

## **Legal Q & A**

**By Heather Mahurin, TML Legal Counsel**

### **Does a councilmember automatically resign from that office when announcing a candidacy for another elected office?**

It depends. Article 16, Section 65, of the Texas Constitution (often called the “resign-to-run” provision) applies to cities with council terms of more than two years. In cities with terms of more than two years, a city official who has more than one year and 30 days remaining in the current term of office, and who announces a candidacy for another office automatically resigns from the first office. TEX. CONST. ART. 11, § 11; TEX. CONST. ART. 16, § 65.

A home rule city, though, may provide in its charter that a mayor or councilmember who becomes a candidate for another office automatically resigns his or her current office, even if the term of office is two years. Tex. Att’y Gen. Op. No. GA- 0217 (2004).

### **What is considered an announcement of candidacy?**

The attorney general has opined that an officer announces candidacy for office by making a written or oral statement from which a reasonable person may conclude that the individual intends, without qualification, to run for an office. Tex. Att’y Gen. Op. No. GA-0643 (2008); Tex. Att’y Gen. Op. No. GA-0769 (2010). A statement made in a private conversation does not constitute an announcement of candidacy for the purposes of the “resign to run” provision. Tex. Att’y Gen. Op. No. GA-0643 (2008).

A statement that a person would “seriously consider running” if the incumbent resigns or decides not to seek re-election was determined by the attorney general to not invoke an automatic resignation. Tex. Att’y Gen. LO-95-071 (1995). Likewise, a statement indicating an interest in an office is not considered an announcement of candidacy. Tex. Att’y Gen. Op. No. JC-0249 (2000).

### **How can a home rule city extend the terms of councilmembers?**

A home rule city may only extend its council terms by a charter amendment. Tex. Att’y Gen. Op. No. GA-0985 (2013). In order to establish terms of office longer than two years, the voters of a home rule city must adopt a charter amendment to that effect. TEX. CONST. ART. 11, § 11.

### **How can a general law city extend the terms of councilmembers?**

A general law city may extend its council terms by passing an ordinance to call an election for that purpose. The majority of the voters voting at the election on the question must approve the change. TEX. CONST. ART. 11, § 11.

### **May an officer who announces candidacy for another office decide to reconsider and avoid resignation?**

No. Once an announcement of candidacy is made, the resignation is automatic. Withdrawing from candidacy for another office does not affect the resignation, because the resignation occurs immediately upon the announcement of candidacy. *See* Tex. Att'y Gen. LO-94-059 (1994); Tex. Att'y Gen. Op. No. DM-0406 (1996). An officeholder who automatically resigns holds over in the office until a successor is appointed and qualified for office. TEX. CONST. ART. 16, § 17; Tex. Att'y Gen. Op. No. JC-0318 (2000). "Holding over" means that the officer may continue to perform the duties of office until his or her successor has taken office.

### **Are city police officers subject to the "resign-to-run" provision?**

The automatic resignation provisions of the Texas Constitution apply only to elected and appointed municipal *officers*. TEX. CONST. ART. 11, § 11. The general test in Texas law for whether a person holding a public position is an officer is whether the person exercises "any sovereign function of the government...for the benefit of the public largely independent of the control of others." *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955); *See* Tex. Att'y Gen. Op. No. DM-212 (1993). In applying this test to city police officers, the attorney general's office concluded that city police officers generally perform their duties under the direction and control of others. *Id.* Consequently, a police officer will likely not be subject to the "resign-to-run" provision. Tex. Att'y Gen. Op. No. GA-0217 (2004).

### **How must a vacancy created by the "resign-to-run" provision be filled?**

In most cases, the vacancy must be filled by a special election within one hundred and twenty days after the date the vacancy occurs, even if no uniform election date occurs in that period. TEX. CONST. ART. 11, § 11(c); Tex. Att'y Gen. Op. No. JC-0318 (2000); Election Law Opinion No. MAM-1 (1984). The holdover provision in the Constitution provides that the resigning mayor or councilmember continues to serve during that time until the vacant office is filled by a qualified candidate. TEX. CONST. ART. 16, § 17. (Note: An election may not be held within 30 days before or after the date of the general election for state and county officers, general primary election, or runoff primary election. TEX. ELEC. CODE § 41.001.)

A home rule city, though, may avoid the special election requirement. If a city provides in its charter, or through a charter amendment, a procedure for filling a vacancy occurring on its governing body for an unexpired term of 12 months or less, then a home rule city may appoint a qualified candidate, in accordance with its charter, to fill the vacancy. TEX. CONST. ART. 11, § 11(c).

### **Can one person run for more than one office at a time?**

Not in most cities. Section 141.033 of the Election Code prohibits a person from filing applications for a place on the ballot for two or more offices that are not permitted by law to be held by the same person and are to be voted on at one or more elections held on the same day. If a person does file more than one application for a place on a ballot in violation of the Election Code, only the first one filed is valid.

### **Can a person hold two public offices at the same time?**

The Texas Constitution generally prohibits dual office holding. TEX. CONST. ART. 16, § 40. The section provides that “no person shall hold or exercise at the same time, more than one civil office of emolument...” The term “office” has been interpreted by the courts and attorney general to mean public officer, not merely an employee. See *Aldine Independent School District v. Standley*, 280 S.W. 2d 578 (Tex. 1955); Tex. Att’y Gen. Op. No. GA-0032 (2003). The courts and attorney general define the term “emolument” as “a pecuniary profit, gain, or advantage.” *Irwin v. State*, 177 S.W. 2d 970 (1944); Tex. Att’y Gen. Op. Nos. GA-0032 (2003) at 2, JC-0490 (2002) at 1. In other words, an individual is generally prohibited from holding two paid, public offices.

### **Can a city councilmember apply for employment with the city?**

Yes. However, before a councilmember may *accept* a position with the city, the councilmember must resign from the position and that position must be filled. Under the holdover provision of the Texas Constitution, a councilmember would remain in the position as a holdover until the vacancy is filled. TEX. CONST. ART. 16, § 17. A councilmember cannot be an employee of the city, so the councilmember cannot accept and begin employment with the city until the council seat is filled.

### **Can a city discipline or terminate an employee that is running for public office?**

No. A city cannot discipline or take any other adverse employment action against an employee simply because they are a candidate for office. TEX. LOC. GOV’T CODE § 150.041. However, if an employee’s position is funded by federal grants then the person may be prohibited from running in partisan elections under the federal Hatch Act. 5 U.S.C. § 1502.

A city can prohibit an employee from campaigning while in uniform or on city time. Additionally, an employee is prohibited from using city resources to produce or distribute political advertising in connection with an election. TEX. ELEC. CODE § 255.003.