



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George W. Cox
State Health Officer
Austin, Texas

Dear Sir:

Opinion No. 0-1898
Re: Would the State Health Officer or an employee of the State Health Department be permitted under the State laws to accept a commission from the United States Secretary of Agriculture.

Your request for an opinion on the above stated question has been received and considered by this department. We quote as follows from your letter:

"Attached hereto is a copy of a letter from W. S. Frisbie, Chief, Division of State Cooperation, Food and Drug Administration, U. S. Department of Agriculture in which he requests the name of the food, drug, or health official of Texas to whom should be issued a commission signed by the U. S. Secretary of Agriculture pursuant to Section 702 (a) of the Federal Food, Drug, and Cosmetic Act, a copy of which Act is herewith enclosed.

"It has been the practice of the employees of the State Health Department heretofore to cooperate with the Federal Food and Drug Administration in the collection of samples of foods and drugs shipped in interstate traffic when such cooperative service can be rendered without incurring additional expense or consuming any considerable amount of time on the part of the employee, and when such samples are paid for by voucher drawn on the Federal Government. In this connection it has been necessary for each inspector of this Department to carry an authorization

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card signed by the U. S. Secretary of Agriculture, such authorization being limited to this particular service.

"Since the Federal Law has been amended, the question has arisen whether the State Health Officer or an employee of the State Health Department would be permitted under the State law to accept the commission mentioned in Mr. Frisbie's letter. . . ."

Section 702 (a) of the Federal Foods, Drugs, and Cosmetics Act, provides, in part, that:

"The Secretary is authorized to conduct examinations and investigations for the purposes of this Act, through officers and employees of the Department or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department. . . ." (Underlining ours)

It is to be noted that when a person in the public employ is designated as an officer of the United States by the terminology of the Federal statutes then that person is ipso facto an officer. See 26 Opinions United States Attorney General 264.

Article 16, Section 33, of the Constitution provides as follows:

"The Accounting Officers of this State shall neither draw nor pay a warrant upon the Treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States. . . ." (Underlining ours)

Section 40 of Article 16 of the Constitution provides, in part, that:

"No person shall hold or exercise, at the same time, more than one Civil Office of emolument, . . ."

The constitutional provisions referred to above proceed to set out certain exceptions unnecessary for us to consider here for clearly none would embrace our situation.

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The word "emolument" found in Article 16, Section 40, set out above, implies some idea of profit, gain, or benefit. It is our understanding that the Federal Government does not pay salaries to those who are commissioned and are officers of the Department of Agriculture pursuant to Section 702(a) of the Federal Food, Drug, and Cosmetics Act. However, there is consideration in the transaction in this manner: In consideration of the assumption of the various duties or services attached thereto the Federal Government will bestow a commission upon the person so undertaking the performance thereof. This constitutes a quid pro quo. Whether or not this is consideration within the meaning of the word "emolument" presents a question of considerable doubt. In our opinion it is not. However, you are advised that the office or position conferred by the commission comes within the scope of Article 16, Section 33, supra. The position conferred has ample attributes of one of "honor" or "trust".

Therefore, in the opinion of this department, Article 16, Section 33, of the Constitution would prohibit and restrain the accounting officers of this State from paying those who are thus commissioned by the Federal Government any salary or compensation for the services they are now rendering the State or might render in the future so long as they hold their positions with the Federal Government.

Trusting that the above satisfactorily answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED FEB 19, 1940

George W. Mann
ATTORNEY GENERAL OF TEXAS

By

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By

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GW:LL

