



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

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ATTORNEY GENERAL

May 19, 1994

Honorable David W. Wallace
Sutton County Attorney
P.O. Box 1508
Sonora, Texas 76950-1508

Letter Opinion No. 94-46

Re: Whether the Sutton County Judge also may serve as administrator of the Sutton County Emergency Medical Service and related questions (ID# 24861)

Dear Mr. Wallace:

You have asked whether the Sutton County Judge may assume the duties of the Sutton County Emergency Medical Service (the "EMS") administrator. You state as follows:

The administrator of the Emergency Medical Service . . . of Sutton County . . . turned in her resignation to the Commissioner[]s Court. The administrator's position is compensated by the Commissioners Court of Sutton County. . . . The majority of the people who work for the EMS, including the County Judge, volunteer their time to assist the injured and sick in Sutton County. The administrator suggested that[,] presently, the best qualified person to run the EMS was the Sutton County Judge.

You specifically ask three questions:

- 1) Is the County Judge precluded from holding the office of County Judge and EMS administrator under the dual officeholding doctrine or the doctrine of incompatibility?
- 2) Is the County Judge precluded from receiving additional remuneration [for] performing some of the duties presently performed by the administrator, if so requested by the Commissioner[]s Court a) until the new budget year and b) once a new budget year has begun?
- 3) Are the County Commissioners required to hire an administrator for the EMS or can those duties be absorbed by the Commissioners Court?

A county commissioners court is a court of limited jurisdiction; it may exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. Attorney General Opinion V-1162 (1951) at 2 (and sources cited therein);

see Attorney General Opinion MW-473 (1982) at 1 (and sources cited therein). This office long has asserted that, consistent with the commissioners court's general authority to appropriate and spend county funds for public health purposes, see Health & Safety Code § 122.001, a county may provide ambulance service. See Attorney General Opinion H-976 (1977) at 1 (and sources cited therein); 36 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 26.36, at 194-95 (Texas Practice 1989). Additionally, a county may provide ambulance or emergency medical service pursuant to a specific statute.

Section 774.003(a) of the Health and Safety Code authorizes the commissioners court of a county to provide for emergency ambulance service in the county, which may entail supplying necessary equipment, personnel, and maintenance for the service. In addition, chapter 776 of the Health and Safety Code provides for the creation of an emergency services district in a county with a population numbering 125,000 or less, such as Sutton County. By adhering to the procedures chapter 776 establishes, a county commissioners court may create an emergency services district to provide fire-fighting, emergency rescue, and ambulance services to the area within the district. See Health & Safety Code ch. 776, subch. B (providing for creation of district), §§ 776.031(a)(7)(A), .035(b). The commissioners court appoints five emergency commissioners to, among other things, administer the emergency services district. See *id.* §§ 776.033, .035(a)(5).

We assume from your letter that Sutton County has not created an emergency services district, governed by a separate board. We assume instead that the county commissioners court itself governs the county emergency medical or ambulance service, pursuant to the common law, section 774.003(a) of the Health and Safety Code, or some statute other than chapter 776 of the Health and Safety Code of which we are unaware. Thus, the county commissioners court is the entity that appoints ambulance service personnel, including the administrator, and sets the terms of their employment.

We consider first whether the constitutional prohibition against dual officeholding or the common-law doctrine of incompatibility of office apply. We conclude that the constitutional prohibition against dual officeholding does not apply. However, we conclude that the common-law doctrine of incompatibility precludes the county judge from being appointed to the position and to holding it.

Article XVI, section 40 of the Texas Constitution provides that, with various exceptions, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." To determine whether a position is an office for purposes of article XVI, section 40, this office applies the test the Texas Supreme Court articulated in *Aldine Independent School District v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955), quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. App.—Galveston 1949, writ *ref'd.*) "The Supreme Court has repeatedly held that the determining factor in distinguishing an officer from an employee is whether the individual in question exercises a 'sovereign function of the government . . . largely independent of the control of others.'"

Attorney General Opinion JM-1266 (1990) at 2. An elected official holds a civil office for purposes of article XVI, section 40. Attorney General Opinion JM-1266 (1990) at 2; *see* Tex. Const. art. V, § 15 (providing that county judge shall be elected in each county). Additionally, the office of county judge is an office "of emolument." *See* Attorney General Opinion JM-594 (1986) at 2. Thus, a county judge holds a civil office of emolument for purposes of article XVI, section 40.

On the other hand, we do not believe that the EMS administrator exercises a sovereign function of the government largely independent of the control of others. You do not cite, and we are unaware of, a statute detailing the powers and authority that can be attributed to the Sutton County EMS administrator. In our opinion, therefore, the administrator may exercise only those powers that the commissioners court properly has delegated to him or her. Moreover, the county commissioners court does not, by delegating the administration of the EMS, "abdicate its statutory authority or control." *Cf. Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658, 660 (Tex. Civ. App.—Eastland 1981, no writ). The county commissioners court retains supervisory authority over all decisions the EMS administrator makes. Because the position of EMS administrator is not an office for purposes of article XVI, section 40 of the Texas Constitution, the prohibition against dual officeholding does not preclude the Sutton County Judge from simultaneously serving as administrator of the Sutton County EMS.

The common-law doctrine of incompatibility has multiple facets. First, the common-law doctrine of incompatibility disqualifies all officers who have the appointing power from appointing themselves to a different position. *Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); *St. Louis Southwestern Ry. Co. of Texas v. Naples Indep. Sch. Dist.*, 30 S.W.2d 703, 706 (Tex. Civ. App.—Texarkana 1930, no writ); Attorney General Opinions JM-934 (1988) at 3; C-452 (1965) at 3; O-410 (1939) at 5-9. As the Texas Supreme Court has stated:

It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

Ehlinger, 8 S.W.2d at 674. Thus, unless a specific statute provides otherwise, a public governing body must not appoint one of its members to an office or position while that person remains a member of the governing body. Attorney General Opinion C-452 at 3; *see* Attorney General Opinion JM-1157 (1990) at 3. Any appointment that contravenes this common-law principle is void as a matter of law. *Ehlinger*, 8 S.W.2d at 673-74; *St. Louis Southwestern Ry. Co. of Texas*, 30 S.W.2d at 706; Attorney General Opinion C-452 at 4. *See generally* Letter Opinion No. 92-8 (1992).

Second, the common-law doctrine of incompatibility prevents one person from holding two offices if the duties are inconsistent or in conflict. See Attorney General Opinion JM-203 (1984) at 3 (and sources cited therein). To determine whether a position is an "office," we again apply the test the Texas Supreme Court articulated in *Aldine v. Standley*, 280 S.W.2d at 583. See *supra* at 2-3 (stating *Aldine* test). Finally, the common-law doctrine of incompatibility prevents one person from holding an office and a public employment if one is subordinate to the other. See Attorney General Opinion JM-203 at 3 (and sources cited therein).

Because the county commissioners court appoints the EMS administrator, it may not, pursuant to the common-law doctrine of incompatibility, appoint one of its members to the position. Cf. Letter Opinion 90-62 (1990) at 3 (concluding that county commissioners court may appoint county judge to be records management officer because Local Government Code section 203.025 expressly authorizes commissioners court to do so). Furthermore, the position of EMS administrator is subordinate to the county commissioners court. Consequently, the county judge cannot be appointed to the position of EMS administrator without ceding his current office. See, e.g., *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgment adopted) (stating that officer who accepts and qualifies for second, incompatible office *ipso facto* relinquishes prior post); *Kugle v. Glen Rose Indep. Sch. Dist. No. 1*, 50 S.W.2d 375, 376 (Tex. Civ. App.--Waco 1932) (same), *rev'd on other grounds sub nom. Pruitt v. Glen Rose Indep. Sch. Dist. No. 1*, 84 S.W.2d 1004 (Tex. 1935); Attorney General Opinions JM-203 at 10 (same); JM-133 (1984) at 2 (same).

We understand you to premise your last two questions on the assumption that a county commissioners court may not, either because of the constitutional prohibition against dual officeholding or the common-law doctrine of incompatibility, appoint the county judge to the position of EMS administrator. In effect, you ask whether the Sutton County commissioners court may abolish the position of EMS administrator, either permanently or temporarily, and assign the duties the EMS administrator performed to various members of the commissioners court. Your second question assumes that the commissioners court may assign some of the EMS administrator's duties to the county judge;¹ it also assumes that the commissioners court may vote to increase the amount of compensation the county judge receives to compensate him or her for performing additional duties.² You ask whether the county judge may receive the additional remuneration before the start of the county's new fiscal year.

¹We therefore do not consider whether, because of the common-law doctrine of incompatibility or any other reason, the commissioners court may assign to the county judge any or all of the duties that the EMS administrator has heretofore performed.

²Thus, we do not consider whether the commissioners court may provide the county judge with additional remuneration for performing additional tasks.

A county commissioners court must set the amount of compensation that an elected official will receive "at a regular meeting of the court during the regular budget hearing and adoption proceedings," after properly publishing notice of the meeting. Local Gov't Code § 152.013(a), (b); *see also id* § 152.017. This office has stated in prior opinions that the commissioners court may modify an elected county official's salary only during the regular budget hearing. *See* Attorney General Opinions JM-839 (1988) at 6; H-643 (1975) at 2 (construing statutory predecessor to Gov't Code § 152.013); H-11 (1973) at 3 (same). The commissioners court may not amend the county budget during the fiscal year to increase an elected county official's salary. *See* Letter Opinion No. 89-3 (1989) at 2. Consequently, we conclude that, until the start of the county's new fiscal year, the county judge may not receive additional remuneration for performing some of the EMS administrator's tasks. Additionally, the county may not at that time compensate the county judge for tasks he performed prior to the start of the fiscal year. *See* Tex. Const. art. III, § 53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ).

Your third question asks whether the commissioners court, as a body, may absorb the duties previously assigned to the EMS administrator. No statute requires a county commissioners court to establish an emergency medical or ambulance service, much less hire an administrator for such a program. As we have noted above, however, the commissioners court, consistent with its general authority to appropriate and spend county funds for public health purposes, may provide ambulance service. *See supra* at 2. Additionally, a county may provide ambulance service pursuant to section 774.003(a) of the Health and Safety Code.

A county commissioners court has implied authority to do what may be necessary in the exercise of the duties constitutionally and statutorily conferred upon it. *El Paso County v. Elam*, 106 S.W.2d 393, 395 (Tex. Civ. App.—El Paso 1937, no writ). Accordingly, we conclude that the commissioners court may abolish the position of EMS administrator and absorb the functions that the EMS administrator previously performed.

Of course, if the Sutton County commissioners court abolishes the position of administrator of the EMS and absorbs the administrative functions itself, it must make administrative decisions for the EMS only as a body at a meeting subject to the Open Meetings Act. *See Swaim v. Montgomery*, 154 S.W.2d 695, 696-97 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.) (stating that commissioners court does not act by statement of one member; rather, it acts as court, meeting in open session to transact county business) (quoting *Tarrant Co. v. Smith*, 81 S.W.2d 537, 538 (Tex. Civ. App.—Fort Worth 1935, writ ref'd)); *see also* Gov't Code § 311.013 (providing for authority and quorum of public body); *id.* ch. 551 (codifying Open Meetings Act).

S U M M A R Y

The administrator of the Sutton County emergency medical services is not an officer for purposes of the constitutional prohibition against dual officeholding, article XVI, section 40 of the Texas Constitution. Thus, article XVI, section 40 does not preclude the Sutton County Judge from simultaneously serving as the Sutton County emergency medical services administrator.

However, the common-law doctrine of incompatibility precludes the county judge from simultaneously serving as the emergency medical services administrator. Because the county commissioners court appoints the EMS administrator, it may not appoint one of its members to the position. Furthermore, the position of EMS administrator is subordinate to the county commissioners court.

Pursuant to section 153.013(a) of the Local Government Code, the county commissioners court may not provide the county judge with additional remuneration for performing some of the EMS administrator's tasks until the start of the county's new fiscal year.

Because no statute requires Sutton County to appoint an emergency medical services administrator, the commissioners court may abolish the position and absorb the functions that the emergency medical services administrator previously performed. If the commissioners court does so, it must make administrative decisions for the EMS only as a body at a meeting subject to the Open Meetings Act.

Yours very truly,



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