



MESSER ★ FORT ★ McDONALD

THE MUNICIPAL LAW FIRM

NORTH TEXAS | AUSTIN | ABILENE

*Confidential/Privileged
Attorney-Client Communication*

MEMORANDUM

TO: City of Kyle Ethics Commission; City Council Member Alex Villalobos; City Secretary, City Attorney

FROM: Monte Akers, Ethics Compliance Officer

DATE: August 30, 2019

RE: Advisory Opinion Requested by Council Member Villalobos

Request for opinion: By phone call on August 22, 2019, City Council Member Villalobos advised that he would request an advisory opinion pursuant to the City of Kyle Ethics ordinance, which he subsequently submitted by email on August 23, as follows:

The following are the questions proposed.

Is it a conflict of interest for you to serve as the Hays County EMC while also serving on the Kyle City Council?

As the chief of staff for Hays County, what involvement and participation can you have in the matters surrounding our co-location agreement with Hays County?

Thank you, Council Member Alex Villalobos

Basis for Opinion: The applicable provision of the Ethics Code regarding the basis for this type of advisory opinion is the following:

Opinions Issued by the Ethics Compliance Officer.

(1) Requests by City officers and Employees.

(A) By writing filed with the Ethics Compliance Officer, any city officer or employee may request an advisory opinion with respect to whether proposed action by that person would violate the ethics laws.

(B) Within thirty (30) days of receipt of the request by the Ethics Compliance Officer, the Ethics Compliance Officer shall issue a written advisory opinion. The advisory opinion shall not reveal the name of the person who made the request, if that person requested anonymity, in which case the opinion shall be written in the form of a response to an anonymous, hypothetical situation. Copies of the opinion shall be forwarded by the Ethics Compliance Officer to the members

of the Ethics Commission, to the person who requested the opinion, and to the City Secretary, and promptly posted by the Ethics Compliance Officer for a period of no less than five (5) years on the Internet via the City of Kyle website. The City Secretary shall make the opinion available as a public record in accordance with the Texas Public Information Act.

Council Member Villalobos did not request anonymity.

Background: Alex Villalobos is a City of Kyle Council Member who is employed by Hays County as Chief of Staff and as Emergency Management Coordinator.

As Chief of Staff he works under the direction of the County Judge, manages office and staff and provides assistance to the judge. He also serves as liaison between the judge and other officials, including governmental entities. The job description for the position does not specifically refer to the City of Kyle or to other cities in the county, but it includes responsibilities, such as assisting in contract negotiations, land acquisition, and bond issues that could potentially involve the City of Kyle.

The position of Emergency Management Coordinator (“EMC”) is appointed by the County Judge (who serves as Director of Emergency Management and Homeland Security for the county) and the role of the EMC is to oversee the day to day Emergency Management and Homeland Security Programs for the County, including responsibility for maintaining the County’s Comprehensive Emergency Management Plan based on an analysis of the hazards that could occur in the County and Central Texas area. A relevant provision of the Texas Government Code is the following:

Sec. 418.1015 EMERGENCY MANAGEMENT DIRECTORS.

(a) The presiding officer of the governing body of an incorporated city or a county or the chief administrative officer of a joint board is designated as the emergency management director for the officer's political subdivision.

(b) An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

(c) An emergency management director may designate a person to serve as emergency management coordinator. The emergency management coordinator shall serve as an assistant to the emergency management director for emergency management purposes. (emphasis added)

(d) A person, other than an emergency management director exercising under Subsection (b) a power granted to the governor, may not seize state or federal resources without prior authorization from the division or the state or federal agency having responsibility for those resources.

Applicable Authorities Related to Ethics Issues: Analysis of the question posed for this opinion involves consideration of the following:

1. Dual office holding restrictions under Art. 16, Sec. 40, Texas Constitution; Separation of Powers under Art. 2, Sec. 1, Texas Constitution, and the common law doctrine of incompatibility of offices.

2. Ch. 171, Local Government Code, regarding Conflicts of Interest.
3. Provisions of the Kyle Code of Ethics, particularly including Section 2-142 regarding the appearance of impropriety, Section 4, Confidential Information, Section 6, Conflicting Outside Employment, and Section 10, prohibited interests in contracts.

Question 1: “Is it a conflict of interest for you to serve as the Hays County EMC while also serving on the Kyle City Council?”

Summary Answer: No. A Kyle City Council Member is not prohibited from simultaneously holding the position of county EMC and is not required under Ch. 171, Local Government Code to file an affidavit and abstain from participating in matters involving emergency management that come before the Council because a statutory conflict of interest exists. However, provisions of the Kyle Code of Ethics, particularly those regarding an appearance of impropriety, make it incumbent on the Council member to “scrupulously avoid the appearance of impropriety at all times,” and to recuse himself from matters that may be perceived by the citizens of Kyle as improper.

Discussion and analysis: By statute, the position of Hays County EMC is appointed by the Hays County Emergency Management Director, who by statute is the Hays County Judge, and the role of the EMS is to “serve as an assistant to the emergency management director for emergency management purposes.”

The position of county EMC is neither an “office of civil emolument” for purposes of Art. 16, Sec. 40, Tex. Constitution nor an “officer” who is delegated sovereign authority for purposes of the common law doctrine of incompatibility of offices. Essentially the EMC serves at the pleasure and under the direction of the Emergency Management Director in an advisory capacity. Accordingly there is no dual office-holding prohibition against serving as Hays County EMC and as a City of Kyle council member.

Pursuant to Ch. 171, Local Government Code, it is not a statutory conflict of interest for a City Council member to simultaneously serve as EMC because the member does not have a “substantial interest” in a business entity or in real property that triggers the restrictions of Ch. 171. Courts and the Attorney General have ruled that political entities such as cities, school districts and, by extension, counties are a “business entity” for purposes of Chapter 171. *See, San Antonio Indep. School Dist. v McKinney*, 936 S.W.2d, 279, 283 (Tex. 1996); *County of Harris v. Eaton*, 573 S. W. 2d 177, 179 (Tex. 1978); *Tex. Att’y Gen. Op.* GA-0031 (2003); *Tex. Att’y Gen. Op.* DM 267 (1993); *Tex. Att’y Gen. Op.* JM-852 (1988). Accordingly, it is my opinion that the duties of Mr. Villalobos in connection with his position as County Chief of Staff or as Emergency Management Coordinator do not trigger the provisions of Ch. 171 that would require him to file an affidavit and abstain from participating in emergency management matters that come before the Kyle City Council.

The Kyle Code of Ethics, however, contains provisions that place a greater burden on council members to police their conduct in order to avoid an “appearance of impropriety.” Specifically Section 2-142 of the Code provides that:

Appearance of Impropriety: Public service is a public trust. All city officers and employees are stewards of the public trust. They have a responsibility to the citizens of Kyle to enforce and adhere to the City Charter and the associated ordinances and codes. The appearance of impropriety may itself be a conflict of interest. To ensure and enhance public confidence in City Government, each city officer must not only adhere to the principles of ethical conduct set forth in this code and technical compliance therewith, but they must scrupulously avoid the appearance of impropriety at all times.

This provision may be characterized as an attempt to document and define what is often referred to colloquially as “the smell test.” By stating that the appearance of impropriety “may itself be a conflict of interest,” the Code implies that behavior that is legal and not unethical may nevertheless be elevated to conflict of interest status based on the opinion of one or more persons who believe the behavior is improper. Such a result or allegation would be difficult to resolve, particularly in a politically-charged situation. It is my opinion that there is no basis in the law for concluding that simultaneously holding the positions of City Council member and EMC are a conflict of interest. However, in exercising the duties and role of EMC, Mr. Villalobos must be vigilant about and sensitive to the opinions of other council members, county officials, and the citizens of Kyle, and should recuse himself or otherwise abstain from participating in matters that will or may create a bona fide appearance of impropriety.

Question 2: As the chief of staff for Hays County, what involvement and participation can you have in the matters surrounding our co-location agreement with Hays County?

Summary answer: The foregoing analysis related to dual office holding and Ch. 171, Local Government Code, apply equally to this question. Mr. Villalobos is not prohibited from serving simultaneously as Kyle City Council member and Hays County Chief of Staff. However provisions of the Kyle Code of Ethics, particularly that involving prohibited interests in contracts (Section 10 of the Code), together with that involving the appearance of impropriety mean that Mr. Villalobos should not participate in the negotiation and finalization of any contract between the City and the County. In regard to the co-location agreement, which has already been executed by both parties, Mr. Villalobos must be vigilant to not be involved in a manner that creates and appearance of impropriety, but he is not prohibited from, for example, being involved in budget, manpower, or basic implementation details of the project for which such a contract was created so long as, in doing so, he is able to remain one hundred percent loyal to the interests of both the City and the County.

Discussion and analysis: The analysis related to dual office holding and Ch. 171, Local Government Code, above, are applicable to this question but will not be repeated. Similarly, the discussion of the provision of the Kyle Code of Ethics related to the appearance of impropriety is relevant, and three other sections of that Code must also be considered, being those involving confidential information (Section 4 of the Code), conflicting outside employment (Section 6 of the Code), and prohibited interests in contracts (Section 10 of the Code).

Under Section 4 Mr. Villalobos is prohibited from disclosing confidential or proprietary information, or any information he has acquired or obtained in the course of his official duties that may adversely influence the property, government, or affairs of the City. Accordingly Mr. Villalobos must be careful to not intentionally or inadvertently reveal information related to city business that could adversely affect the City's dealings with, governmental affairs of, or relationship with the County.

Under Section 6, Mr. Villalobos is prohibited from soliciting, accepting, or engaging in concurrent outside employment which could reasonably be expected to impair independence of judgment in, or faithful performance of, official duties. Although the holding and exercising of the three offices will not automatically impair the judgment or performance of official duties for the positions, the potentially exists for a project to arise that does so.

Under Section 10, the prohibitions regarding an interest in a city contract apply particularly when an officer or employee of the City owns stock in a corporation contracting with the City, which will not arise or be applicable in connection with employment by the County. However, the Section also applies when an officer or employee is "financially interested directly or indirectly in the sale to the city of any land, materials, supplies or services except on behalf of the city as an officer or employee" An argument may be made that because Mr. Villalobos is employed by and compensated by Hays County, that he therefore has an indirect interest in contracts between the City and the County that involve land, materials, supplies, or services. Any such contract with which he may be involved will be on behalf of the County as an employee but on behalf of the City as a decision maker, and such involvement—working both sides of a contractual agreement—almost certainly generates an appearance of impropriety if not a potential violation of Section 10.

The content and subject matter of the co-location agreement have not been disclosed or explored for purposes of this opinion, but it is probable that the agreement involves land, materials, supplies or services of the City. It should be noted, however, that Mr. Villalobos has advised that his involvement with the co-location agreement between the County and the City is not and has not been one in which he is helping to negotiate or finalize the agreement. The agreement has already been executed and Mr. Villalobos has not been asked or directed to revise, amend, or interpret its meaning for either the county or the city. Accordingly, while it is my opinion that Mr. Villalobos should not be involved with or participate on both sides of a contract between the City and Hays County, based on the restrictions in Section 10 of the Code, he is not prohibited from being involved in city budget, manpower, or basic implementation details of the project for which such a contract was created so long as in doing so he is able to remain one hundred percent loyal to the interests of both the City and the County.

Disclaimer: The foregoing is an advisory opinion of the Ethics Compliance Officer based on his analysis and understanding of the applicable authorities cited. The opinion was not prepared in response to a complaint or an investigation and is not intended to be binding on the City of Kyle Ethics Commission. Should the subject matter of this advisory opinion lead to a complaint or investigation, the facts disclosed thereby may affect or alter the opinions stated above.