Office of the Attorney General
State of Texas

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April 2, 1998

The Honorable James M. Kuboviak
Brazos County Attorney
300 E. 26th St., Suite 325
Bryan, Texas 77803

Letter Opinion No. 98-035

Re: Whether a district clerk may also serve as a reserve deputy sheriff (RQ-977)

Dear Mr. Kuboviak:

You ask whether a district clerk may also serve as an unpaid reserve deputy sheriff without violating either article XVI, section 40 of the Texas Constitution, which forbids dual office holding, or the common-law doctrine of incompatibility. In our view such service does not as a matter of law violate either the Constitution or the common law.

A similar question was presented to this office in Letter Opinion No. 97-081 (1997), which considered whether a county commissioner could serve as a reserve deputy. In that opinion, we found neither a constitutional nor a common-law bar. However, there are some important differences between the two situations.

Like a county commissioner, as an elected constitutional officer the district clerk holds a civil office of emolument for the purposes of article XVI, section 40. *See* Tex. Const. art. V, § 9 (establishing office of district clerk). However, unlike the county commissioner, the district clerk is not exempted from the strictures of article XVI, section 40. Accordingly, were the position of reserve deputy sheriff as a matter of law a civil office of emolument, the clerk would be barred from holding both offices.

You suggest that there is no constitutional problem because "Brazos County reserves are unpaid," and hence the position is not an office of emolument. While we agree that article XVI, section 40 does not present a bar here, it is not because reserve deputy sheriffs are not compensated. Under Local Government Code section 152.075, the commissioners court of Brazos County could if it so chose compensate reserve deputy sheriffs.

Rather, article XVI, section 40 presents no bar here because deputy sheriffs do not hold a civil office of emolument as a matter of law. At one time, this office, following *Irwin v. State*, 147 Tex. Crim 6, 177 S.W.2d 970 (1944), held that peace officers were civil officers for the purposes of article XVI, section 40. *See, e.g.*, Attorney General Opinion V-70 (1947). However, Attorney General Opinion DM-212 (1993) explicitly overruled all such opinions. *See* Attorney General Opinion DM-212 (1993) at 6. Following *Aldine Independent School District v. Standley*, 280

S.W.2d 578, 583 (Tex. 1955), DM-212 advised that the test of whether one is an officer or an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public *largely independent of the control of others.*" Attorney General Opinion DM-212 (1993) at 2 (quoting *Aldine*) (emphasis in original). At that time, we wrote that "at least some . . . sheriff's deputies . . . do not hold civil office." *Id.* Indeed, while any particular *Aldine* inquiry would involve fact-specific questions, in our view it would be a rare set of facts which would require the treatment of a deputy sheriff, and particularly a reserve deputy sheriff, as a civil officer.

While we do not now decide, as we did not decide in Letter Opinion No. 97-081, that as a matter of law a reserve deputy sheriff is an employee, we believe that generally such deputies are employees. Since they do not therefore hold civil offices, they do not hold civil offices of emolument for the purposes of article XVI, section 40.

That being the case, Letter Opinion No. 97-081's analysis of the common-law doctrine of incompatibility holds with equal force here. In that opinion, we noted that the doctrine has three distinct prongs: "The common law doctrine of incompatibility prevents a person from holding two public offices whose duties are inconsistent or in conflict ("conflicting loyalties" incompatibility), or appointing himself to another public entity ("self-appointment" incompatibility), or holding an employment subordinate to his public office ("self-employment" incompatibility)." Letter Opinion No. 97-081 (1993) at 1.

With respect to the "self-employment" or "self-appointment" branches of the doctrine, there is even less cause for concern in this case than in Letter Opinion No. 97-081. In that case, there was an argument that the county commissioners had at least some effect on the employment of reserve deputies, given their influence over the sheriff's budget. However, following *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 754, 756 (Tex. App.--Tyler 1991, no writ), Letter Opinion No. 97-081 found that "The commissioners court does not appoint or employ deputy sheriffs." Letter Opinion No. 97-081 (1993) at 2.

Your brief suggests a "conflicting loyalties" problem might in certain circumstances occur with respect to service of process. However, as this office pointed out in Attorney General Opinion JM-1266 (1990) and reiterated in Letter Opinion No. 97-081, "conflicting loyalties" incompatibility applies only when both positions are offices. Accordingly, since as we have pointed out reserve deputy sheriffs will generally be employees, "conflicting loyalties" analysis does not apply here.

Therefore we conclude that as a general matter, a district clerk may serve as a reserve deputy sheriff without violating either article XVI, section 40 of the Texas Constitution or the common-law doctrine of incompatibility.

SUMMARY

As a general matter, a district clerk may serve as a reserve deputy sheriff without violating either article XVI, section 40 of the Texas Constitution or the common-law doctrine of incompatibility.

Yours very truly,

James E. Tourtelott

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Opinion Committee