



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

September 19, 1994

Honorable Robert Junell
Chair
Committee on Appropriations
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 94-070

Re: Whether a volunteer fighter may
serve on the city council and vote on issues
concerning the volunteer fire depart-
ment (ID# 25437)

Dear Representative Junell:

You ask whether an individual violates the common-law doctrine of incompatibility by serving as a member of the Hudson City Council and at the same time as a member of the Hudson Volunteer Fire Department ("HVFD"). You also ask whether this person may vote as a city council member on issues involving the HVFD.

A letter from the Mayor pro tem of the City of Hudson provides some information about the control and funding of the HVFD. Members of a past city council helped establish the HVFD, but the city does not own or control it, nor does it assign duties to fire fighters. The fire-fighting activity of the HVFD is not confined to the Hudson city limits. Although the greatest concentration of housing is within the city limits, the majority of the fires the department fights are grass fires, which occur in a much wider area. The city does not have a written contract with the HVFD at this time, apparently receiving fire protection and providing support for the fire department through an informal, unwritten agreement. Funding for the HVFD derives from the city, the county, and individual citizens who donate one dollar per month in paying their water bills to local water supply corporations. The city owns the land where the fire station is located and leases it to the HVFD for one dollar a year and also contributes \$7,000 per year for fire protection. The city initially paid premiums for a life insurance policy protecting HVFD volunteers, but has ceased to do so, instead increasing its insurance donation to allow the HVFD to purchase its own insurance. A volunteer fire fighter does not receive a salary, but does receive the benefit of the life insurance policy.

We can conclude from the letter written by the mayor pro tem that the volunteer fire fighter is not a city employee. We will assume for the purposes of this decision that the HVFD is a private entity that receives funding from public entities in exchange for being available to provide fire prevention services.

The common-law doctrine of incompatibility prevents one person from holding two public offices if the duties of office are inconsistent with one another or in conflict, or if one office is subordinate to the other. *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgment adopted); Attorney General Opinions DM-156 (1992); JM-203 (1984). It also prohibits an individual from holding an

office and at the same time holding an employment that is subordinate to the office. Attorney General Opinion DM-55 (1991); Letter Advisory No. 114 (1975) For example, Letter Advisory No. 114 determined that the position of trustee of a school district was incompatible with employment as a teacher by the district, because the trustees set teachers' salaries and had general supervisory power over teachers. One person could not hold both positions. Letter Advisory No. 114 at 2.

A city council member holds a public office, *see Thomas*, 290 S.W. 152, but a volunteer fire fighter who works for a private volunteer fire department does not. In serving as a volunteer fire fighter, the city council member does not hold two incompatible offices. Nor does the city council member hold an employment that is subject to the control and supervision of the city council. The city does not control the HVFD or determine the duties of volunteer fire fighters. Accordingly, the service of one individual as a member of the city council of Hudson and as a volunteer fire fighter with the HVFD does not violate the common-law doctrine of incompatibility.

You also ask whether the volunteer fire fighter may vote as a city council member on issues pertaining the HVFD. Chapter 171 of the Local Government Code addresses conflicts of interest of local public officials, including city council members. Local Gov't Code § 171.001(1). The requirements of chapter 171 apply to a local public official who has a substantial interest in a business entity, as defined by the statute. A business entity is "a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law." *Id.* § 171.001(2). A non-profit corporation is also a business entity within section 171.001(2) of the Local Government Code. Attorney General Opinion JM-424 (1986). A person has a substantial interest in a business entity if:

- (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$5,000 or more of the fair market value of the business entity; or
- (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

Local Gov't Code. § 171.002(a). A public officer who has a substantial interest in a business entity must file, before a vote or decision on a matter involving the business entity, an affidavit stating the nature and extent of the interest and shall abstain from further participation if:

- (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public.

Id. § 171.004.

The city council member in question receives the benefit of the life insurance policy purchased by the fire department. However, no facts have been presented to suggest that the department is a "business entity" within section 171.001(2) of the Local Government

Code or that the city council member in question has a substantial interest in the fire department. Assuming that the HVFD is not a business entity and the city councilman's interest in the life insurance policy is not a "substantial interest in a business entity," chapter 171 of the Local Government Code will not prevent him from voting on issues involving the HVFD. However, he might consider refraining from voting to avoid even the appearance of impropriety. *See generally* Tex. Const. art. XVI, § 1 (officers must take oath to "faithfully execute the duties of the office").

S U M M A R Y

A city council member does not hold two incompatible public offices when he serves as a volunteer fire fighter for a private volunteer fire department that the city funds but does not control. Nor does he hold an employment that is subordinate to his office. His dual service as city council member and volunteer fire fighter under these circumstances do not violate the common-law doctrine of incompatibility. Chapter 171 of the Local Government Code would not prevent the city council member from voting on issues involving the fire department unless the department is a business entity within that chapter and the city council member has a "substantial interest" in that business entity.

Yours very truly,



Susan L. Garrison
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Opinion Committee