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By Opinion Committee at 9:42 am, Nov 13, 2020

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November 13, 2020

VIA Email: [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)  
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Opinion Committee  
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Dear Sir or Madam,

I am writing to request, on behalf of Burleson County Sheriff Gene Hermes, an Attorney General's opinion as to whether either Article XVI §40 of the Texas Constitution or the common law doctrine of incompatibility would prohibit Mr. Hermes from assuming, and holding simultaneously with his position as Sheriff, the position of Fire Marshal for the city of Caldwell, Texas.

### **I. Background**

Gene Hermes is the Sheriff of Burleson County. In brief, the mission of the Burleson County Sheriff is to, among other things, protect the people and property of Burleson County, to enforce the laws of the State of Texas, and to run the Burleson County Jail. Caldwell is a city entirely within Burleson County. A fire marshal is appointed by the Caldwell City Manager. The Fire Marshal's mission is, primarily, to reduce the occurrence of fires within the city of Caldwell by conducting inspections of facilities such as hospitals, schools, and nursing facilities. The Fire Marshal is a salaried position that, administratively, is located within the Caldwell Fire Department. However, in performing these duties, the Fire Marshal has no direct report within the Fire Department and serves at the pleasure of the City Manager.

### **II. Constitutional Prohibition against Dual Office Holding**

**RQ-0386-KP**  
**FILE# ML-48901-20**  
**I.D.# 48901**

Article XVI § 40 of the Texas Constitution provides that "No person shall hold or exercise at the same time, more than one civil office of emolument." For the purposes of this provision, a "civil office of emolument" is limited to an individual for whom a "sovereign function of the government [has been] conferred [for him] to . . . exercise[] . . . for the benefit of the public largely independent of the control of others," *i.e.* a "public officer," as opposed to an "employee." Tex Att'y Gen. Op. No. GA-365 (2005) at 2 (quoting *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955)). In addition, for purposes of this constitutional prohibition, an office is only "of emolument" if it receives some kind of salary of compensation. *See, e.g.*, Tex Att'y Gen. Op. No. JM-594 (1986) at 1-2.

Here, the Attorney General's Office has previously opined that a Sheriff is a civil office of emolument. *See* Tex Att'y Gen. Op. No. KP-54 (2015) at 2. Moreover, the City of Caldwell Fire Marshall receives a salary. The issue, therefore, is whether the Fire Marshal has largely-independent authority to exercise for the benefit of the general public. As previously stated, the Fire Marshal has no substantive direct supervision or control from the Fire Department in conducting inspections, and is appointed directly by the Caldwell City Manager. Accordingly, the position of Fire Marshall appears to be a public office. So assuming, the constitutional provision set forth above would prohibit Mr. Hermes from simultaneously holding the positions of Burleson County Sheriff and the City of Caldwell Fire Marshal. If so, it is worth noting that the prohibition could not be bypassed simply by Mr. Hermes declining to accept the Fire Marshal's salary. *See* Tex Att'y Gen. Op. No. JM-704 (1987) at 2.

### **III. Common Law Doctrine of Incompatibility**

The common law doctrine of incompatibility, specifically conflicting-loyalties incompatibility, prohibits an individual from holding two offices where doing so "is detrimental to the public interest or [where] the performance of [one office's] duties . . . interferes with the performance the other [office's duties]." KP-54 at 2 (quoting *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994)). This doctrine only applies to "public officers," as defined by the same standards set forth above. *Id.* Moreover, where, as here, "the geographical boundaries of two governmental bodies overlap, there is always the potential for conflict . . . ." *See* Tex Att'y Gen. Op. No. GA-307 (2005) at 4.

Here, as explained above, the two positions appear to be public offices. The jurisdiction of the Caldwell Fire Marshall falls entirely within the jurisdiction of the Burleson County Sheriff. Should the need arise, the Sheriff's Office would have the authority to conduct criminal investigations of members of the Fire Department, of which the Fire Marshal is a part, albeit an independent one. *C.f.* Tex Att'y Gen. LO-95-29 (county attorney could not also serve as a school board trustee because the county attorney's authority to investigate the school board created conflicting loyalties). Additionally, one could imagine a situation where the Sheriff's Office is conducting a criminal investigation related to a facility which submitted to an inspection by the Caldwell Fire Marshal. Otherwise, there are no obvious circumstances in which the performance of the duties of the Burleson County Sheriff would interfere with the duties of the Caldwell Fire Marshal, or vice versa.

#### **IV. Conclusion**

In conclusion, I am writing to request, on behalf of Burleson County Sheriff Gene Hermes, an attorney general's opinion as to whether either Article XVI §40 of the Texas Constitution or the common law doctrine of incompatibility would prohibit Mr. Hermes from assuming, and holding simultaneously with his position as Sheriff, the position of Fire Marshal for the city of Caldwell, Texas. As explained above, the constitutional provision would appear prohibit Mr. Hermes from simultaneously holding both positions, whereas the common law doctrine of incompatibility is a closer call.

Yours Respectfully,



Susan Deski  
Burleson County Attorney