the duties imposed by statute upon county commissioners and constables, the work load of the two offices in Nacogdoches County, the compensation attached to the positions, and the likelihood that any individual might be able to fulfill the requirements of those offices while simultaneously functioning as full-time university employees.

We conclude that a rule of Stephen F. Austin State University requiring executive approval for outside employment is valid on its face. Whether it is constitutionally applied in any particular set of circumstances requires of course the resolution of factual matters inappropriate to the opinion process.

S U M M A R Y

A rule of Stephen F. Austin State University requiring executive approval for all outside work undertaken by its employees is valid on its face.

Yours very truly,



Rick Gilpin
Deputy Chief
Opinion Committee

³In Attorney General Opinion JM-188, this office approved an outside-employment policy of the Department of Human Resources [now the Department of Human Services] that required executive approval for all outside employment. Attorney General Opinion JM-188 (1984). Specifically, the opinion sanctioned the department's prohibition of its employees' performing court-ordered social studies on their own time when the workers' dual employment created a conflict of interest by competing with the department for court appointments and revenue under provisions of the Family Code or by affecting other aspects of departmental work. *Id.* at 4.