



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 14, 1997

The Honorable Fred Hill
Chair, Committee on Urban Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 97-070

Re: Whether under Local Government Code section 143.006(c)(5) members of a certain municipality's fire fighters' and police officers' civil-service commission were eligible for appointment to the commission, and related questions (ID# 39519)

Dear Representative Hill:

Local Government Code section 143.006(c)(5) declares ineligible for appointment to a municipal fire fighters' and police officers' civil-service commission an individual who has held a public office within three years preceding the appointment. You ask about the eligibility of all three members of the City of Cleburne's Fire Fighters' and Police Officers' Civil Service Commission (the "commission"). One member has, prior to and simultaneously with his tenure as commissioner, served as postmaster for the City of Cleburne. One member has, prior to and simultaneously with his tenure as commissioner, been a member of the Johnson County Tax Appraisal Review Board. The third member has, simultaneously with his tenure as commissioner, served the City of Cleburne as interim city attorney and as interim municipal judge.

Of the three positions, we conclude that only a member of the tax-appraisal-review board holds public office. Consequently, we believe a court would find that the commissioner who served on the tax-appraisal-review board at the time he was appointed to the commission was ineligible for the appointment. But we further conclude, as you contend, that the sole legal method for determining a commissioner's eligibility is by a quo warranto proceeding. You ask how a member's ineligibility affects decisions the commission has made before and decisions the commission will make after we have issued this opinion. Because no quo warranto proceeding has been brought, the commission's actions are valid, regardless of a commissioner's eligibility.

You also ask whether the commissioners' terms of office are properly staggered for purposes of Local Government Code section 143.006(b). Because the terms of office overlap, we conclude that they are. We further conclude that a term runs with the office, not with an appointee.

As your letter suggests, all three members of the commission serve or have served the government, either federal or state, in other capacities.¹ Mr. Charles Seay, who was originally appointed to the commission in 1989, has served as postmaster for the City of Cleburne since 1984. Mr. J.M. Hill was originally appointed to the commission in 1992 to complete a term begun, we assume, in 1990; Mr. Hill also served as a member of the Johnson County Tax Appraisal Review Board from 1990 through 1995. Mr. Hugh Higgins has served on the commission since 1985. Mr. Higgins also served as interim city attorney for the City of Cleburne from March through June 1996, and he has served as interim municipal judge on several occasions during the last several years. Each member has been reappointed to the commission several times, and with the possible exception of Mr. Higgins, whose most recent term expired in April 1997,² each member currently serves on the commission.

Under Local Government Code chapter 143, certain municipalities may establish a fire fighters' and police officers' civil-service commission.³ Once a municipality properly has established its commission, the municipality's chief executive must appoint three commissioners, whom the municipal governing body must confirm.⁴ Commissioners "serve *staggered three-year terms* with the term of one member expiring each year."⁵ If a vacancy occurs, the chief executive must appoint a commissioner to fill the "remainder of the unexpired term."⁶ Finally, an individual is ineligible to be appointed to the commission if he or she has "held a public office within" three years preceding the date of appointment.⁷

We believe a court would find that only one of the three commissioners held a public office within three years prior to his appointment and was therefore ineligible for appointment to the commission. As you assert, a "public office" is to be distinguished from public employment using the standard adopted in *Aldine Independent School District v. Standley*.⁸ The *Aldine* court declared

¹You aver that the position of postmaster is not governmental. *But see infra* note 14.

²You have not informed us whether Mr. Higgins has been reappointed to the commission.

³See Local Gov't Code §§ 143.002 (describing municipality that may adopt civil-service system under chapter 143), .004 (authorizing municipality to hold election to adopt chapter 143), .006(a) (stating that once municipality has adopted chapter 143, civil-service commission is created). For purposes of this opinion, we assume that the City of Cleburne is a municipality that may adopt a civil-service system under Local Government Code chapter 143 and that it adopted the system in accordance with section 143.004 of that code.

⁴*Id.* § 143.006(a), (b).

⁵*Id.* § 143.006(b) (emphasis added).

⁶*Id.*

⁷*Id.* § 143.006(c)(5).

⁸280 S.W.2d 578, 583 (Tex. 1955) (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. (continued...))

that “the determining factor [that] 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.*”⁹ More recently, the Texas Supreme Court and courts of civil appeals have emphasized that an individual who performs sovereign functions under the direction of another does not operate independently of the control of others and therefore is not a public officer.¹⁰ An individual whom a superior body may terminate at will generally does not exercise power “largely independent of the control of others” because the superior body, by threatening to terminate the individual, may dictate the individual’s every act.¹¹ We will apply these principles to each of the positions -- postmaster, tax-appraisal-review board member, interim city attorney, and interim municipal judge -- about which you ask.

We believe a court would find that Mr. Seay, who has served as postmaster since 1984, did not hold a public office prior to his 1989 appointment to the commission and was therefore eligible for appointment to the commission. Preliminarily, we note that article XVI, section 40 of the Texas Constitution expressly exempts the “office” of postmaster from the prohibition against dual-office holding. Thus, a postmaster may hold what we will assume for the moment is *another* “civil office of emolument.”¹² We do not believe this amounts to a legislative determination that the position of postmaster is a public office under *Aldine*, however. Indeed, the legislature or the electorate could not have considered the *Aldine* standard because *Aldine* (and the case on which it relied) was issued after the enactment of article XVI, section 40.¹³ Moreover, the role of the postmaster has changed in the 121 years since article XVI, section 40 was originally enacted.

Because Mr. Seay is supervised and holds an at-will position, we believe a court would conclude that Mr. Seay does not perform his official duties independently of the control of others.¹⁴

⁸(...continued)

App.--Galveston 1949, writ ref'd).

⁹*Id.* at 583 (quoting *Dunbar*, 224 S.W.2d at 740) (emphasis in original).

¹⁰See Attorney General Opinion DM-212 (1993) at 3 (citing, as examples, *Green v. Stewart*, 516 S.W.2d 133, 136 (Tex. 1974); *Harris County v. Schoenbacher*, 594 S.W.2d 106, 111 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.)).

¹¹See Attorney General Opinion JM-1266 (1990) at 2.

¹²See Tex. Const. art. XVI, § 40.

¹³*Aldine* was issued in 1955. The case from which the *Aldine* Court quoted the standard we use to determine whether a position is a public office, *Dunbar v. Brazoria County*, is a decision of the Texas Court of Civil Appeals issued in 1949. By contrast, article XVI, section 40 of the Texas Constitution has exempted postmaster from the prohibition of dual-office holding since 1876. See Tex. Const. art. XVI, § 40 historical note.

¹⁴It is suggested that the position of postmaster is a private, not a public, position because, you aver, the United States Postal Service operates independently from the federal government. But the Postal Service is “an

(continued...)

As materials you sent with your request indicate, Mr. Seay's postmaster position involves managing the operation of a medium- to large-sized post office and encompasses mail distribution, delivery, and collection, as well as window service. Mr. Seay is supervised by the manager of Post Office Operations. More importantly, he is an at-will employee who may be terminated at any time.

On the other hand, we believe a court would conclude that Mr. Higgins, who served as a member of an appraisal-review board when he was appointed to the commission, held a public office and was ineligible for appointment to the commission under Local Government Code section 143.006(c)(5). First, we believe a court would conclude that appraisal-review board members collectively exercise a sovereign function because of the board's power to order the appraisal records or rolls be changed, unsupervised by any other entity (except the judiciary). The Tax Code creates an appraisal-review board in each appraisal district¹⁵ to review and correct appraisal records and appraisal rolls:

The appraisal review board shall:

- (1) determine protests initiated by property owners;
- (2) determine challenges initiated by taxing units;
- (3) correct clerical errors in the appraisal records and the appraisal rolls;
- (4) act on motions to correct appraisal rolls . . . ;
- (5) determine whether an exemption or a partial exemption is improperly granted and whether land is improperly granted appraisal . . . ;
and
- (6) take any other action or make any other determination that this title specifically authorizes or requires.¹⁶

If the appraisal-review board concludes that an error has been made, it must, without further review by any other governmental body, direct the chief appraiser to correct or change the appraisal records

¹⁴(...continued)

independent establishment of the *executive branch*" of the federal government. 39 U.S.C. § 201 (emphasis added); *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1035 (9th Cir. 1991); *Johnson v. Grumman Corp.*, 806 F. Supp. 212, 217 (W.D. Wis. 1992). Thus, the Postal Service is within the government; it is a public, not a private, entity. Positions within the Postal Service are, as a consequence, public positions.

¹⁵Tax Code § 6.41(a).

¹⁶*Id.* § 41.01(a).

or the appraisal roll.¹⁷ Second, we believe a court would find that the members of an appraisal-review board act largely independently of others' control. The appraisal-review board's decisions are unsupervised. In addition, board members serve specified terms and may be removed only for limited reasons. Under the statute, members are appointed to the appraisal-review board by the appraisal-district board of directors.¹⁸ Each member serves a two-year term,¹⁹ and the appraisal-district board may remove a member from the review board only for specified causes, neither of which allow the appraisal-district board to dictate a review-board member's decisions.²⁰

Finally, we believe a court would find that neither of the interim positions Mr. Higgins has held is a public office and that he therefore was eligible for appointment to the commission.²¹ This office stated in Attorney General Opinion C-627 that, to be a public office, a position "must have some permanency and continuity"; it may not be a "temporary or [an] occasional" position.²² Accordingly, the opinion continued, a constable may act as a deputy tax assessor-collector for one day,²³ while he might not be permitted to do so if the assessor-collector position were permanent.²⁴ Applying this rationale to the situation about which you ask, Mr. Higgins' interim positions are not public offices.

You suggest that the proper forum for determining a commissioner's eligibility for office is judicial, in the form of a quo warranto action.²⁵ A quo warranto action is available to contest an individual's eligibility for public office,²⁶ but it may be brought only by the attorney general or the

¹⁷See *id.* § 41.02.

¹⁸*Id.* § 6.41(d).

¹⁹*Id.* § 6.41(e).

²⁰*Id.* § 6.41(f).

²¹We accept as true your assertions that the positions were interim.

²²Attorney General Opinion C-627 (1966) at 2 (quoting Attorney General Opinion O-4313 (1942)).

²³*Id.* at 2.

²⁴Attorney General Opinion C-627 did not consider whether the position of deputy tax assessor-collector was an office.

²⁵We assume, as you do, that a commissioner holds a public office.

²⁶See Civ. Prac. & Rem. Code § 66.001(1).

appropriate county or district attorney.²⁷ An individual found guilty in a quo warranto action will be removed from office and may be fined.²⁸

We conclude that a commissioner's eligibility for office may be determined only by a court in a quo warranto action. Generally, a quo warranto proceeding is the exclusive means by which an officer's right to office may be tested.²⁹ As the Texas Court of Appeals has stated, a public officer need not defend his or her authority to hold office unless either the attorney general or the appropriate county or district attorney "has determined that the question raised is serious and deserves judicial consideration."³⁰

You also ask about the validity of the commission's actions, both before and after this opinion is issued. Because a commissioner's eligibility ultimately must be judicially determined, we believe the commission's actions are valid until and unless a court issues an order in a quo warranto action. Until that time, a commissioner who is ineligible to serve is a de facto officer who holds the office under color of appointment.³¹ A de facto officer's acts are considered valid.³² Thus, whether the commission's action occurs before or after this opinion is issued is irrelevant.

You finally ask whether the commissioners' terms are properly staggered. As we stated above, Mr. Seay was first appointed to the commission in 1989 and subsequently appointed in 1992 and 1995. His current term will expire in 1998. Mr. Higgins was first appointed to the commission

²⁷*Id.* § 66.002(a).

²⁸*Id.* § 66.003(1), (3).

²⁹*See, e.g., Lewis v. Drake*, 641 S.W.2d 392, 393-94 (Tex. App.--Dallas 1982, no writ); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Consol. Indep. Sch. Dist.*, 497 S.W.2d 455, 456-57 (Tex. Civ. App.--El Paso 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 991 (1974); *Vick v. City of Waco*, 614 S.W.2d 861, 864 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.). Courts have recognized only two exceptions to the general rule that a public officer's authority may be questioned solely in a quo warranto proceeding: a statutory election contest to determine the correct result of the election and a suit for title to an office by one claiming to be presently qualified to hold the office. *See Lewis*, 641 S.W.2d at 394. Neither exception applies here.

We also note that Election Code section 201.026(b) deems an office vacant on the date an "administrative authority" declares an officer or officer-elect ineligible to hold the office. Although we are uncertain at this point which entities are administrative authorities for purposes of section 201.026(b), we do not believe the phrase includes this office. Rather, we suspect the phrase denotes entities to whom the legislature has delegated the power to declare an officer or officer-elect ineligible for office, such as those entities listed in Election Code section 145.003.

³⁰*Lewis*, 641 S.W.2d at 395.

³¹*See* Attorney General Opinion JM-874 (1988) at 2-3 (and sources cited therein); Letter Opinion No. 88-103 (1988) at 3.

³²Attorney General Opinion JM-874 (1988) at 2-3 (and sources cited therein); *see* Letter Opinion No. 88-103 (1988) at 3.

in 1988 and subsequently appointed in 1991 and 1994. His most recent term expired in April 1997. Mr. Hill was first appointed in 1992 to fill a vacant term, which we assume began in 1990. He was reappointed in 1993 and 1996, and his current term will expire in 1999.

Local Government Code section 143.006(b) requires that the three commissioners serve “*staggered* three-year terms with the term of one member expiring each year.”³³ The term “*stagger*” in this context indicates terms that are arranged so that they do not coincide in time -- so that starting and finishing times overlap.³⁴ In your case, one commissioner began his most recent term in 1994, one in 1995, and one in 1996. One commissioner ended his term in 1997, one will end his in 1998, and one in 1999. As the statute requires, then, one commissioner’s term expires each year. Additionally, the starting and ending years of the three terms overlap.³⁵ In our opinion, the commissioners’ terms are properly staggered.

Although you do not indicate precisely why you are concerned about the staggered terms, we suspect you fear that Mr. Hill’s original appointment to the commission in 1992 is problematic. You state that Mr. Hill was appointed in 1992 to “complete the term” of another commissioner, appointed in 1990, who resigned from office before his term expired. Because of the vacancy, two commissioners were appointed in 1992: Mr. Hill as well as Mr. Seay, who was reappointed to the commission upon the expiration of his first three-year term.

Your fears are unfounded. As the statute is written, a term of office runs with the office rather than with an appointee.³⁶ For example, when a vacancy occurs mid-term, the statute requires the municipality’s chief executive to complete “the unexpired term.”³⁷ Indeed, to construe the statute so that a term of office runs with an appointee would defeat the apparent purpose of the staggered-term requirement: to provide the commission with continuity by rotating the terms of office at

³³[Emphasis added.]

³⁴See XVI THE OXFORD ENGLISH DICTIONARY 452-53 (2d ed. 1989).

³⁵A table illustrates that the terms of office overlap:

	Year term began									
	'88	'89	'90	'91	'92	'93	'94	'95	'96	
Position 1	x			x			x			
Position 2		x			x			x		
Position 3			x			x			x	

³⁶Cf. *People ex rel. Labochotte v. Morris*, 106 P.2d 635, 636 (Cal. Dist. Ct. App. 1940).

³⁷Local Gov’t Code § 143.006(b).

regular intervals.³⁸ Consequently, the term to which Mr. Hill was appointed in 1992 began in 1990 and ended in 1993; it did not begin with his in 1992 and end in 1995.

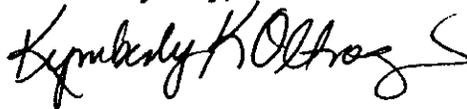
S U M M A R Y

The postmaster of a local post office does not exercise sovereign functions independently of others' control and therefore does not hold a public office. An interim position, such as interim city attorney or interim municipal judge also is not a public office. Consequently, a court probably would find that a postmaster or an individual who has served as interim city attorney or interim municipal judge is eligible for appointment to a municipal fire fighters' and police officers' civil-service commission under Local Government Code section 143.006(c)(5).

On the other hand, members of a tax-appraisal-review board collectively exercise sovereign functions independently of others' control and thus hold public offices. Accordingly, a court probably would find that a member of a tax-appraisal-review board is ineligible for appointment to a municipal civil-service commission under Local Government Code section 143.006(c)(5).

Assuming that a member of a municipal civil-service commission holds a public office, the commission's actions are valid until and unless a court determines in a quo warranto proceeding that one of the commissioners was ineligible for appointment to the commission. Where the starting and ending years of the term of office of each of the three civil-service commissioners overlap, so that one commissioner's term expires every year, the commissioners' terms are properly staggered as Local Government Code section 143.006(c) requires. Additionally, a term of office runs with the office, not with an appointee. Thus, an individual who is appointed to complete a vacant, unexpired term completes the existing three-year term; the appointee does not begin a new three-year term.

Yours very truly,



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³⁸See *People ex rel. Labochotte*, 106 P.2d at 636.