



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 12, 1997

The Honorable Lee Price Fernon
Baylor County Attorney
101 South Washington
Seymour, Texas 76380

Letter Opinion No. 97-081

Re: Whether a county commissioner may also
serve as a reserve deputy sheriff (ID# 39419)

The Honorable Dib Waldrip
Criminal District Attorney
150 North Seguin, Suite 318
New Braunfels, Texas 78130-5113

Dear Messrs. Fernon and Waldrip:

You have each asked the same question, namely whether a county commissioner may also be a reserve deputy sheriff. For that reason, your requests have been consolidated and will be considered together.

Each of your briefs focuses on one of the two doctrinal areas which may be implicated by this question--the Comal County brief on the constitutional question of dual office holding, the Baylor County brief on the common-law doctrine of incompatibility. We shall examine the questions in that order.

As the brief attached to the Comal County request correctly points out, article XVI, section 40 of the Texas Constitution prohibits any person from holding or exercising "more than one civil office of emolument." Even if reserve deputy sheriff were an "office,"¹ the constitutional prohibition in article XVI, section 40 still would not apply, since the position of county commissioner is specifically exempted by its terms from the prohibition. Accordingly, the constitutional ban on dual office holding does not cover the situation presented by your requests.

As the Baylor County letter brief suggests, however, this does not end the inquiry. We must also consider the common-law doctrine of incompatibility. The common-law doctrine of incompatibility prevents a person from holding two public offices whose duties are inconsistent or in conflict ("conflicting loyalties" incompatibility), or appointing himself to another public entity ("self-appointment" incompatibility), or holding an employment subordinate to his public office ("self-employment" incompatibility). Letter Opinion Nos. 94-70 (1994) at 1-2, 95-29 (1995) at 2-3.

¹We do not now decide that reserve deputy sheriffs are employees rather than officers as a matter of law. See Attorney General Opinion DM-212 (1993) (deputy sheriffs do not hold civil office of emolument as matter of law).

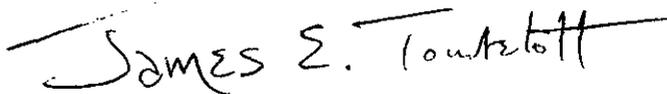
The Baylor County brief suggests that "self-appointment" or "self-employment" incompatibility would bar a commissioner from holding a position as a reserve deputy sheriff, because the sheriff's "accounts and budgets are approved by the membership of the commissioner's court." We disagree. The commissioner's court does not appoint or employ deputy sheriffs. A deputy sheriff "serves at the pleasure of the sheriff." Local Gov't Code § 85.003(c). "[B]oth the appointment and tenure of a sheriff's deputy depend upon the sheriff's sole discretion." *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 754, 756 (Tex. App.--Tyler 1991, no writ). "On the other hand, the commissioners court or members of the court are expressly forbidden to attempt to influence the appointment of any person to an employee position authorized by the court. The commissioners court may limit the number of deputies authorized, but it has no power of naming the individuals to be appointed." *Id.* Nor, in our view, would "conflicting loyalties" incompatibility, which applies only when both positions are offices, *see* Attorney General Opinion JM-1266 (1990) at 4, apply in this situation.

Since the authority of the sheriff to appoint deputy sheriffs is independent of the commissioners court, the common-law doctrine of incompatibility does not apply here. Accordingly, neither article XVI, section 40 of the Texas Constitution nor the common-law doctrine of incompatibility prohibits a county commissioner from also serving as a reserve deputy sheriff. Since the court may compensate a reserve deputy sheriff, *see* Local Gov't Code § 152.075, both the sheriff and the commissioner may wish to consider the apparent propriety of such an appointment; but the appointment is not barred as a matter of law.

S U M M A R Y

Neither article XVI section 40 of the Texas Constitution nor the common-law doctrine of incompatibility prohibits a county commissioner from also serving as a reserve deputy sheriff.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee