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OPINION COMMITTEE

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February 7, 2018

RQ-0270-KP

Honorable Ken Paxton
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FILE # ML-48495-19
I.D. # 48495

Re: Request for Opinion regarding:

1. whether a County commissioners court may appoint a sitting regent of a public university system to a county hospital district's board of trustees
2. whether Tex. Gov't Code Ann. § 574.005, Tex. Local Gov't Code Ann. § 791.004, or any other statute, repeals the common law doctrine of incompatibility
3. whether common law incompatibility is determined as a matter of law or is a fact-specific inquiry
4. whether the common law doctrine of contract incompatibility is limited to contracts under which one entity may "impose its policies" upon the other
5. whether, irrespective of Chapter 171 of the Local Government Code, a dual office holder may recuse himself or herself, or abstain from voting

Dear General Paxton:

As the attorney for both Harris County and Harris Health System ("Harris Health"), a county hospital district and political subdivision of the State of Texas¹, the Office of the Harris County Attorney is requesting your opinion concerning the appointment of a sitting University of Texas System regent to the Harris Health Board of Trustees.

¹ TEX. CONST. ART. IX § 4. Tex. Health & Safety Code Ann. § 281.002. See also Texas Gov't Code Ann. § 2254.021(p) (defining political subdivision as including an hospital district); *Harris County Hosp. Dist. v. Tomball Regional Hosp.* 283 S.W.3d 838, 842 (Tex. 2009) ("Governmental immunity protects political subdivisions of the State from lawsuits for damages . . . Hospital districts have such immunity."); *Seamans v. Harris Cnty. Hosp. Dist.*, 934 S.W.2d 393, 395 (Tex.App.—Houston [14th Dist.] 1996, no writ) ("Under the doctrine of sovereign immunity, the State is not liable for the torts of its officers or agents in the absence of a constitutional or statutory provision therefor . . . State agencies such as the Harris County Hospital District share this governmental immunity.").

Harris County commissioners court created Harris Health on January 1, 1966. Today, Harris Health is a fully integrated healthcare system that cares for all residents of Harris County, Texas. It is the first accredited healthcare institution in Harris County to be designated by the National Committee for Quality Assurance as a Patient-Centered Medical Home and is one of the largest systems in the country to achieve the quality standard. Harris Health consists of 18 community health centers, five same-day clinics, five school-based clinics, three multi-specialty clinic locations, a dental center and dialysis center, mobile health units, a rehabilitation and specialty hospital, and two full-service hospitals. Its Board of Trustees, who receive no compensation,² is appointed by Harris County commissioners court in accordance with Tex. Health & Safety Code Ann. § 281.021(c).

Harris Health is proud of its clinical affiliations with nationally recognized schools of medicine, including McGovern Medical School at The University of Texas Health Science Center at Houston (“UTHealth”) and The University of Texas Health Science Center School of Dentistry, both part of The University of Texas System (“UT”). These academic affiliations provide Harris Health patients with access to some of the finest medical care in Southeast Texas.

UTHealth is the most comprehensive academic health center in the UT System and the U.S. Gulf Coast region and is home to schools of biomedical informatics, biomedical sciences, dentistry, medicine, nursing and public health. UTHealth educates more healthcare professionals than any health-related institution in Texas and features the nation’s seventh-largest medical school. More than 5,000 physicians have earned their medical degrees from UTHealth and the school provides residency and fellow training, as well as, continuing education programs for practicing physicians. UTHealth staffs Harris Health’s Lyndon B. Johnson Hospital, a primary teaching hospital, and many of Harris Health’s growing network of health centers throughout Harris County. UTHealth’s 10,000-plus faculty, staff, students and residents are committed to delivering innovative solutions that create the best hope for a healthier future for the residents of Harris County.

Since its founding in 1905, the University of Texas Health Science Center School of Dentistry has graduated more than 6,000 dentists, 1,850 dental hygienists and nearly 1,500 post-graduate specialists. As the only dental school in southeast Texas, it is a primary source of quality oral health care for low-income families, the traditionally underserved, and for patients with special needs and/or medical comorbidities. Currently, the school offers 10 accredited programs: DDS, dental hygiene, two primary care general residency programs and six specialty programs in pediatric dentistry, endodontics, oral and maxillofacial surgery, prosthodontics, periodontics and orthodontics. Students gain clinical skills at Harris Health’s on-site clinics, Ben Taub and Lyndon B. Johnson Hospitals, and community outreach projects.

Beginning as early as 1988, physician services have been provided by UT Health to Harris Health (formerly the Harris County Hospital District) through Affiliated Medical Services, a non-profit corporation limited to two members--the UT Board of Regents representing UT Health and Baylor College of Medicine. Individual contracts for physician services between Affiliated Medical Services and Harris Health have not been presented to the UT Board for approval; however, the Board authorized the formation of AMS and appointed the UT representatives to the

² Texas. Health & Safety Code Ann. § 281.024.

AMS Board prior to delegating those selections to the institutional president in 2004. In addition, the UT Board approved an ongoing affiliation agreement between the Harris County Hospital District and UT Nursing School – Houston in 1987 and the terms of a sub-affiliation agreement between the Board, on behalf of the UT Medical School – Houston, and AMS in 1990.

Janiece Longoria currently serves on UT's Board of Regents. Governor Greg Abbott appointed her to a six-year, non-compensated,³ term in January 2017 and the Texas Senate confirmed her on February 7, 2017 (after she previously served as a UT regent from 2008 to 2011).

During her current tenure as a UT regent, Ms. Longoria also served on the Boards of Directors of two private companies, CenterPoint Energy, Inc. and Superior Energy Services, Inc., and was unanimously appointed by Harris County commissioners court and the City of Houston city council to chair the Port of Houston Authority ("Port Authority") from January 2013 until January 2019.

On December 18, 2018 Harris County Commissioners Court appointed Ms. Longoria serve on Harris Health's Board of Trustees. Ms. Longoria has not yet accepted the appointment and has not performed any actions in connection with such appointment, wishing to await an opinion from the Attorney General.

The Office of the Attorney General has held that dual state and county office holding is not barred in every circumstance.

Except for specified offices, Article XVI, Section 40, of the Texas Constitution prohibits individuals from "hold[ing] or exercis[ing] at the same time, more than one civil office of emolument" When state and county offices do not involve "emolument," however, dual office holding is not generally prohibited. For example:

[a]n individual who holds an elected or appointed local government office may be appointed to the governing body of a state agency if otherwise eligible. The individual may not receive compensation for serving on the governing body of the state agency but may be reimbursed as provided by other law for a reasonable and necessary expense incurred in the performance of an official function.⁴

Tex. Gov't Code Ann. § 574.005(b). Thus, the Attorney General has held that a "county clerk may be appointed as a director of the Sabine River Authority to serve simultaneously in both offices without violating the Texas Constitution" so long as the common law doctrine of incompatibility does not otherwise bar the individual from service. Tex. Atty. Gen. Op. GA-0250.

³ Tex. Educ. Code Ann., Title 3.

⁴ "Local government" means a county, a municipality, a special district or authority, or another political subdivision of this state" while "State agency" means a department, commission, board, office, council, authority, or other agency in the executive branch of state government that is created by the constitution or a statute of this state, including a university system or institution of higher education as defined by Section 61.003, Education Code." Tex. Gov't Code Ann. § 574.005(a).

This common law rule “prevents one from holding two public offices the duties of which are inconsistent or in conflict . . . , appointing oneself to another public entity . . . , or holding an employment subordinate to one’s public office. *Id.*

The Attorney General has never specifically addressed whether Tex. Gov’t Code Ann. § 574.005(b) repealed the common law doctrine of incompatibility.

The Attorney General issued Tex. Atty. Gen. Op. GA-0015 on January 24, 2003. In March of that same year, the Texas Senate passed § 574.005 (as S.B. 735) while, in May 2003, the House did the same. The law became effective in June 2003, subsequent to GA-0015’s pronouncement that Chapter 171 of the Local Government Code did not repeal the common law doctrine of incompatibility. Further, although Tex. Atty. Gen. Op. GA-0250 followed § 574.005, the opinion does not address whether the passage of § 574.005 repealed the common law.

Additionally, 791.004 of the Texas Local Government Code provides that “[a] person acting under an interlocal contract does not, because of that action, hold more than one civil office of emolument or more than one office of honor, trust, or profit.” Tex. Local Gov’t Code Ann. § 791.004. The Office of the Attorney General has apparently never addressed whether § 791.004 repeals the common law.⁵

Confusion exists regarding whether the incompatibility determination is legal or factual.

Parts of GA-0250 (for example, the conclusion that “[i]t is well established that when two governmental bodies are authorized to contract with each other, one may not serve as a member of both”) suggest that the determination of whether two offices are incompatible is made as a matter of law. On the other hand, in recognizing that “exercising independent and disinterested judgment” is a factor to be considered when looking at incompatibility, GA-0250 simultaneously suggests the determination is fact-specific. (citing Tex. Atty. Gen. Op. 0169 and *Thomas v. Abernathy Cnty. Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm’n App. 1927, judgm’t adopted)).

Likewise, though Tex. Atty. Gen. Op. GA-0015 holds “that the offices of county commissioner and city council member in the same county are incompatible as a matter of law,” Tex. Atty. Gen. Op. JM-1266 says “the common law doctrine of incompatibility may, but does not as a matter of law, prohibit a single individual from serving both as a member of a board of directors of a navigation district and as a city council member of a municipality where the territory of the district and municipality overlap.” Rather, the two offices have merely a “potential” for being incompatible if they contract with one another.

Still, in other cases, the Attorney General’s Office has suggested the analysis may be both: “[i]n *most* instances, whether or not two positions are legally incompatible is a fact question” (emphasis added) Tex. Atty. Gen. Op. JM-634 (quoting Tex. Atty. Gen. LA No. 62 (1973)); Tex. Atty. Gen. Op. GA-0786 (“[i]n prior opinions this office has determined that mutual contracting

⁵ Although, the Attorney General did cite the statute in briefing in *Perry v. People for Efficient Transp. Inc.*, No. 03-06-00147-CV; In the Third Court of Appeals of Texas.

authority renders particular offices incompatible as a matter of law On the other hand, this office has also stated that whether the contracting authority of governmental entities renders offices on their boards incompatible may depend on particular facts and circumstances.”).

**Clarification is needed regarding whether certain types
of contracts invoke the incompatibility analysis**

In Tex. Atty. Gen. Op. JM-133, the Attorney General stated that “[t]he doctrine of incompatibility prohibits one person from occupying two offices when one office ‘may thereby impose its policies on the other or subject it to control in some other way.’” Consequently, the office of county auditor and city councilmember are incompatible because councilmembers vote on contracts with counties while county auditors have the power to stop payments to cities (even after commissioners court has approved payment). The opinion relied, in part, upon *Thomas*’ conclusion that:

the offices of school trustee and alderman are incompatible; for under our system there are in the city council or board of aldermen various directory or supervisory powers exercisable in respect to school property located within the city or town and in respect to the duties of school trustee performable within its limits--e. g., there might well arise a conflict of discretion or duty in respect to health, quarantine, sanitary, and fire prevention regulations If the same person could be a school trustee and a member of the city council or board of aldermen at the same time, school policies, in many important respects, would be subject to direction of the council or aldermen instead of to that of the trustees.

Thomas, 290 S.W. 152.

Reaffirming JM-133, though, Tex. Atty Gen. LO-88-49 (1988) went on to say that the “the *main reason*” JM-133 held that a person cannot simultaneously serve as county auditor and city councilmember was because of the mere possibility “that cities and counties may contract with each other” (emphasis added).

In reaching the conclusion that the offices of county commissioner and city councilmember (within the same county) are incompatible, the Attorney General’s Office relied upon various provisions in the Interlocal Cooperation Act, Health & Safety Code, and Local Government Code that “authoriz[e] county-city contracts for services such as law enforcement fire protection, and road construction, . . . emergency medical services . . . library services,” acquisition of “[a] park, playground, museum, or [other] site . . . [and] law enforcement assistance.” Tex. Atty. Gen. Op. GA-0015. GA-0015 also relied upon *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). Setting aside that *Hill* is a criminal law plurality opinion, *Hill* specifically recognizes that, in determining whether two offices are incompatible, “the *crucial* question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.” (emphasis added) *Hill*, at 930.

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The Attorney General took a somewhat different approach in Tex. Atty. Gen. Op. GA-0169, holding that the doctrine of incompatibility “prohibits an individual from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions. It most often occurs where two governmental bodies have overlapping geographical jurisdiction, *and* each has the power of taxation or the authority to contract with each other.” (emphasis added).

Given these varying standards, clarification is needed so that governmental bodies can determine when, and what types of, contractual relationships are incompatible.

The Attorney General has not considered whether, outside of Chapter 171 of the Local Government Code, a dual office holder may be recused or abstain

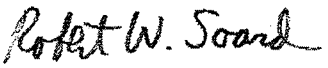
In Tex. Atty. Gen. Op. GA-1083 (2014), the Attorney General opined that Chapter 171 of the Local Government Code only applies to financial conflicts of interests of local government officials. Consequently, GA-1083 concluded that Chapter 171 has no application to an incompatibility inquiry.

The Attorney General has not, however, considered whether local government official abstention or recusal exists, or applies, outside of a Chapter 171 context. Nor has the Attorney General considered whether Chapter 572 of the Government Code (which concerns, not only pecuniary matters, but “direct and indirect interest[s] . . . other” than financial matters) applies.

For these reasons, the Office of the Harris County Attorney respectfully request that you issue an opinion regarding the authority of a county commissioners court to appoint a sitting regent of a public university system to a county hospital district’s board of trustees.

Very truly yours,

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By: 
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