Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 21, 1993

Honorable Libby Linebarger
Chairman
Committee on Public Education
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-31

Re: Whether a legislator who serves as an independent contractor for an independent school district holds a "position of profit under this State" (RQ-513)

Dear Representative Linebarger:

You have requested our opinion as to whether a member of the legislature may contract with an independent school district to perform non-teaching services on a part-time basis.

The legislator in question, Representative Huey McCoulskey, Jr., was first elected to the legislature in November, 1992. Prior to that time, in December, 1989, he had entered into a contractual arrangement with the board of trustees of the Lamar Consolidated Independent School District. Pursuant to this contract, the parties agreed to the following:

1. McCoulskey would retire from his regular full-time employment with the district, effective November 30, 1990;

2. Beginning on the same date, McCoulskey would be employed "on a part-time basis for not more than 73 days a year" for a term ending on December 31, 1993;

3. McCoulskey would be compensated at a daily rate equivalent, *pro rata*, to his previous full-time salary;

4. McCoulskey's contract "may be terminated at any time for unsatisfactory performance, for cause, or by McCoulskey's resignation."

You indicate that, under this agreement, McCoulskey does not receive any of the usual benefits of employment, *e.g.*, paid medical insurance premiums, vacation time accrual, or survivor maintenance. Furthermore, McCoulskey, and not the district, is solely responsible for all tax payments, "and any other obligations required of self-employed individuals." McCoulskey's arrangement with the district bears many of the common indicia of an "independent contractor"--rather than an employer-employee--relationship.

Article XVI, section 40, Texas Constitution, provides, in part:

> 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. [Emphasis added.]

The question before us is therefore whether McCoulskey's relationship with the school district requires the conclusion that he thereby holds a "position of profit under this State."

In *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964), the Texas Supreme Court held that a city council member holds an "office . . . under . . . this State." Although *Willis* addressed article III, section 19[1] rather than article XVI, section 40, the court specifically determined that the office of city council member is one which is held "under this state." For purposes of the present inquiry, the inference is unavoidable that a compensated school district *employee* holds a "position of profit under this state." However, the prohibition of article XVI, section 40, has not, to our knowledge, ever been applied to a person who acts in the capacity of "independent contractor."[2] Because of the well-established principle that any constitutional or statutory restriction on the right to hold office should be strictly construed against ineligibility, *Willis*, 377 S.W.2d 622, it is our view that the prohibition should not be extended to apply to independent contractors.

As we have noted, McCoulskey's arrangement with the school district bears many of the indicia of an "independent contractor" relationship. The contract does not address, however, the most important feature of the typical "independent contractor" relationship, *i.e.*, that the individual performs his duties under the contract largely free of the supervision of any other person. *See, Herndon v. Halliburton Oil Well Cementing Co.*, 154 S.W.2d 163 (Tex.App., 1941, writ ref'd) (right of control is supreme test in determining whether one is an employee or an independent contractor); *see also* 44 Tex.Jur.3d., Independent Contractors, §6, at 275 (collecting cases) The ultimate resolution of this issue will require the consideration of factual inquiries which we cannot address in the opinion process. We can suggest, however, the advisability of revising the contract to make more explicit the precise nature of the relationship.

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[1]Article III, section 19, states that "no person holding a lucrative office . . . under . . . this state . . . shall. . . be eligible to the Legislature."

[2]Attorney General Opinion DM-76 (1992) is not to the contrary. In that decision, this office stated that the nepotism statutes, V.T.C.S. article 5996a, *et seq.*, do not distinguish between an employee and an independent contractor, and thus, a county commissioner's court is barred from hiring, as an independent contractor, a person who is related to a commissioner within the prohibited degree. We do not believe that this principle can be justifiably applied to questions of dual office holding. Nepotism is solely a creature of statute, and its prohibitions have been considerably liberalized in recent years.

SUMMARY

A legislator is not as a matter of law prohibited by article XVI, section 40, of the Texas Constitution from acting in the capacity of "independent contractor" for a school district on a part-time basis.

Yours very truly,

Rick Gilpin

Rick Gilpin
Deputy Chief
Opinion Committee