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The Texas Senate
Committee on Criminal Justice

RQ-0616-JC

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OPINION COMMITTEE

October 3, 2002

Ms. Susan Gusky
Division Chief, Opinions Committee
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-42826-02
I.D. # 42826

Dear Ms. Gusky,

I would appreciate an Attorney General's opinion regarding the City of Wharton.

Thank you in advance for the time and consideration for this request. If you have any questions, please call Steve Foster in my committee office at (512) 463-0345.

Sincerely,

Kenneth Armbrister

REQUEST FOR ATTORNEY GENERAL OPINION

FACTS

In May, 1999, Domingo Montalvo was elected to the Wharton City Council. Some time in the year 2000, Montalvo was approached by a member of the Selective Service Local Board and asked if he was interested in a similar Selective Service position. Montalvo indicated that he would be willing to serve, and in August 2001, completed the paperwork to be appointed. On August 8, 2001, the Selective Service System issued a Certificate of Appointment to Montalvo. (This certificate and the accompanying correspondence is attached at Tab "1".)

At the time of his appointment, Montalvo was informed he was required to undergo training before he could serve on the board. The first training opportunity came in May, 2002. However, on that weekend was the Wharton mayoral election in which Montalvo was a candidate, so he did not attend training. Before the May 2002 training weekend, Montalvo attempted to attend a Selective Service board meeting in Houston, but was not allowed in because he had not received the required training.

On July 7, 2002, Wharton mayor Garland Novosad sent Montalvo a letter stating that he believed when Montalvo accepted the Selective Service appointment, he had automatically resigned his position as a city councilman. (Tab "2") Montalvo immediately resigned his position on the Selective Service board and is now working to change the provision in Texas law which prohibits concurrent service on a city council and a Selective Service Local Board.

LEGAL AUTHORITY

Article 16, Section 12 of the Texas Constitution states:

"No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit

or trust under this State."

Attorney General Opinion MW-360, in interpreting this section of the Texas Constitution, states that a position on a selective service board is a position of "trust, under the United States," and that it was therefore prohibited for anyone to hold a state, county, or city elected position while serving on a Selective Service local board. (Tab "3")

Texas law also holds that when a person accepts an office which is incompatible with an office already held, he is deemed to have resigned the first office. Article 16, Section 40 of the Texas Constitution states that a person cannot hold more than one office of emolument. Further, the Texas Supreme Court in *Pruitt, et al., v. Glen Rose I.S.D.*, 84 S.W.2d 1004, 1006 (Tex. 1935), held that the acceptance and qualification of the second office serves, *ipso facto*, as a resignation of the first office. (Tab "4")

QUESTION TO BE ANSWERED

Neither of the parties disputes the law with regard to the dual office holding. However, the question is whether Domingo Montalvo both accepted and qualified for the position on the Selective Service board.

Even though he had accepted the appointment, Montalvo contends that since he did not receive the required training, he could not serve, and therefore was not qualified as a Local Board Member.

Did Domingo Montalvo's acceptance of the position on the Selective Service Local Board serve as an automatic resignation of his city council position?