THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

August 21, 1974

The Honorable Karl Lovelady
County Attorney
Crockett County
P. O. Box 1245
Ozona, Texas 76943

Letter Advisory No. 83

Re: May county official take leave of absence to take position with the State?

Dear Mr. Lovelady:

You have requested an opinion on whether a county attorney may take a leave of absence, without pay, for one month, to work for the State of Texas, and then return to his position as county attorney.

We can find no statutory authority for a county attorney to take such a leave of absence, with or without pay. Under Fannin County v. Dobbs, 202 S.W.2d 950 (Tex. Civ. App., Texarkana 1947, no writ) a public official cannot estop himself from receiving a salary by agreeing to accept less than the full authorized salary. See also Morrison v. City of Fort Worth, 155 S.W.2d 908 (Tex. 1941).

The Texas Constitution, Art. 16, Sec. 40 provides that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument" except in the specific situations listed in the Section. Since we do not know exactly what type of employment is contemplated, we can merely caution you that Art. 16, Sec. 40 will control whether the dual employment would be constitutional. For a discussion of what is a civil office of emolument see Attorney General Letters Advisory Nos. 63 (1973) and 81 (1974).

A further problem may be presented under the Constitution by Art. 2, Sec. 1, which provides for separation of powers, stating: "no person . . . being of one of these departments (of government), shall exercise any power properly attached to either of the others . . . . " Since the county attorney is considered of the judicial branch under the Texas Constitution,

see State v. Moore, 57 Tex. 307 (1882), acceptance of a position in the executive branch would violate this Section. See also Attorney General Letter Advisory No. 55.

Under Pruitt v. Glen Rose Independent School District No. 1, 84 S.W.2d 1004 (Tex. 1935), the taking of an incompatible office would be an ipso facto resignation from your present position and prevent return to Crockett County as county attorney.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

LARRY F. YORK, First Assistant

DAVID M. KENDALL, Chairman
Opinion Committee