



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 15, 1988

Mr. Bob E. Bradley
Executive Director
Texas State Board of Public Accountancy
1033 La Posada, Suite 340
Austin, Texas 78752-3892

LO-88-103

Dear Mr. Bradley:

You ask for our opinion about the status of a member of the Board of Public Accountancy in light of Letter Opinion LO-88-68. In that ruling we determined that section 41a-1 § 4(c), V.T.C.S., made that member of the Board ineligible for service because her sister was an officer in a trade association in the profession of public accountancy.

You first ask whether the member was ineligible to participate in the activities of the Board from the time of her initial appointment, assuming that her sister was an officer of the trade association at that time and has remained in office at least through the date of LO-88-68.

The member was ineligible for appointment to the Board and has remained ineligible to serve throughout the term of her appointment under the facts you have provided to us.

You next ask about the effect of the participation of the ineligible member in the activities of the Board.

Although the Board member was ineligible for appointment and has remained ineligible for service, her participation in the activities of the Board as a de facto member is not a nullity. In other words, a de facto officer, otherwise ineligible for an office, nevertheless is cloaked with the full authority of the position. Forwood v. City of Taylor, 208 S.W.2d 670, reh'g denied, 209 S.W.2d 434 (Tex. Civ. App. - Austin), affirmed, 214 S.W.2d 282 (Tex. 1948). This rule is founded upon sound considerations of necessity and policy and protects the public and individuals whose interests are affected because they rely on the validity of the appointment. Jones v. State Bd. of Trustees

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of the Employees Retirement System of Texas, 505 S.W.2d 361 (Tex. Civ. App. - Dallas 1974 no writ). See also French v. State, 572 S.W.2d 934 (Tex. Crim. App. 1977).

The service of the individual as a de facto member of the Board is subject to the strictures of the conflict of interest law, article 6252-9b, V.T.C.S. That provision of the law requires a member of the Board to refrain from voting if the member has "a personal or private interest in any measure, proposal or decision pending before the board" as defined in article III, section 22 of the Texas Constitution. V.T.C.S., art. 6252-9b, § 6(a), (b). In normal circumstances, the affected board member must make the initial decision about whether participation in a particular matter is appropriate. The Board's only remedy is to seek the removal of the Board member according to the mechanism specified in the statute. See Attorney General Opinion H-1319 (1978). We note that the statute bars any action for removal brought more than two years after an alleged violation is said to have occurred. Id. § 6(d). In this instance, the Board should make a case-by-case evaluation of any suspect actions not subject to the bar of the limitations provision.

Additionally, a consideration touching upon the possibility for a conflict of interest -- or the appearance of a conflict -- in matters directly affecting the de facto board member's sister or the organization in which the sister is an officer makes it imperative for the Board to review all of the matters in which the ineligible member has cast a vote. Public policy in Texas requires that that an official refrain from casting a deciding vote in a matter concerning an issue in which the official has a direct, personal interest. See generally Hager v. State ex rel. TeVault, 446 S.W.2d 43 (Tex. Civ. App. - Beaumont 1969, writ ref'd n.r.e.); Attorney General Opinion JM-824 (1987). In our opinion, if such an examination reveals that the ineligible member cast a deciding vote in a matter, then the Board's action in that instance, at the least, is voidable.

You also ask whether the de facto board member was entitled to receive per diem and travel expenses for service on the Board. The answer is yes. Harris County v. Hunt, 388 S.W.2d 459, 465 (Tex. Civ. App. - Houston 1965, no writ). See also 60 Tex. Jur.3d Public Officers and Employees § 257 and Glenn v. Town of Trenton, 256 S.W. 631 (Tex. Civ. App. - Texarkana 1923, no writ).

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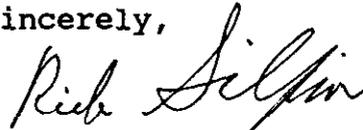
You next ask what action the Board should take to assure compliance with the anti-nepotism provision of the Public Accountancy Act.

A member of the Board of Public Accountancy may be removed from office either by resignation or by proceeding quo warranto. See generally Civ. Prac. & Rem. Code, ch. 66. Such an action may be initiated at the instance of the Board or any person by the Attorney General, or the county or district attorney of a proper county. Id. § 66.002.

Finally, you ask whether the affected board member may participate in the activities of the Board from the date of Letter Opinion LO-88-68 until she is no longer in office or until her sister leaves office in a trade association in the profession of public accountancy, thus removing the bar to continued future service by the board member.

A member of the Board of Public Accountancy -- even if only a de facto holder of the position -- remains a member of the Board until resignation, removal, and replacement. The board member remains subject to all of the provisions concerning conflict-of-interest discussed above. She is under an obligation to disclose conflicts-of-interest subject to the prohibitions in article 6252-9b and to observe the general statutory prohibitions against the disclosure of confidential information. See, e.g., V.T.C.S. arts. 6252-17 and 6252-17a. The member may not be excluded from participation in the activities of the Board, absent appropriate legal action. Nor may the majority of the Board prevent the member from viewing information available to the entire Board and necessary for the member to discharge her duties. See Attorney General Opinion H-1319 (1978). See also Attorney General Opinion JM-119 (1983).

Sincerely,



Rick Gilpin, Chairman
Opinion Committee

RG/DB/bc

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