



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**WAGGONER CARR  
ATTORNEY GENERAL**

November 12, 1963

Mr. D. F. Smallhorst  
Executive Secretary  
Texas Water Pollution Control  
Board  
Austin 5, Texas

Opinion No. C-174

Re: Various questions concern-  
ing the construction of  
Article 7621d, Vernon's  
Civil Statutes.

Dear Mr. Smallhorst:

You have requested the opinion of this office on a number of questions concerning the construction of Article 7621d, Vernon's Civil Statutes (State Water Pollution Control Board Act). The questions will be stated and answered in the order in which they were submitted.

"(1) Does the personal representative of an ex-officio member of the Board, while engaged in the discharge of official Board duties on behalf of and as authorized by such member, stand in the place and stead of such member for purposes of attending, participating in and voting on matters arising at Board meetings and hearings?"

Section 3(d) of Article 7621d, Vernon's Civil Statutes, reads as follows:

"Each ex-officio member of the Board listed in paragraph (c) above, is authorized to delegate to a personal representative from his office the authority and duty to represent him on the Board, but by such delegation a member shall not be relieved of responsibility for the acts and decisions of his representative."

Under Section 3(d) of Article 7621d, as quoted above, a personal representative of an ex-officio member would stand in the place of the ex-officio member for the purposes of Board duties. This is evident from the language of the statute and from the provision which places responsibility for the acts and decisions of the personal representative on the ex-officio member. If the personal representative could not act in the place of the ex-officio member there would be no need for the placing of responsibility.

"(2) If an ex-officio member of the Board is delegated the authority to take testimony in a hearing called by the Board, as authorized by Section 4(d), paragraph (2), . . . may such member delegate to a personal representative from his office the authority and duty to represent him for the purpose of taking testimony at such hearing?"

Section 4(d)2 of Article 762ld reads as follows:

"(d) The Board is hereby authorized to:

". . .

"(2) delegate to one (1) or more of its members or to one(1) or more of its employees the authority to take testimony in any hearing called by the Board with power to administer oaths, but all orders entered shall be made by and in the name of the Board after its official action and attested to by the Executive Secretary;"

Section 4(d)2 of Article 762ld, as quoted above, states that the Board is authorized to delegate authority to a member or employee to take testimony in a hearing called by the Board. From the wording of the statute, the authority must be given by the Board to the person actually taking the testimony at the hearing. This would preclude an individual member making a delegation of authority to take testimony at a hearing. The authority to take testimony must be given by the Board directly to the person who is to take the testimony.

"(3) May the Board in delegating authority to take testimony in a hearing called by the Board, as authorized by said Section 4(d), paragraph (2), make such delegation to a named ex-officio member and further authorize such member to delegate such authority to a personal representative from his office?"

Section 4(d)2 of Article 762ld, as quoted earlier, does not give the Board the power to delegate to one of its members the appointment power of the Board with respect to hearing officers or persons to take testimony at a hearing called by the Board. It therefore follows that a delegation of authority to take testimony at a Board hearing must be made by the Board itself.

"(4) Is the duly authorized personal representative of an ex-officio member of the Board entitled to be reimbursed from funds available for the purposes of Article 762ld for his actual and necessary travel and other expenses incurred in the discharge of official Board duties as such personal representative, to the same extent that the ex-officio member would be so entitled?"

Section 3(e) of Article 762ld, reads as follows:

"Actual and necessary travel and other expenses incurred by the three (3) ex-officio members in the discharge of their official duties as members of the Board shall be paid out of any funds which are or may become available for the purposes of this Act. Employees of the Board shall receive their necessary traveling expenses while traveling on the business of the Board."

Section 3(e) provides for the payment of the traveling expenses for the ex-officio members and the employees of the Board and makes no mention of the expenses of the personal representatives of such ex-officio members. In view of this language, the statute must be construed as applying to the ex-officio members and employees of the Board only. The personal representative would not be entitled to receive travel expenses under Section 3(e) of Article 762ld.

"(5) Are the moneys in Fund 273 expended under operational control of Budget 49 funds of the Board or expendable by the Board?"

The facts concerning Fund 273 as set out in your opinion request are as follows:

"To qualify for Federal funds under Public Law 660, it is necessary for the qualifying agency to develop a water pollution control program satisfactory to the Public Health Service, account for expenditures of Public Law 660 funds, and perform other functions relative to the administration of the program. Because of the limited staff authorized and available to the Board, the Board, which is itself eligible to qualify for such Federal funds, by resolution requested the State Department of Health, which in the years prior to the establishment of the Board was the agency qualifying for

such funds, to meet or continue to meet all requirements and to apply for and receive Federal funds for water pollution control activities in the State for the 1962 and 1963 Federal fiscal years. A similar resolution was adopted for the 1964 and 1965 Federal fiscal years. . . . At the request of the Board, the Health Department also furnishes fiscal and accounting services for the Board, as authorized by Section 3(h) of Article 7621d, thereby relieving the Board of the necessity of employing personnel to perform such services. The Public Health Service funds together with other Federal moneys are delivered periodically in a single Federal warrant made payable to the Treasurer of the State of Texas. Upon the advice of the State Department of Health, the Federal water pollution control moneys are set up by the Comptroller in two funds. One of these is Fund 153, which also receives moneys transferred to the Board from other State agencies under Section 3(i) of Article 7621d. This fund is recognized by the Comptroller as a Board fund. The other is Fund 273, which is a Health Department fund, recognized as such by the Comptroller. However, part of the money in Fund 273 is reserved by the Health Department for the Board to finance some of the Board's operations, and these expenditures are made under an operating control budget known as Budget 49. . . ."

According to the facts submitted, the moneys in Fund 273 are grants from the Federal Government to the Health Department based on the qualifications and application of the Health Department. The funds are carried by the Comptroller as Health Department funds. Even though these moneys are budgeted to the Board by the Health Department, they are still Health Department funds until they are paid over to the Board. The moneys in Fund 273 under Budget 49 would not be considered funds of the Board and would not be expendable by the Board.

"(6) Would a person on the staff of the Board whose salary is paid from Fund 273 under Budget 49 and who is subject to the supervision of the Executive Secretary of the Board, but who is also considered by the Health Department as an employee of that agency for retirement, annual

leave and other purposes of personnel policy, be an 'employee' of the Board for the purpose of being eligible to have delegated to him the authority to take testimony in a hearing called by the Board, as authorized by said Section 4(d), paragraph (2)?"

As stated in your question, the person would be paid from Health Department funds, would be considered by the Health Department as their employee for personnel purposes, and would also be considered an employee of the Health Department for retirement and annual leave. Under the facts as stated, the person would be a Health Department employee and not an employee of the Board.

"(7) Would a member of the staff of the Board whose salary is paid from Fund 153 and who is subject to the supervision of the Executive Secretary of the Board be an 'employee' for such purpose?"

The moneys in Fund 153 are Board funds, so if a person was paid by the Board, was subject to the supervision of the Executive Secretary, and was hired under personnel policies of the Board, the person would be an employee of the Board for purposes of Article 762ld.

"(8) Would a person retained as a professional consultant under authority of Section 3(h) of the Act and compensated from Fund 153 be an 'employee' for such purposes?"

Normally a professional consultant is not considered an employee, but is considered an independent contractor. If the consultant is compensated on a retainer or fee basis and if he is not subject to supervision in the details of his work, he would be considered as an independent contractor.

Section 3(h) of Article 762ld reads, in part, as follows:

". . . the Board may employ and compensate with funds available therefor professional consultants, assistants and employees that may be necessary. . . ."

Section 3(h), quoted in part above, draws a distinction between professional consultants and employees and since

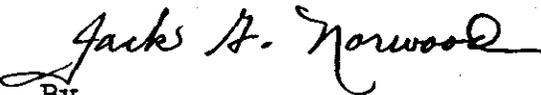
Section 4(d)2 deals with employees and members only, the Legislature must have intended to carry out this distinction with regard to authority to take testimony at its hearings. It follows that a professional consultant could not be considered an "employee" for purposes of Section 4(d)2 of Article 762ld.

SUMMARY

Under Section 3(d) of Article 762ld of Vernon's Civil Statutes, a personal representative of an ex-officio member of the Board would stand in the place of the ex-officio member for the purposes of Board duties. Under Section 4(d)2, the authority to take testimony must be given by the Board directly to the person who is to take the testimony. Section 3(e) provides for the payment of the traveling expenses for the ex-officio members and employees of the Board only and does not apply to their personal representatives. The moneys in Fund 273 under Budget 49 would not be considered funds of the Board and would not be expendable by the Board. A person paid from Health Department funds and considered by the Health Department as their employee for purposes of personnel policy, retirement, and annual leave would not be an employee of the Board for purposes of Section 4(d)2. A person paid from Board funds, hired under Board personnel policy, and subject to the control and supervision of the Executive Secretary of the Board would be a Board employee for purposes of Section 4(d)2. A professional consultant would not be considered an employee for purposes of Section 4(d)2 of Article 762ld.

Yours very truly,

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Attorney General

  
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JGN:wb

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