



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 28, 1998

Mr. John Maline
Executive Director
Executive Council of Physical Therapy
and Occupational Therapy Examiners
333 Guadalupe, Suite 2-510
Austin, Texas 78701-3942

Letter Opinion No. 98-055

Re: Whether a member of the Texas Board of
Physical Therapy Examiners may simultaneously
hold the office of county clerk (RQ-1094)

Dear Mr. Maline:

You have requested our opinion as to whether a member of the Texas Board of Physical Therapy Examiners may simultaneously hold the office of county clerk.

Article XVI, section 40, of the Texas Constitution provides that “[n]o person shall hold or exercise at the same time, more than one civil office of emolument. . . .” A county clerk holds a salaried position, but a member of the Board of Physical Therapy Examiners does not. A member is entitled, however, “to a per diem as set by the General Appropriations Act for each day that the member engages in the business of the Board.” V.T.C.S. art. 4512e, § 2A. This per diem payment is provided not in lieu of, but in addition to, “reimbursement for meals, lodging, and transportation expenses as provided by the General Appropriations Act.” *Id.* Per diem for state board and commission members is set by the 1997 General Appropriations Act as \$30 per day, in addition to “reimbursement of actual expenses for meals and lodging not to exceed \$80 per day when traveling within the State of Texas,” and “reimbursement of transportation and incidental expenses at the rates specified in this Act for state employees.” Act of May 29, 1997, 75th Leg., R.S., ch. 1452, art. IX, § 4, 1997 Tex. Gen. Laws 5535, 6355.

An “emolument” for purposes of article XVI, section 40, is any pecuniary profit, gain, or advantage paid to an officer, although it does not include the legitimate reimbursement of expenses. Attorney General Opinion DM-55 (1991); *see Irwin v. State*, 177 S.W.2d 970 (Tex. Crim. App. 1944); *see generally* Attorney General Opinion MW-450 (1982). Even a token payment of \$10 per meeting constitutes an emolument.¹ *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964); *see* Attorney General Opinion JM-1266 (1990). Since the \$30 flat rate per diem created by statute exists apart

¹While the term “per diem” in some contexts has come to connote reimbursed meal expenses, the daily \$30 payments in question clearly constitute compensation for services, and thus an “emolument” under article XVI, section 40.

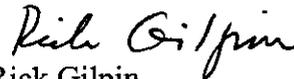
from the reimbursements provided, there can be no question that the \$30 per day payment is in excess of actual expenses. Any payment received in excess of actual expenses constitutes an "emolument." Letter Opinion Nos. 95-001 (1995), 93-033 (1993).

We conclude that a member of the Board of Physical Therapy Examiners holds an "office of emolument," and thus may not simultaneously serve as a county clerk. Furthermore, qualification for and acceptance of a second office operates as an automatic resignation from the first office. *Pruitt v. Glen Rose Indep. Sch. Dist.*, 126 Tex. 45, 84 S.W.2d 1004 (1935). In the situation you pose, if the member of the Board of Physical Therapy Examiners accepts the office of county clerk, she will thus automatically relinquish her position on the board.

S U M M A R Y

A member of the Texas Board of Physical Therapy Examiners holds an "office of emolument," and is thus prohibited by article XVI, section 40, of the Texas Constitution from simultaneously serving as a county clerk.

Yours very truly,



Rick Gilpin
Deputy Chair
Opinion Committee



Executive Council of
Physical Therapy and Occupational Therapy Examiners

Texas Board of Physical Therapy Examiners
Texas Board of Occupational Therapy Examiners

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February 17, 1998

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I.D. # 40089

General Dan Morales
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
ATTN: Opinion Committee

RQ-1094

RECEIVED
FEB 18 1998
Opinion Committee

Re: *Whether a board member may concurrently serve as a county clerk.*

Dear General Morales,

The purpose of this letter is to request an opinion from your office concerning a member of the Texas Board of Physical Therapy Examiners holding an elective office while continuing to serve as a member of the Physical Therapy Board.

Specifically, this board member is seeking election as a county clerk, a position that will pay her remuneration for her services. As a member of the Physical Therapy Board, this board member does not receive any compensation for her services on the Board. This board member does receive reimbursement for travel expenses under Section 2A of the Board's Practice Act.

Please advise if this board member may continue to serve as a board member while concurrently holding the elective office of county clerk should she be elected to such position.

Thank you for your consideration of this request for an opinion from your office. Please contact me if you should require any further information concerning this matter.

Sincerely,

John Maline
Executive Director

cc: Mr. Frank Knapp, General Council Division, OAG