



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

July 17, 2023

The Honorable Dee Hobbs
Williamson County Attorney
405 M.L.K. Street, #7
Georgetown, Texas 78626

Opinion No. AC-0001

Re: Whether, under Texas Constitution article XVI, section 40, a state employee receiving all or part of their compensation from state funds may also receive compensation as an elected member of the Hutto City Council (RQ-0498-KP)

Dear Mr. Hobbs:

On behalf of the Mayor of the City of Hutto ("City"), you ask whether a state employee receiving all or part of their compensation from state funds may also receive compensation as an elected member of the Hutto City Council.¹ Your letter explains that in 2021, voters of the City voted to provide for compensation for the mayor and city council members through its charter rather than fixing compensation by ordinance. Request Letter at 1. As a result, section 3.04 of the City's charter now provides in relevant part:

b) City Council members shall receive as compensation the sum of four hundred dollars (\$400.00) for attendance at each regular City Council meeting; provided, however, that no City Council member shall receive compensation for more than two (2) meetings in any one month.

c) The Mayor and City Council members shall be entitled to all necessary expenses incurred in the performance of their official council duties upon approval by the City Council.

HUTTO, TEX., CITY CHARTER, art. III, § 3.04(b), (c) (2021) ("Charter"). Your letter states that a legislative director for a member of the Texas Legislature was elected to the Hutto City Council on May 7, 2022. Request Letter at 1. As a legislative director, the person receives a salary from

¹See Letter from Honorable Dee Hobbs, Williamson Cnty. Att'y, to Off. of the Att'y Gen., Op. Comm. at 1 (Jan. 24, 2023), <https://www.texasattorneygeneral.gov/sites/default/files/request-files/request/2023/RQ0498KP.pdf> ("Request Letter").

state funds. *Id.* The inquiry stems from the prohibition found in article XVI, subsection 40(b) of the Texas Constitution, which provides that

[s]tate employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts. Such State employees or other individuals *may not receive a salary for serving as members of such governing bodies,*

with certain exceptions not relevant here.² TEX. CONST. art. XVI, § 40(b) (emphasis added); Request Letter at 2. Specifically, you ask “whether a state employee who receives all or part of their compensation from funds of the State of Texas, and who is also an elected . . . member of a municipal governing body, can receive compensation from the elected municipal position while still collecting his state employee salary from the state[.]”³ Request Letter at 2.

The plain language of article XVI, subsection 40(b) prohibits state employees who receive compensation from state funds from “receiv[ing] a salary” for their service as local governmental body members. TEX. CONST. art. XVI, § 40(b) (emphasis added). This office previously advised you regarding whether the compensation provided by subsection 3.04(b) of the Charter constitutes a “salary” for purposes of the prohibition in article XVI, subsection 40(b). *See* Tex. Att’y Gen. Op. No. KP-0414 (2022). In Opinion KP-0414, we were unable to predict with certainty whether a court would equate the term “salary” with “compensation” because no court had directly addressed the meaning of the terms “salary” and “compensation” in article XVI, subsection 40(b). *Id.* at 2–3. No court has construed these terms as they are used in article XVI, subsection 40(b) since the time KP-0414 was issued.

Opinion KP-0414 did advise, however, that by virtue of its home-rule status the City has discretion to construe the per-meeting payment in subsection 3.04(b) of the Charter, subject to judicial review. *Id.* at 3–4. You do not inform us that the City has made any such determination but we are aware that the City approved a resolution stating that “[t]he ‘compensation’ received under section 3.04(b) of the Charter is different from the reimbursement of expenses under section 3.04(c) of the Charter and is a ‘salary’ under subsection 40(b), article XVI of the Texas Constitution.”⁴ So construed, a city council member employed as a legislative director and

²Article XVI, subsection 40(b)(1) excepts certain schoolteachers and administrators from the prohibition, allowing them to “receive compensation for serving as a member of a governing body of a school district, city, town, or local governmental district, including a water district” TEX. CONST. art. XVI, § 40(b)(1). In addition, article XVI, subsection 40(b)(2) allows certain higher education faculty members to “receive compensation for serving as a member of a governing body of a water district” *Id.* § 40(b)(2).

³We understand you to ask whether the affected council member may receive the per-meeting payment set forth in subsection 3.04(b) of the Charter.

⁴City of Hutto Council Meeting Minutes at 10 (Oct. 20, 2022) (council action approving Resolution No. R-2022-089), available at <https://www.huttotx.gov/129/Agendas-Minutes-Archive>; *see also* City of Hutto Resolution No. R-2022-089 (unsigned copy on file with the Op. Comm.).

receiving compensation from the State of Texas for that employment must decline⁵ the per-meeting payment of subsection 3.04(b) of the Charter in order to avoid violating article XVI, subsection 40(b).⁶

To the extent the underlying question is whether there would be a conflict between the Charter, which provides that “City Council members *shall* receive” the salary payment, and the Texas Constitution, which provides that an individual meeting the circumstances of article XVI, subsection 40(b) “may not receive a salary,” we address it briefly. HUTTO, TEX., CITY CHARTER, art. III, § 3.04(b) (2021) (emphasis added); TEX. CONST. art. XVI, § 40(b). The City is a home-rule city that derives its authority from the Texas Constitution and the Charter adopted by its voters. *Powell v. City of Houston*, 628 S.W.3d 838, 842 (Tex. 2021). As such, the City “may exercise all powers not denied to [it] by the Constitution or state law.” *Id.*; *see also* TEX. CONST. art. XI, § 5(a) (providing that a charter provision may not be inconsistent with the Texas Constitution). Article XVI, subsection 40(b) expressly prohibits an individual described therein from receiving a salary for serving as a member of a city’s governing body. TEX. CONST. art. XVI, § 40(b). To the extent the City construes subsection 3.04(b) of the Charter to mandate that a city council member receive a per-meeting salary payment, it is unenforceable as applied to a council member who is prohibited from receiving salary under article XVI, subsection 40(b). As the Charter provision is unenforceable in those circumstances, an affected council member declining the per-meeting payment does not violate the Charter.

⁵Your letter refers to prior opinions of our office concluding that compensation attached to an office is an incident of office that cannot be repudiated to avoid the dual office holding prohibition of subsection 40(a) of the Texas Constitution. *See* Request Letter at 2; *see also* TEX. CONST. art. XVI, § 40(a) (stating that “[n]o person shall hold or exercise at the same time, more than one civil office of emolument,” with certain exceptions not relevant here). However, that analysis does not apply here because article XVI, subsection 40(b) concerns state-paid individuals “who are not State officers[.]” TEX. CONST. art. XVI, § 40(b); *see also* Tex. Att’y Gen. Op. No. KP-0265 (2019) at 1–2 (explaining that both positions must be “officers” for the dual office holding prohibition of subsection 40(a) to apply). In declining the per-meeting payment, the affected council member is not attempting to change the character of the city council position from being an office of emolument but, instead, is simply obeying subsection 40(b)’s condition for being a state employee and a member of a municipal governing body. Thus, our analysis in prior opinions concerning the repudiation of salary under subsection 40(a) does not apply in the present context and the affected council member is not prohibited from declining the per-meeting payment of the Charter.

⁶Our conclusion should not be read to restrict the city council from including the salary amount for the council member position in its annual budget, as the constitutional prohibition concerns the *receipt* of salary by an individual so long as the circumstances disqualifying the receipt of salary remain in place. *See* TEX. CONST. art. XVI, § 40(b).

S U M M A R Y

Article XVI, subsection 40(b) of the Texas Constitution prohibits a state employee who receives all or part of their compensation from state funds from receiving a salary for serving as an elected member of the Hutto City Council. As the Hutto City Council has construed the per-meeting payment provided by subsection 3.04(b) of the Hutto City Charter to constitute “salary” under article XVI, subsection 40(b), a state employee serving as a council member must decline the charter’s salary payment in order to comply with article XVI, subsection 40(b).

Very truly yours,

A handwritten signature in black ink that reads "Angela Colmenero". The signature is written in a cursive, flowing style.

ANGELA COLMENERO
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