



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

October 29, 1992

Ms. Georgina S. Gonzalez
Chair
Finance Commission
2601 North Lamar Boulevard
Austin, Texas 78705-4294

Letter Opinion No. 92-70

Re: Whether one person may serve as commissioner of a department subordinate to the Finance Commission and as executive director of the Finance Commission consistently with article XVI, section 40 of the Texas Constitution and the common-law doctrine of incompatibility (ID# 17074)

Dear Ms. Gonzalez:

The Finance Commission, which appoints the banking commissioner, savings and loan commissioner, and consumer credit commissioner, wishes to employ one of these persons on a part-time basis as its executive director. You ask whether it may do so without violating article XVI, section 40 of the Texas Constitution, which prohibits one person from holding two civil offices of emolument, or the common-law doctrine of incompatibility, which prohibits one person from holding two public positions with conflicting duties.

To provide a context for the question you ask, we will describe the complex relationships between the Finance Commission, the executive director of the Finance Commission, and the commissioners of the Banking Department, the Savings and Loan Department, and the Consumer Credit Commission. The Texas Banking Code of 1943, codified as V.T.C.S. article 342-101 through 342-1113, governs the Finance Commission, the Banking Department, and the Savings and Loan Department, while article 5069, V.T.C.S., governs the Office of Consumer Credit Commissioner. The Finance Commission consists of nine members appointed by the governor, subject to confirmation by the senate. V.T.C.S. arts. 342-103, 342-106. It is required by statute to

(1) adopt rules and determine general policies for the regulation of state banks, state associations, and the consumer credit industry in the state;

(2) consult and advise the Banking Commissioner, Savings and Loan Commissioner, and Consumer Credit Commissioner on the implementation and enforcement of the rules and policies adopted by the Finance Commission; and

(3) carry out other duties, powers and authority as may be conferred by law.

V.T.C.S. art. 342-103.A. You describe the Finance Commission as the "umbrella" over the three commissioners and their respective departments.

The Texas Banking Code provides for a Banking Department and a Savings and Loan Department, while article 5069-2.02(6) establishes the Office of the Consumer Credit Commissioner. The Finance Commission is required to appoint a banking commissioner, a savings and loan commissioner, and a consumer credit commissioner.¹ V.T.C.S. arts. 342-201, 342-205; 5069-2.02(2). Each of the three commissioners appointed by the Finance Commission is described by statute as an employee of the Finance Commission who is subject to its orders and directions and who serves at its pleasure. *Id.* The Finance Commission determines the compensation to be received by the banking commissioner and the savings and loan commissioner. V.T.C.S. arts. 342-201; 342-205. It also has some authority to establish salaries for employees in the Office of Consumer Credit Commissioner. V.T.C.S. art. 5069-2.02(7).

Although authority to regulate financial institutions is delegated by statute to the banking commissioner and the savings and loan commissioner, *see* V.T.C.S. arts. 342-205, 342-207, the Finance Commission may promulgate rules and regulations applicable to banks and to savings and loans institutions. V.T.C.S. arts. 342-113, 342-114. The consumer credit commissioner is charged with enforcing certain provisions of consumer credit law, article 5069-2.02A, but the finance commission "may promulgate rules necessary for supervising the Consumer Credit Commissioner and for ensuring compliance" with article 5069-1.01 *et seq.*, V.T.C.S.

¹The Finance Commission is to elect a banking commissioner and savings and loan commissioner "by and with the advice and consent of the Senate." V.T.C.S. arts. 342-201, 342-205.

The banking commissioner,² the savings and loan commissioner, and the consumer credit commissioner are all subject to the oversight of the Finance Commission.

The Finance Commission "may employ an executive director and staff as it considers necessary to carry out its functions." V.T.C.S. art. 342-111C. The Banking Code does not state the duties of the executive director, but you inform us that the executive director "would coordinate and facilitate the oversight of the Commission's departments by the Finance Commission," and would perform the following duties:

Develop the agenda for all Finance Commission meetings and ensure that the agenda is properly posted in accord with the Texas Open Meetings Act.

Coordinate the agenda items with Finance Commission members as well as the departments of the Finance Commission.

Communicate with the Attorney General's Office regarding any agenda items to ensure compliance with the Texas Open Meetings Act.

Ensure that all Finance Commission meetings are properly recorded and that a permanent record is maintained of all decisions.

Coordinate information packages from all departments of the Finance Commission and... [be] responsible for disseminating this information to the Finance Commission sufficiently prior to all meetings.

²The banking commissioner "shall supervise and shall regulate, as provided in this Code, all state and private banks and shall enforce the provisions of this Code . . ." V.T.C.S. art. 342-207. Applications for a state banking charter are, however, heard and determined by the State Banking Board, which consists of the banking commissioner, the state treasurer, and a public representative appointed by the governor with the advice and consent of the senate. *Id.* 342-115.

Coordinate the activities of the Administrative Committee³
of the Finance Commission.

We first consider whether article XVI, section 40 of the Texas Constitution would prevent one person from serving as a commissioner of a department under the umbrella of the Finance Commission and also as the executive director of the Finance Commission. This provision states in part that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument" The executive director would receive a salary for performing the duties of that position, and the commissioners of the three departments receive compensation. The following test is used to determine whether any person is an officer within article XVI, section 40 of the constitution:

[T]he determining factor which distinguishes a public officer from 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.*

Aldine Indep. School Dist. v. Standley, 280 S.W.2d 578, 583 (Tex. 1955) (emphasis in original). Public officers usually have a fixed term of office and may be removed only in accordance with constitutional or statutory removal procedures. Attorney General Opinion DM-114 (1992). The fixed term of office helps protect the officer's independence from the control of others.

In our opinion, the executive director of the Finance Commission is not a public officer. The legislature has not conferred any governmental powers upon the executive director or authorized the Finance Commission to delegate governmental powers to that person. The holder of that position may not exercise governmental powers. *See generally Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948); *Lipsey v. Texas Dep't of Health*, 727 S.W.2d 61 (Tex. App.—Austin 1987, writ ref'd, n.r.e.). The

³According to your letter, the Administrative Committee of the Finance Committee reviews certain aspects of the three departments and reports or makes recommendations to the Finance Commission. Specifically, the Administrative Committee reviews the three agencies' strategic plans and recommends changes in them; it reviews the operations of the three departments and recommends action on "house-keeping" matters; it is available to discuss administrative matters with the three agency commissioners; it reviews and reports to the Finance Commission on interpretations of the Credit Code; and it initially reviews information that the three departments provide to Finance Commission members before Finance Commission meetings.

Finance Commission intends to assign the executive director purely administrative duties involving no exercise of governmental powers. The executive director of the Finance Commission is not an officer, but an employee. A person who serves as executive director of the Finance Commission and also as commissioner of the Banking Department, the Savings and Loan Department, or the Credit Union Commission does not hold two civil offices of emolument. We therefore need not determine whether any of the three commissioners are public officers.⁴

The common-law doctrine of incompatibility prohibits one person from holding two offices when one is accountable or subordinate to the other, or where there is overlap of powers and duties such that one person could not disinterestedly serve in both offices. *See Thomas v. Abernathy County Line Indep. School Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgment adopted); *State ex rel. Brennan v. Martin*, 51 S.W.2d 815 (Tex. Civ. App.--San Antonio 1932, no writ); Attorney General Opinions DM-55 (1991); JM-141; JM-133 (1984). The common-law doctrine of incompatibility applies only to offices, except in cases where one person seeks to be both a public officer and an employee subject to appointment and supervision by the public officer or the governing body of which he is a member. Letter Advisory No. 114 (1975); *see also Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928) (commissioners court may not employ county judge as an attorney for county).

The Finance Commission employs and supervises the executive director. The executive director is accountable only to the Finance Commission, not to any of the three commissioners of the departments under the Finance Commission's oversight. Each of the three commissioners is accountable in some degree to the Finance Commission, but none of them are accountable to or subject to supervision by the executive director. The responsibilities contemplated for the executive director do not overlap with the powers or duties of any of the commissioners. The common-law doctrine of incompatibility does not prevent the commissioner of the Banking Department, the commissioner of the Savings and Loan Department, or the commissioner of the Consumer Credit Commission from serving as part-time executive director of the Finance Commission.⁵

⁴The provisions applicable to the commissioner of the Banking Department state that he is an employee of the Finance Commission who shall serve at their pleasure, but they also refer to his office. *See V.T.C.S. art. 342-201, 201a.*

⁵You have not inquired about, nor do we address, the effect of article 6252-9b, section 8(c), which provides that a state officer or employee should not accept employment that could reasonably be expected to impair his independence of judgment in the performance of his official duties.

S U M M A R Y

The executive director of the Finance Commission has no statutory powers, nor may the Finance Commission delegate governmental powers to that position. Neither article XVI, section 40 of the Texas Constitution nor the common-law doctrine of incompatibility would prevent the commissioner of the Banking Department, the commissioner of the Savings and Loan Department, or the commissioner of the Consumer Credit Commission from serving the Finance Commission as its part-time executive director.

Yours very truly,

A handwritten signature in cursive script that reads "Susan L. Garrison".

Susan L. Garrison
Assistant Attorney General