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OPINION COMMITTEE

RQ-0076-GA

June 30, 2003

VIA FIRST CLASS UNITED STATES CERTIFIED MAIL
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The Honorable Greg Abbott
Texas Attorney General
ATTN: Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43176-03 FILE # _____
I.D. # 43176 I.D. # _____

Re: Creation of Ellis County Purchasing Agent Position

Dear Attorney General Abbott:

Ellis County is considering creating the statutory position of Purchasing Agent under Section 262.0115 of the Texas Local Government Code. Section 262.0115 states, in part, that the purchasing agent serves at the pleasure of the Commissioners Court without a fixed term. According to Section 262.0115(d), under supervision of the Commissioners Court, the purchasing agent shall carry out the duties prescribed by law under Section 262.011 and for the County Auditor in regard to County purchases and contracts. Under Section 262.011, the County agent may enter into contracts for purchase of certain property on behalf of the County except where required to be made by bid. Further, pursuant to statute, the County purchasing agent shall transfer County supplies and equipment among various County departments, prepare an inventory and cooperate with the purchasing agent of a municipality to purchase any item in volume as may be necessary.

The person who currently assists Ellis County in County purchasing activities is currently the Mayor of Midlothian, Texas, a home rule city in Ellis County. As Mayor, he receives no emolument. This person is the most likely candidate to fill the position of County Purchasing Agent upon creation of the position.

He has asked the Ellis County and District Attorney for an opinion as to the possible effect of his appointment to the Purchasing Agent upon his ability to serve as the Mayor of Midlothian with respect to dual office holding or incompatibility of office.

Issue:

May the Mayor of a home rule city, who receives no emolument, serve as a statutory County Purchasing Agent pursuant to Section 262.0115 without being deemed to have submitted his automatic resignation as Mayor upon appointment as County Purchasing Agent?

Answer:

Under the Texas Constitution, as he receives no emolument as Mayor, he may so serve in both positions. But under the common law doctrine of incompatibility, he may not.

Discussion:

1. Texas Constitution:

The Texas Constitution forbids a "public official" from holding more than one position of emolument. In this particular case, the mayoral position does not provide emolument. For this reason, the Texas Constitution does not prevent the Mayor from also serving as a statutory purchasing agent.

2. Common law doctrine of incompatibility:

This common law doctrine does not depend on the emolument element of the Texas Constitution, but on whether certain factors are present, such as whether there is anything relating to contact between the two positions; anything inconsistent between the two positions; if one position is somehow subordinate or accountable to the other position; or if the two positions demand dual allegiance to potentially conflicting authority. One key element appears to depend on whether both positions are considered "public offices."

There is no question that the mayor is a public officer. The issue of purchasing agent depends upon whether the purchasing agent is a "mere employee" or whether the office constitutes a public office. If he is a mere employee, then the doctrine does not apply. Under the applicable statutory provision, the purchasing agent serves at the pleasure of the Commissioners Court.

Certain Attorney General opinions have indicated that the doctrine does not apply to employees. One key is to determine whether the person serves at will or if he is appointed or elected for a certain term, but this element alone is not determinative of the employee versus public office issue.¹

¹One could argue that in a certain sense, all officials including the governor are employees and indeed many public officials are subject to recall elections, a form of at-will employment.

The Texas Supreme Court has held the determinative element is the essential nature of his duties: "The determining factor which distinguishes a public officer from an employee is whether any sovereign function of government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Aldine ISD v. Standley* 154 Tex 547, 280 S.W. 2d 578, 585 (1955)²

The purchasing agent is statutory and clearly endowed with certain discretionary functions and the sovereign power to enter into contracts. Under the statutory scheme the purchasing agent may be terminated "at will," but before he is terminated, he has independent authority to enter into contracts on behalf of the County except where required to be made by bid. On the other hand, if he were just a mere employee, such as a purchasing clerk, his job duties would be merely clerical or ministerial functions where he exercised no discretion.

Attorney General Opinion JC-0264, demonstrates this distinction in ruling that the Commissioners Court is authorized to hire persons necessary to conduct County business, provided that the employee is subject to direct control and there is no delegation of sovereign authority. Clearly the Commissioners Court may not delegate to the employee the authority to make purchases or enter into contracts binding on the County. The employee may only carry out ministerial duties in the absence of an appointment of a purchasing agent under Section 262.001 or 262.0115. Hence the appointment of a statutory purchasing agent means a "sovereign function of government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." *Aldine, supra*.

For this reason, the position of purchasing agent constitutes a form of public office. Further, as purchasing agent, he may cooperate with a municipality to purchase items individually. Without impinging the character of the current candidate, this ability would give "mixed loyalties" to the County and to the City of Midlothian as well as the power to impair other cities who might compete with Midlothian and to Ellis County. Further, the entire city limits of Midlothian are located within the boundaries of Ellis County.

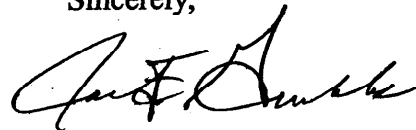
As purchasing agent, the purchasing agent should owe direct allegiance to the Commissioners Court and Ellis County to exercise his discretionary sovereign powers to solely seek what is best for Ellis County. Just as the Commissioners would appear unable to also serve on the City Council due to the doctrine of incompatibility, then the purchasing agent who possesses certain sovereign powers

²Unfortunately, the case law and Attorney General opinions are conflicting and do not provide a precise bright line. For many years, deputy sheriffs and deputy clerks were public officials, but the current trend has been to hold that deputy clerks and deputy sheriffs are not public officials. (Compare Op. Tex. Atty. General No. 0-697 with No. DM-212). Further, some managerial positions (such as school superintendent) have been held to be a public office while other similar positions have not. For example, the mayor could not serve as County Auditor nor as an Assistant County Auditor. Indeed, the *Aldine* Court indicated that a person occupying a position may be a public officer for some purposes, but not other purposes.

otherwise reserved to the Commissioners Court, would owe direct allegiance to potentially conflicting bodies and be disqualified under the doctrine of incompatibility.

For this reason, the Mayor is disqualified from holding both positions under the common law doctrine of incompatibility.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe F. Grubbs". The signature is fluid and cursive, with the first name "Joe" and last name "Grubbs" clearly legible.

Joe F. Grubbs,
Ellis County & District Attorney

cc: Chad Adams, Ellis County Judge
Ellis County Commissioners
David Setzer