



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Mr. Sheppard:

Opinion No. O-2801

Re: Eligibility of a member of the faculty of A. & M. College to membership in the Merit System Council of the Texas Unemployment Compensation Commission.

Your request for an opinion from this department is as follows:

"A member of the faculty of A. & M. College has been appointed as a member of the Merit System Council of the Texas Unemployment Compensation Commission.

"I am desirous of knowing if he is eligible for appointment to this position. If you should rule that he is, would he be entitled to either his expenses or a per diem while performing the duties required of him as a member?"

Texas Unemployment Compensation Commission is created by Article 5221b-3 of Vernon's Revised Civil Statutes, and the succeeding Article concerns administration of the affairs of the Commission. Subdivision (d) of this Article pertains to personnel, and is as follows:

"Subject to other provisions of this Act, the Commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. The Commission shall not employ

or pay any person who is an officer or committee member of any political party organization. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Act, and may, in its discretion, bond any person handling moneys or signing checks hereunder."

In pursuance of this authority, the Commission has set up a body of employees known as the Merit System Council, designed to meet the approval of the Federal Security Agency for minimum standards of a merit system. This setup is as follows:

"SECTION I - MERIT SYSTEM COUNCIL

"Paragraph 1. A Merit System Council, to be governed by the rules herein provided, shall be appointed by the majority consent of the Commissioners. The Council shall be composed of three (3) members who shall be public-spirited citizens of recognized standing with knowledge of public administration and impartial selection of efficient government personnel and known interest in its improvement. They shall have had experience, training, or have been engaged in work in the fields of Organization and Management, Personnel, Public Administration or related fields of instruction. No member shall have held political office or have been an officer in a political organization during the year next preceding his appointment, nor shall he hold such office during his term. No member of the Council shall be otherwise employed as an official or employee of the Commission during his term as a member of the Council, and shall not have been an employee of the Commission within one year next preceding his appointment as a member of the Council.

Par. 2. It shall be the duty of the Council:

1. To advise on adoption of general policies for the administration of merit examinations, and to act as appeal board for applicants who have been re-

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jected for examination, as provided in Article XIII.

2. To hear appeals of employees discharged or demoted.
 3. To advise in the formulation of procedures in personnel administration to insure conformity with rules and policies.
 4. To advise with and recommend for selection and appointment, by the Commission, a Merit System Supervisor; to advise with the Merit System Supervisor in formulation of procedures for the conduct of merit examinations; and to inspect and review the activities of the Supervisor to insure conformity with this Rule and the policies, classification and objective standards of the Commission.
 5. To review the classification and compensation plans and to advise on their adoptions and subsequent revisions.
 6. To promote public understanding of the purposes, policies and practices of the merit system. As a means thereto, the Council shall make a report to the Commission at least semi-annually on the operation of the merit system, including the conduct of examinations, the establishment of registers, certification from registers, promotions, salary advancements, dismissals, demotions, transfers, separations, and the maintenance of classification and compensation plans. A copy of this report shall be open to public inspection.
 7. To recommend to the Commission amendments or changes in the merit system, which, in their opinion, are deemed necessary and advisable and which, in their opinion, will promote a more efficient and economical operation of the merit plan.
- Par. 3. Members of the Council shall serve for a term of one (1) year, beginning with the date on which these rules are approved, or until successors have been appointed. A member appointed to fill a vacancy occurring prior to the expiration of the term shall be appointed for the remainder of such term.

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Par. 4. The Council shall elect a Chairman from its membership. It shall also designate the Merit System Supervisor or other employee as its Recording Secretary, whose duty it shall be to keep a record of the proceedings of meetings. Meetings of the Council shall be held as often as necessary and practicable upon call of the Chairman. The Commission shall have the right to be represented at all meetings, but such representation shall be without voting power. The Council shall adopt procedures for the conduct of its activities.

Par. 5. Members of the Council shall receive no salary or wage, except that they may be compensated on a per diem basis of not to exceed Ten Dollars (\$10.00) per day for each day that they are in attendance at meetings of the Council and engaged in the performance of their duties. They may also be reimbursed for expenses incurred while engaged in the performance of their duties, including traveling expenses, within the limits of the biennial appropriation act."

Your inquiry raises at once the fundamental question of whether or not the occupancy of the position of faculty member to the A. & M. College, and of membership in the Merit System Council is in anywise in violation of Sections 33 or 40 of Article XVI of the Constitution, or otherwise illegal because of incompatibility of the two positions.

Section 40 of Article XVI of the Constitution forbids any person to hold or exercise, at the same time, more than one "civil office of emolument", with certain exceptions not pertinent to this inquiry.

The position of a faculty member of the A. & M. College is not a civil office. Such a member is an employee rather than a civil officer, although, of course, his position is one of emolument. The position of faculty member is not created by law but by contract between the employing Board and the individual; and, furthermore, the

duties of such faculty member are not created by law, but, on the contrary, by contract; again, such faculty member does not exercise any of the functions of sovereignty whatsoever, and this is an indispensable function to a civil officer.

We have recognized these as tests in our Opinion No. 0-490, in which we cited with approval the case of State of Montana vs. Hawkins, Secretary of State, 257 Pac. 411, 53 A. L. R. 583, and annotation thereto upon the subject of "Distinction between Office and Employment." See, also, our Opinion No. 0-2226, and 34 Tex. Jur. p. 323.

Section 33 of Article XVI of the Constitution is more restrictive. It 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", with certain enumerated exceptions not pertinent here.

This Section extends the disqualification of a person beyond the holding or exercising of a "civil office of emolument," so as to include the holding of any other "office or position of honor, trust or profit", under this State or the United States, except as prescribed in the Constitution.

The question recurs then, whether or not the position of a faculty member in the A. & M. College is an "office or position of honor, trust or profit", under this State. Undoubtedly, a professorship in the A. & M. College is a "position of honor, trust and profit". Such position, we think, further, is held "under this State". True it is that the faculty member is not employed directly by the State, but, on the other hand, is employed by the Board having control of the institution; but such Board is itself a body of public officers, constituting a State governmental agency for the very purpose of conducting the affairs of the College, and in every just sense, therefore, the faculty members employed by the Board, and who, of course, are paid directly by the

State, are holding positions of honor, trust and profit under the State, not immediately but mediately. The State can only act through agencies.

So that, in the opinion of this department, Section 33, Article XVI, of the Constitution does prohibit a member of the faculty of A. & M. College from receiving salary or compensation whatsoever out of the State Treasury for services rendered as a member of the Merit System Council of your board.

We think this conclusion is supported, if not compelled, by the opinion of First Assistant Attorney General Cureton (Legal Opinions, Attorney General, 1912-1914, p. 873) wherein he held as follows:

"We, therefore, beg to advise you that Honorable Will H. Mayes while acting as Lieutenant Governor of this State, could not legally hold the position or employment of a professor of journalism in the University of Texas."

Moreover, our conclusion finds support and authority in the opinion of Mr. Taylor, Assistant Attorney General, a conference opinion during General Looney's administration (Opinions, Book 30, p. 394) wherein it was held that:

"Should one of the clerks in a department be appointed a member of a board of managers of an eleemosynary institution, then the accounting officers of this state would be prohibited by the above Section from drawing or paying any warrant upon the Treasury for the salary of such a clerk."

It will be observed that in the two cases just cited the question propounded and answered by the Attorney General's Department was with respect to the rights of an employee of a department to receive compensation while at the same time holding and enjoying a public office under the law. The precise question whether or not the public officer holding at the same time a position of honor and trust under the state could receive compensation from the

State Treasury was not presented or decided. That is, however, the precise question presented in this case. That such officer is denied the right of salary or compensation we think is clear beyond doubt under the express terms of Section 33. The two cases above cited are also authority for the proposition that the employee in such a case is likewise denied compensation from the state. This conclusion would appear to be corollary to the main conclusion that the two positions are incompatible under the Constitution and that the person occupying such dual positions would therefore not be entitled to compensation from the State with respect to either position, whether of officer, agent, appointee, or employee solely.

However that may be, we are of the opinion that in any event Section 33 of Article XVI does prohibit the payment of compensation out of the State Treasury to an officer, such as the one under consideration here, who at the same time likewise holds or attempts to hold a position of honor or trust under the State.

Yours very truly

APPROVED AUG 22, 1940

ATTORNEY GENERAL OF TEXAS

W. Ross Allen
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By

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