ELECTION LAW: GETTING ON THE BALLOT AND STAYING IN OFFICE – RESIGNING TO RUN, HOLDOVERS, AND CONFLICTS

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ELECTION LAW: GETTING ON THE BALLOT AND STAYING IN OFFICE – RESIGNING TO RUN, HOLDOVERS, AND CONFLICTS

I. RESIGN-TO-RUN

A. The Context of the Resign-to-Run Provisions of the Constitution

County and city officials who plan to seek other offices must consider the effect of resign-to-run provisions of the Texas Constitution. The provisions, found at article XVI, section 65, and article, XI, section 11, date to 1958 and developed after the Constitution was amended to permit longer terms for local officials.

The Texas Constitution provides that the maximum length of terms for offices is two years unless otherwise fixed by the Constitution. TEX. CONST., art. XVI, § 30(a). In 1954, article XVI, section 65, was added to the Constitution to lengthen the terms of county and district officers from two to four years and to stagger the terms so that roughly half of the offices would be on the ballot each two years. By lengthening the terms and providing for the staggered terms, the original version made it possible for an officeholder to run for a different office in the middle of his or her term while having a safety net so that, in the event of a loss, the official would retain the original position. Further, if the candidate running in the middle of a four-year term was successful, a vacancy would be created

As a result, just four years after its initial enactment, section 65 was amended in 1958 to address the concern about mid-term efforts to move up to different and perhaps more prestigious positions. The solution was to remove the safety net by adopting the resign-to-run part of the provision saying that persons who run for a different office with more than a year[1] left in the term would automatically resign upon announcing or filing for the new office. Also, in the 1958 legislative session, the Legislative proposed an essentially parallel provision applying to home-rule cities. The amendment permitted home-rule ciities to adopt terms of office of up to four years but provided that if a person filed to run for a different office or announced for that different office with more than a year left in the term, he or she would automatically resign the original office.

Thus, the county provision (article XVI, section 65) now provides:

> Sec. 65. (a) This section applies to the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys; County Surveyors; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.
>
> (b) If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

TEX. CONST., art. XVI, § 65.

The provision relating to home-rule cities (article XI, section 11) provides:

> Sec. 11. (a) A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4)

[1] While the 1958 version applied to persons who announced for a different office with more than a year left in their term, a 2011 amendment lengthened the amount of time remaining in the original office from a year to a year and 30 days. The change was made to reflect the earlier primary filing deadline adopted that year. Act of May 29, 2011, 82nd Legis., R.S., ch. 1318, § 29 (amending TEX. ELEC. CODE, § 172.023(a)). The original constitutional provision was designed to trigger a resignation when someone became a candidate in the middle of a four-year term. When the filing deadline was moved from January to the second Monday in December, the resign-to-run provision would catch persons seeking a new office to commence on the expiration of the current term, since they would need to file in December when a year and two or three weeks were remaining in their term. Thus, the time set out in the constitutional provision was lengthened by 30 days to preserve the original intent of the provision and to avoid requiring the resignation of officials seeking a different office on the expiration of their regular term.

> years; provided, however, that tenure under Civil Service shall not be affected hereby; provided, however, that such officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies.

TEX. CONST., art. XI, § 11(a).

Article XVI, section 65, was challenged as violating the Equal Protection Clause, and the district court and Fifth Circuit found it to be constitutionally deficient. The United States Supreme Court, however, reversed the lower courts and, applying rational-basis review, found that the resign-to-run provision was constitutional even though it applied only to certain officials and did not impose similar restrictions on others. *Clements v. Fashing*, 457 U.S. 957 (1982). The suit additionally challenged article III, section 19, of the Texas Constitution, which made various officials ineligible for the legislature during the term for which they were elected or appointed. It was a more draconian provision as it did not permit a resignation option but instead simply made the officials ineligible for the legislature until the term ended. The Supreme Court directed most of its attention to the challenge to that section and found it, as well as article XVI, section 65, to be constitutional.

B. Triggering the Resign-to-Run Provision

The triggering event that results is automatic resignation in article XVI, section 65, and in article XI, section 11, which incorporates section 65 of article XVI, is "announc[ing] their candidacy, or . . . in fact becom[ing] a candidate." The text of the Constitution recognizes two potential triggering events—either announcing for another office or becoming a candidate. Since the resignation is automatic upon occurrence of the triggering event, the relevant legal question is what constitutes announcing one's candidacy or becoming a candidate.

1. Becoming a Candidate

Attorney General Opinion No. JC-0249 (2000) addressed the question of when one becomes a candidate. In that opinion a county-court-at-law judge wished to seek election to a newly created district judgeship. Because of the timing of the creation of the court, the political party nominees were chosen by the party executive committee rather than by a primary election. The question was whether the county-court-at-law judge becomes a candidate for another position and thereby automatically resigns his office if he sought the executive committee nomination for the new office. The Attorney General concluded that one becomes a candidate "by the act of applying for a place on the ballot." OPIN. TEX. ATTY GEN'L No. JC-0249 (2000) at 3. Thus, once one fills out an application and submits it to the proper authority—*e.g.*, political party chair, city secretary, etc.—he or she is at that point a candidate, and the automatic resignation is triggered. *See also*, OPIN. TEX. ATTY GEN'L No. JM-132 (1984). General Cornyn concluded that it is not relevant "whether the officer is eligible to hold the second office or whether his or her name is actually placed on the ballot." *Id.*

While filing an application for a place on the primary ballot would make one a candidate and act as a triggering event that resulted in automatic resignation, General Cornyn determined that seeking the executive committee nomination would not. The Attorney General acknowledged that the issue was a close one, but relied heavily on the doctrine that provisions restrict the right to hold office are to be strictly construed against ineligibility. *Id., citing Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992). He felt that seeking the executive committee nomination was akin to expressing interest in the position with the ultimate candidacy for the position being entirely contingent on receiving the nomination. He did "not believe that a reasonable person may conclude from the fact that an officeholder seeks his or her party's executive committee nomination to be the party's general election candidate that the officeholder intends, without qualification, to run for the office in question in the general election." *Id.* Thus, filing to run in the primary or general election makes one a candidate for purposes of article XVI, section 65, and article XI, section 11, but seeking the nomination of the executive committee to fill a vacancy on the party ticket does not.

2. Announcing One's Candidacy

In addition to "becoming" a candidate by filing for office, one can trigger the resign-to-run provision by announcing his or her candidacy. What constitutes an announcement?

The Attorney General has said that, "If a reasonable person may conclude after hearing the statement that the individual intends, without qualification, to run for the office in question, we believe that the individual may be said to have 'announce[d] his or her candidacy.'" Attorney General Letter Opinion No. LO95-071 (1995). Thus, in that letter opinion, the Attorney General concluded that a statement saying "If the current county judge resigns or decides not to seek re-election, I will seriously consider running for county judge," was not a triggering event. That statement fairly obviously was not a clear announcement. It was qualified by a future uncertain event (the current county judge resigning or deciding not to run) and said only that the officeholder would

seriously consider being a candidate, not that he would be.

Cases where the Attorney General has found an announcement to be a triggering event include issuance of a press release saying that the officeholder was announcing his candidacy for a different position, OPIN. TEX. ATTY GEN'L No.WW-1253 (1962), and a county-court-at-law judge's statement in a meeting of the commissioners court that he was "'at that moment' a candidate for [the district court bench]." OPIN. TEX. ATTY GEN'L No. DM-377 (1996). A common characteristic of these situations is that they were both certain and public. OPIN. TEX. ATTY GEN'L No. GA-0210 (2004). The requirement that the announcement be public played a role in the more difficult issue considered in Attorney General Opinion No. GA-0210. At a time when the constitutional provision referred to becoming a candidate with more than a year left in one-s term, rather than the current year and a month, a justice of the peace conferred privately with a newspaper reporter on December 31, 2003, and told him that he planned to run for county commissioner in the 2004 election. The reporter's story reporting the conversation appeared in the next day's paper—*i.e.,* on January 1, 2004. Because the justice of the peace's term expired on December 31, 2004, the conversation between the justice of the peace and the reporter occurred more than a year before the expiration of the justice's term while the story, which appeared the next day, was within the one-year period. If the conversation qualified as an announcement, then the justice automatically resigned his office, while if the newspaper story was the announcement, there was no resignation,. The Attorney General, relying in part on the mandate to construe barriers to candidacy strictly against ineligibility and on the fact that the conversation with the reporter was a private conversation rather than one in a public setting, found that the announcement did not occur until it was made publicly in the newspaper story. *Id.*

The mere fact that the announcement was not published until after the triggering date is not necessarily determinative. A jury found that a constable had announced for sheriff with more than a year left in his term when he told at least a dozen people that he was running when the conversations were in public places and were not confidential. One "on-the-record" conversation was with the newspaper editor. It came near the end of the year and did not appear in the weekly paper until after the new year, but the jury found, and the appeals court affirmed, that he had announced his candidacy. *Standley v. Sansom,* 367 S.W.3d 343, 353 (Tex. App.—San Antonio 2012, pet. denied).[2]

3. Ineligibility to Hold the Position Sought Does Not Nullify the Triggering Event

If there is an announcement or the officer in fact becomes a candidate with more than a year and 30 days left in the officer's term, there is an automatic resignation even if the officer is ineligible to hold the new office he or she is seeking. In Attorney General Opinion No. JM-132 (1984) a county commissioner applied for a place on the ballot for the governing board of a water district. According to the facts presented to the Attorney General, the commissioner was a land developer and under a provision of the Election Code was barred from serving on the board of the water district. Because the announcement triggers automatic resignation, the commissioner forfeited his office even though he was ineligible to assume the water district office he was seeking. OPIN. TEX. ATTY GEN'L No.JM-132 (1984). Further, if a triggering event occurs, there will be an automatic resignation even if the two offices at issue are ones that could be held simultaneously. *Ramirez v. Flores,* 505 S.W.2d 406 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

4. Actions That Do Not Constitute a Triggering Event

When a serving officer takes action to seek an appointment to a higher office, there is no automatic resignation. Article XVI, section 65, applies to elections, not appointments. OPIN. TEX. ATT'Y GEN'L NO. 96-107 (1996).

Circulation of a petition to be filed as part of an application for a place on the primary ballot is statutorily defined as not amounting to candidacy or an announcement of candidacy for purposes of article XVI, section 65, or article XI, section 11. TEX. ELEC. CODE, §172.021(d). Of course, if a sufficient number of signatures are obtained and the petition is submitted to the party chair along with the application for a place on the ballot, the application would be a triggering event if submitted with more than a year and 30 days left in the officer's term.

Similarly, the Election Code provides that the mere filing of a campaign treasurer appointment does not constitute candidacy or an announcement of candidacy for the constitutional provisions. TEX. ELEC. CODE, § 251.001(1)(A).

[2] The constable had submitted his application and filing fee to the party chairman before the end of the year. While that act alone would have resulted in the automatic resignation, the court of appeals opinion focuses on the announcement issue rather than the "in fact become[s] an candidate" portion of the constitutional provision. *Id.* at 347, 352-53.

II. HOLDOVER IN OFFICE

If an officer resigns his or her office, either by choice or through automatic resignation, or when the term of office expires, the officeholder may still have the authority and responsibility to continue exercising the power of the office. Article XVI, section 17, was part of the current Texas Constitution as it was adopted in 1876 and has never been amended. It provides:

> Sec. 17. All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

TEX. CONST., art. XVI, § 17. A similar provision was in each of Texas' earlier constitutions (art. VII, § 23, in the 1845, 1861, and 1866 Constitutions and art. XII, § 16, in the 1869 Constitution) except in those pre-1876 constitutions, the section simply directed the legislature to provide in what cases officers would continue to perform the duties of their offices until their successors were duly qualified rather than, as in the current constitution, providing a self-enacting constitutional mandate that all officers continue to perform their duties pending the qualification of their replacements.

A. Mandatory Nature of the Holdover Provision

Article XVI, section 17's provision that officers hold over until their successors have qualified is mandatory. That is, an officer does not have the option of walking away from his or her duties by resignation or even if the term of office has expired. More than a century ago, this question arose when a county surveyor tendered his unconditional resignation from office and, following the resignation applied to purchase a section of land—a purchase he would not be eligible to make if he was still the surveyor. The court of civil appeals ruled that the provisions of article XVI, section 17, are mandatory. The court construed the obligation to remain in office until one's successor is qualified and assumes the duties of the office as part of the contract between the officer and the state and found it to be designed to ensure that the functions of government do not cease and that the public records of the office are preserved and handed over to a successor. Thus, the court found that the resignation did not result in removing the individual from office and that, accordingly, he continued as surveyor pending qualification of his successor and that until that time he was ineligible to purchase public land. *Keen v. Featherston*, 69 S.W. 983 (Tex. Civ. App. 1902, writ ref'd); *see also, Jones v. City of Jefferson*, 1 S.W. 903, 905-05 (Tex. 1886) (Even though city ceased having elections, its previously elected officers continued to serve pursuant to article XVI, section 17, so that service on the officers was effective to serve the city). Another case where the court recognized that an officeholder could not simply divest himself of the duties of the office is *Plains Common Consolidated School Dist. No. 1 v. Hayhurst*, 122 S.W.2d 322 (Tex. Civ. App.—Amarillo 1938, no writ). In that case a school trustee, O'Neal, was nearing the end of his term, and his successor, Whisenant, was elected on Saturday, April 2. On Tuesday, April 5, Whisenant took the oath of office and presented himself at the school board meeting where Mr. O'Neal stood aside in favor of the newly elected Mr. Whisenant. At that meeting, Mr. Whisenant was the deciding vote on a motion to rehire the superintendent for an additional two years. The April 2 election, however, had not been canvassed at that time, and Mr. Whisenant would not receive his certificate of election until the following week. Thus, his actions and votes taken prior to the official determination of his election were invalid. Mr. O'Neal was obligated to remain in office until his successor qualified, which would not happen until after the canvass of the election.

The constitutional holdover provision would also operate to cause a person who is no longer eligible to serve to continue in office. Attorney General Opinion No. DM-493 (1998) considered the situation of a water district director who became a candidate for another office. Section 49.072 of the Water Code, as it read at the time, provided that "A persons serving as a director of a district who becomes a candidate for another office is no longer qualified to serve as director." Act of May 29, 1997, 75th Legis., R.S., ch. 1349, §75, 1997 Tex. Gen. Laws 5080, 5097.[3] The opinion concluded that a water district director who became a candidate for another office, even though statutorily no longer qualified to serve on the district board, continued to serve pending his or her successor being duly qualified. OPIN. TEX. ATTY GEN'L No. DM-493 (1998); *see also* OPIN. TEX. ATTY GEN'L No. H-1224 (1978) (Teacher Retirement System board member who has retired and, thus, is no longer eligible continues on the board as a holdover pending the board member's replacement). The Attorney General, though, noted that if the water district board member were formally removed, as for example through a quo warranto proceeding, the holdover provision would not apply.

[3] The statutory provision construed in Attorney General Opinion No. DM-493 was repealed in the next legislative session. Acts 1999, 76th Legis., R.S., ch. 1354, § 15. The bill analysis in the House Committee report, citing Attorney General Opinion No. DM-493, explained that the section was being repealed because it is "problematic as it relates to the constitutional provisions for the removal and holdover of district directors."

B. Instances Where the Holdover Provision Does Not Apply

If an officeholder is formally removed from office, the courts have held that article XVI, section 17, does not apply to continue the person in office. *Willman v. City of San Antonio*, 123 S.W.3d 469, 481 (Tex. App.—San Antonio 2003, pet. denied); *Manning v. Harlan*, 122 S.W.2d 704, 707 (Tex. Civ. App.—El Paso 1938, writ dism'd).

Similarly, if a recess appointee of the Governor is rejected by the Senate, the appointee does not holdover under article XVI, section 17.[4] *E.g.*, *Denison v. State*, 61 S.W.2d 1017, 1021 (Tex. Civ. App.—Austin 1933), writ ref'd per curiam, 61 S.W.2d 1022 (Tex. 1933). Attorney General Opinions over the years reached differing conclusions as to whether a recess appointee could continue to serve under article XVI, section 17, if the Senate adjourned without acting on the appointment. *Compare, e.g. ,* OPIN. TEX. ATTY GEN'L Nos JM-1161 (1990) (recess appointee does not hold over when the Senate adjourns without acting on the appointment) and MW-303 (1981) (recess appointee does hold over when Senate adjourns without acting on the appointment). The issue, though, is no longer open, at least as far as recess nominations considered in a regular session are concerned, since the Constitution was amended in 1990 so that it now says that:

> If the Senate, at a regular session, does not take final action to confirm or reject a previously unconfirmed recess appointee or another person nominated to fill the vacancy for which the appointment was made, the appointee or other person, as appropriate is considered to be rejected by the Senate when the Senate session ends.

TEX. CONST., art. IV, § 12(g).

A final class of situations where article XVI, section 17, holdover provisions will not apply involves the assumption of an incompatible office or one that the Constitution prohibits being held at the same time one is holding the first office. The holdover provision will not operate to permit one to hold a constitutionally prohibited office. *State ex rel. Peden v. Valentine*, 198 S.W. 1006, 1007 (Tex. Civ. App.—Fort Worth 1917, writ ref'd).

C. The Relationship Between Article XVI, Section 65 (Resign-to-Run) and Article XVI, Section 17 (Holdover)

Issues involving article XVI, section 65, and article XI, section 11—the resign-to-run provisions affecting county and city officers respectively—are typically addressed in attorney general opinions and seldom reach appellate courts. Thus, the question of whether an official who automatically resigned by becoming a candidate for another office holds over under article XVI, section 17, is one that with little judicial gloss but substantial analysis in attorney general opinions. The Attorney General first addressed the issue in 1962, a little more than three years after adoption of section 65(b)'s resign-to-run provision. OPIN. TEX. ATTY GEN'L No. WW-1253 (1962). In that initial opinion on the subject, Attorney General Will Wilson determined that a justice of the peace who automatically resigned by announcing for another office continued to serve as a de jure officer until his successor was appointed and qualified. Similar conclusions were reached by Generals Carr, Hill, Morales, Cornyn, and Abbott. OPIN. TEX. ATTY GEN'L Nos. C-43 (1963); H-161 (1973); DM-377 (1996); JC-0140 (1999); and GA-0550 (2007). Thus, six attorneys general over a span of roughly half a century consistently opined that an official who automatically resigned by seeking another office continued to serve pending qualification of his or her successor. In 2014, however, a district court issued a judgment in a quo warranto case reaching the opposite conclusion and provided the opportunity for the issue to be addressed by the appellate courts.

Richard Bianchi was elected in 2012 as county attorney for Aransas County for a four-year term to extend through 2016. In June 2013 he announced his candidacy for county court-at-law judge, which would be on the ballot in November 2014. After his announcement he advised the commissioners court, consistently with the various attorney general opinions on the subject, that:

1. By announcing for the judicial position with more than a year and 30 days left in his term he had automatically resigned his position as county attorney,
2. Pursuant to article XVI, section 17, he was obligated to continue to serve as a holdover until his successor was selected and qualified;
3. The commissioners court had three options:

[4] The issue does not arise with appointments made when the Senate is in session. For non-recess appointments--*i.e.* those made when the Senate is in session—the nominee cannot assume office until confirmed by the Senate. Thus, there is no holdover issue because persons who are rejected by the Senate will not have taken office. On the other hand, though, persons appointed during a recess may assume office and serve pending Senate confirmation.

a. to take no action;
b. to replace him by appointment at any time; or
c. to wait until a successor was elected for the unexpired portion of his term at the November 2014 election.

The commissioners court took no action, and Mr. Bianchi continued to serve. At the trial of the quo warranto proceeding members of the commissioners court testified that they believed the interests of the county were served by delaying any appointment until the elected successor was available.

In the 2014 special election to fill the unexpired term there was a contested Republican primary with no one running in the Democratic primary. The Republican nominee, who was selected in March 2014, was assured of election in November. After her primary victory, the nominee and Mr. Bianchi jointly advised the commissioners court the Republican nominee was not yet available to assume the full-time responsibilities of the office due to the time required to wind down her law practice and fulfill her obligations to existing clients. Mr. Bianchi and the nominee advised that she would accept a temporary assignment as a part-time assistant county attorney and would advise the commissioners court when she was available as a full-time county attorney.

Shortly before the primary, the local district attorney filed a quo warranto action challenging Mr. Bianchi's authority to continue in office notwithstanding his automatic resignation. Following a trial the district court ruled that the holdover provision of the Constitution permits the resigned official to stay on the job for a reasonable time to prevent cessation of the functions of government but that he could not continue in office indefinitely and must present evidence that continuing in office was consistent with the purpose of the constitutional provision. *Bianchi v. State,* 444 S.W.3d 231, 245 (Tex. App.—Corpus Christi-Edinburg 2014, no pet.). Bianchi, the holdover county attorney, appealed.[5]

The court of appeals, relying in part on the multiple attorney general opinions discussing the issue and on the testimony of the head of the Secretary of State's Election Division, which was consistent with the interpretation set out in the attorney general opinions, ruled that:

> there is no conflict between the two applicable sections of Article XVI. Under Section 65(b), a 'vacancy' was created in the office of County Attorney upon Bianchi's 'automatic,' constructive resignation in June of 2013. *See* TEX. CONST. art. XVI, § 65(b). The 'vacancy' exists as provided by the Texas Constitution, *see id.*, and it confers to the Commissioners Court, under the Texas Constitution and Local Government Code, the authority and discretion to appoint a successor to serve as County Attorney. *See id.* art. V, §21; TEX. LOC. GOV'T CODE ANN., § 87.04(a)(5). Meanwhile, under Section 17, Bianchi is required to continue performing the duties of the office of County Attorney until his successor is duly qualified and the 'vacancy' is thereby filled. *See* TEX. CONST. art. XVI, § 17. In this manner, both provisions of the Texas Constitution are given the intended effect of their plain language without discord and without resorting to a rule of construction that would add language to the literal text of the Texas Constitution and thereby supplant, if not subvert, the will of the people as expressed by the language they carefully selected.

Bianchi v. State, 444 S.W.3d 231, 248 (Tex. App.—Corpus Christi-Edinburg 2014, no pet.). The appellate court, after recognizing the district court's good intentions and diligent reasoning, went on to say that:

> the district court's decision would have uprooted a firmly founded and widely accepted understanding of a critical aspect of Texas constitutional law that is of vital importance to certain public officials (particularly those contemplating or who have announced their candidacy for a different position), the authorities charged with replacing them, and the communities they serve.

Id. at 250. Thus, there is now reported judicial authority adopting the consistent interpretation by attorneys general that an officeholder who automatically resigns by seeking another office with more than a year and 30 days left in his or her term continues to serve pending the selection and qualification of a successor.

III. CONFLICTS

Elected officials are subject to various constitutional, statutory, and common law prohibitions on conflicts of interest. Most often these prohibit

[5] The author of this paper filed an amicus brief supporting Mr. Bianchi's position in the court of appeals on behalf of the Texas Association of Counties, the County Judges and Commissioners Association of Texas, the Texas Conference of Urban Counties, and the Texas Municipal League.

financial conflicts. *E.g.*, TEX. LOC. GOV'T CODE, §§ 171.001, *et seq.*; TEX. GOV'T CODE, §§ 572.001; TEX. PENAL CODE, § 39.02. This paper, though, focuses on only conflicts that are a bar to acquiring or holding office.

A. Article XVI, § 40, of the Constitution

Article XVI, section 40, of the Constitution is generally known as the dual-office –holding provision. It provides:

(a) No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, [various military positions], and the officers and directors of soil and water conservation districts, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit [various military personnel], and officers of the State soil and water conservation districts, from holding at the same time any other office or position of honor, trust or profit, under this State or the United States, or from voting at any election, general, special or primary in this State when otherwise qualified.

(b) State 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, except that:

(1) a schoolteacher, retired schoolteacher, or retired school administrator may 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 created under Section 59, Article XVI, or Section 52, Article III; and

(2) a faculty member or retired faculty member of a public institution of higher education may receive compensation for serving as a member of a governing body of a water district created under Section 59 of this article or under Section 52, Article III, of this constitution.

(c) It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation.

(d) No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

1. Civil Offices

The key provision is in the first sentence of subsection (a) that prohibits holding more than one "civil office of emolument." Many dual-office-holding issues can be resolved simply be determining if both positions sought to be held are civil offices of emoluments. The first question in the analysis is whether the positions are offices as opposed to some lesser status such as employments. The basic test for determining if a position is an office comes from *Aldine Independent School District v. Standley*, which provides:

> The determining factor which distinguishes a public officer from an employee is whether any sovereign function of the 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 Ind. Sch. Dist. v. Standley, 280 S.W.2d, 578, 583 (Tex. 1955), *disapproved on other grounds, National Surety Corp. V. Friendswood Ind. Sch. Dist.*, 433 S.W.2d 690, 693-94 (Tex.. 1968), *quoting*, *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. App.—Galveston 1944, writ ref'd). Thus, for example, a member of a school board, who exercises sovereign power independent of the control of a superior would be an officer (although not holding an office *of emolument*) while a school teacher, whose actions are subject to the control of the principal, superintendent, and school board would not be an officer. In the *Standley* case Standley was hired by the school district to be the assessor-collector of taxes. He was determined by the court to be essentially an employee at will. He had no term of office and took no oath of office. He exercised no sovereign power but instead derived his power from the school board. The power he exercised was not largely independent of the control of others. Thus, he was not an officer.

2. Offices of Emolument

The constitutional provision applies to civil offices of emolument. Accordingly, it is also necessary to

determine if the office is associated with an emolument. An emolument would be "a pecuniary profit, gain, or advantage." *Irwin v. State*, 177 S.W.2d 970, 973 (Tex. Crim. 1944),, *overruled on other grounds*, *Angel v. State*, 740 S.W.2d 727, 736 (Tex. Crim. 1987) (en banc). This includes offices that have a salary as well as those where there is a lesser form of compensation such as a per diem or fee for attending meetings. *E.g.*, *Willis v. Potts*, 377 S.W.2d 622, 627 (city councilman who received $10.00 per meeting attended up to a maximum of $520.00 per year held a lucrative office); OPIN. TEX. ATTY GEN'L No. JM-704 (1987) (member of a river authority board held an office of emolument where statute provided for payment of $10.00 per day for each day of service even though no member had ever received payment of the per diem).

One may not avoid having an office be one of emolument by declining to accept payment. So long as the office provides for payment, it is one of emolument whether the payment is accepted or not. There is a statute, section 574.005 of the Texas Government Code, that permits elected or appointed local government officials to serve on state boards but provides that the local officials "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." TEX. GOV'T CODE, § 574.005(b). While declining the salary or per diem for service associated with an office would not be effective to prevent an office from being one of emolument, here the statute removes the compensation entirely if a local government official is the board member. This has the effect in this narrow category of cases *(i.e.*, local officials serving on state boards) of eliminating that office, when held by the local official, from being one of emolument. OPIN. TEX. ATTY GEN'L No. GA-0250 (2004).

While salary and per diem for services such as attending meetings constitute an emolument, reimbursement of expenses does not. OPIN. TEX. ATTY GEN'L No. MW- 21 (1979). If, however, a lump sum reimbursement is ostensibly for expenses but, in fact, exceeds the amount of actual expenses as determined by a fair and reasonable calculation, it may constitute an emolument. *Id.*

3. Exemptions from Article XVI, Section 40

Of course, the text of the constitutional provision exempts some offices from its strictures. Specifically, justices of the peace, county commissioners, notaries, and officers and directors of soil and water conservation districts are not prohibited by article XVI, section 40, from dual office-holding. While they may be exempt from the article XVI, section 40, prohibition, it is possible that they would be prohibited from holding a second office for other reasons.

Subsection (b) of section 40 provides that state employees and others individuals who receive compensation from the state are not barred from serving as members of the board of cities, school districts, and other local governments except that they may not receive a salary for serving on the local government boards. The initial version of subsection (b) was a response to a case, *Boyett v. Calvert*, 467 S.W.2d 205 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.), in which several Texas A&M employees served on the College Station City Council. Under a different provision of the Constitution, which has since been amended, the Comptroller was prohibited from issuing a salary check to a state employee who had another office or position under the State. *Boyett* upheld the validity of that prohibition, and section 40 was subsequently amended to permit state employees to serve on local boards so long as they did not receive a salary for their local service. Thus, a state college professor, for example, can serve on a city council and be eligible to continue to receive pay from the university but will not be eligible to be paid the emoluments associated with the city council position. Later amendments permit school teachers and college professors to serve on certain. water district boards and receive compensation from the water district.

While one should be able to address most constitutional dual-office-holding questions by determining if the position at issue is an office, whether it includes emoluments, and whether any of the exemptions set out in the Constitution apply, there are many prior determinations—primarily attorney general opinions—that can be addressed. The annotation for article XVI, section 40, in the West Publishing version of the Constitution contains more than 300 decisions covering most types of issues that may arise. Another helpful publication was put out by the Office of the Attorney General. Although it is no longer found on the Attorney General's website and was last published almost a decade ago, it still can be found on the Internet. The volume is *Public Officers: Traps for the Unwary—2006* and can be found by a Google search or accessed at https://www.scribd.com/document/94810059/Public-officers-Traps-of-the-unwary-2006-by-Texas-Attorney-General-Greg-Abbott.

B. Common-Law Incompatibility

Common-law incompatibility may prevent a person from holding two separate offices. It is distinct from the concept of conflict of interest, which may prohibit what an officeholder may do in office but generally will not prevent a person from assuming an office. Conflicts relate to the private pecuniary interest of a public officer or employee while incompatibility

does not involve an officer's private finances but instead is a function of conflicting public duties. OPIN. TEX. ATTY GEN'L No. JM-172 (1984).

The general categories of common-law incompatibility are (1) self-appointment, (2) self-employment, and (3) conflicting loyalties. *Public Officers: Traps for the Unwary—2006*, at 46.

1. Self-Appointment

"It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint." *Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). Thus, common-law incompatibility would prevent a city council from appointing one of its members to a position. Of course, the prohibition would not apply in those cases where the second position is structured so that it is required by law to be filled by a member of the council who is to be appointed by the council. State law, for example, may create a board where its members consist of a member of the city council to be chosen by the city council, a member of the commissioners court to be chosen by the commissioners court, etc.

2. Self-Employment

The bar to self-employment is closely related to self-appointment, but it is derived primarily from the concern over one position having supervisory authority over the other. A teacher may not serve on the school board of the employing district because that would place the trustee in the position of supervising himself or herself in his role as a teacher. An important test of incompatibility is whether one of the positions "is subordinate to the other in some of its important and principal duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both. OPIN. TEX. ATTY GEN'L No.JC-0371 (2001). Thus, the Attorney General ruled that a school board trustee could not serve as a volunteer teacher of a course even though no pay was involved. The problem was that one position was subordinated to the other. *Id.*

3. Conflicting Loyalties

Conflicting loyalties is the final factor in the incompatibility analysis. For example, the offices of city council member and school trustee were found to be incompatible because there were various powers of the city that could be exercised in regard to school property (*e.g.*, health, quarantine, sanitary, and fire prevention regulations) so that if the same persons served on both the council and the school board it could result in school policies being subject to the discretion of the council rather than the school board. *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgm't adopted). For the conflicting loyalties factor to apply both positions must be offices. Thus, a county attorney in one county could be as assistant county attorney in a neighboring county. Even if there were a question of conflicting loyalties, the assistant county position is not an office as the assistant is subject to the direction and control of the county attorney. OPIN. TEX. ATTY GEN'L No. GA-0350 (2005).

The Attorney General has opined that when two offices in geographically overlapping jurisdictions, both of when have taxing authority, "the potential for conflict is insurmountable," since the object of each jurisdiction is to maximize its own revenues. OPIN. TEX. ATTY GEN'L No.GA-0350 (2003). Similarly, when two entities contract with one another, service on both entities' boards would likely be incompatible. OPIN. TEX. ATTY GEN'L No.JM-1266 (1990).

C. Consequences of Dual-Office Holding

"If a person holding an office is elected or appointed to another (where the two offices cannot be legally held by the same person) and he accepts and qualifies as to the second, such acceptance and qualification operate, *ipso facto*, as a resignation of the former office." *Pruitt v. Glen Rose Ind. Sch. Dist. No. 1*, 84 S.W.2d 1004, 1006 (Tex. 1935). Thus, a person can forfeit one office by taking another. This applies, though, only when one takes a second office as opposed to a second employment or position. Further, if the incompatibility that precludes holding the second office is "self-appointment," the appointment to the second office would be altogether void. In that case, the first office would not be relinquished since the appointment to the second was never effective. Tex. Atty Gen'l LO-89-057; *see also Ehlinger v. Clark*, 8 S.W.2d 666 (1928).