



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 26, 1995

Ms. Barbara J. Childress
Chair
Texas Commission on Law Enforcement
Officer Standards and Education
1033 La Posada, Suite 240
Austin, Texas 78752

Letter Opinion No. 95-039

Re: Whether appointed members of the
Texas Peace Officers' Memorial Advisory
Committee to the Texas Commission on
Law Enforcement Officer Standards and
Education continue to serve until replaced
or reappointed (ID# 33673)

Dear Ms. Childress:

You have requested our opinion regarding whether appointed members of the Texas Peace Officers' Memorial Advisory Committee (the "committee") to the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") whose terms expired on February 1, 1995, "continue to serve until they are replaced or reappointed." The committee, created by the legislature during its 1989 regular session, was established "to fund, design, construct, update, maintain, and manage a Texas peace officers' memorial on the grounds of the Capitol Complex in honor of those Texas peace officers who have died in the line of duty." Gov't Code § 415.112.

The committee consists of thirteen regular members:

- (1) three licensed peace officers appointed by the governor,
- (2) a surviving spouse of a Texas peace officer who died in the line of duty, appointed by the governor, [and]
- (3) nine individuals, each appointed by a member of the commission[.]

Id. § 415.113(1) - (3).¹

¹In addition, there are three nonvoting *ex officio* members:

- (A) the director of the Department of Public Safety;
- (B) the executive director of the State Preservation Board; and

Although the committee is denominated "advisory," *id.* § 415.112, and although certain of its actions require the approval of the State Preservation Board, it is nevertheless directed by statute to perform certain duties without assistance, including the "raising of funds," *id.* § 415.117(2), the selection of "individuals or organizations to provide fund-raising services," *id.* § 415.117(5), the establishment of "rules and procedures for adding names to the memorial," *id.* § 415.117(8), and the promulgation of "guidelines for conducting advisory-committee-sponsored memorial services at the memorial site," *id.* § 415.117(9).²

Section 415.115(a) of the Government Code provides that "[a]ppointed members of the advisory committee hold office for two-year terms that expire February 1 of each odd-numbered year." When a vacancy occurs, the person "who appointed the member who has vacated the advisory committee position" is required to "appoint a replacement who meets the qualifications of the vacated office."³ *Id.* § 415.115(a). A committee

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(C) the director and librarian of the Texas State Library and Archives Commission.

Gov't Code § 415.113(4).

Prior to the statutory amendments of 1993, *see* Act of May 18, 1993, 73d Leg., R.S., ch. 348, § 2, 1993 Tex. Sess. Law Serv. 1558-59, the committee, in addition to the thirteen members appointed by the governor, consisted of the attorney general, the director of the Department of Public Safety, and the architect of the capitol. *Id.* § 415.113(1) - (2), (6) (Vernon 1990).

²With the approval of the State Preservation Board, the committee is authorized to establish "a schedule for the design, construction, and dedication of the memorial," *id.* § 415.117(3), to implement "procedures to solicit designs for the memorial," *id.* § 415.117(4), to devise "a selection process and choice of the final design," *id.*, and to review and monitor "the design and construction of the memorial," *id.* § 415.117(7). With the approval of the State Preservation Board and the Architect of the Capitol, the committee is charged with "actual site selection on the grounds of the Capitol Complex." *Id.* § 415.117(1). And with the approval of the State Preservation Board and the General Services Commission, the committee is instructed to "select[] individuals or firms to construct the memorial." *Id.* § 415.117(6).

³Government Code section 415.114 establishes the following qualifications for membership on the committee:

To be eligible for appointment to the advisory committee, a person must be at least 21 years of age and a resident of this state. Each appointee must be of good character and may not have been convicted of a felony or a misdemeanor involving moral turpitude. Each appointee other than the appointee described by Section 415.113(2) [that is, the "surviving spouse" position] must meet the experience requirements prescribed for commissioners under Section 415.004. Appointments to the advisory committee shall be made without regard to the

member is subject to removal if he or she "does not have at the time of appointment the qualifications required for appointment . . . or does not maintain during service . . . the qualifications required for appointment . . ." *Id.* § 415.115(b).

Article XVI, section 17, of the Texas Constitution provides: "All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." The purpose of article XVI, section 17, is "to insure, in so far as is possible, that there be no cessation in the functions of government. It continues the officer in the office with all the powers incident thereto until his successor has duly qualified." Attorney General Opinion JM-55 (1983) at 2 (quoting Attorney General Opinion V-760 (1949) [citing, among other authorities, *Jones v. City of Jefferson*, 1 S.W. 903 (Tex. 1886)]). Although a former office holder, prior to the appointment and qualification of his successor, continues to serve in a *de facto* capacity, there is nevertheless a "constructive vacancy" in the office "which may be filled at any time by the appointing authority." Attorney General Opinion JM-720 (1987) at 2 (citing *State v. Catlin*, 19 S.W. 302 (Tex. 1892)).

We have not been cited to any authority which defines the parameters of the term "office" for purposes of article XVI, section 17. Prior to its amendment in 1993, section 415.115 provided that committee members held "office at the pleasure of the person having the authority to appoint them." Gov't Code § 415.115(a) (Vernon 1990). When a vacancy occurred, "the member of the commission or the public official who appointed the [vacating] member" was required to "appoint a replacement who meets the qualifications of the vacated office." *Id.* A committee member's term expired when the committee member was "replaced by the appointing person or when the appointing person [was] no longer authorized to appoint a member of the advisory committee." *Id.*

As we have indicated above, however, committee members have, since 1993, served fixed terms and have been removable only for cause. Act of May 18, 1993, 73d Leg., R.S., ch. 348, § 2, 1993 Tex. Sess. Law Serv. 1558-59. As we have also noted above, the committee performs certain of its duties without the assistance or advice of any other individual or entity. Under the usual test for determining whether a person is an "officer" for purposes of article XVI, section 40, Texas Constitution, members of the

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race, color, religion, sex, handicap, or national origin of the appointee. A person is not eligible for appointment to the advisory committee if the person is a commissioner, an employee of the commission, or a person who is related within the second degree by affinity or consanguinity, as determined under Article 5996h, Revised Statutes, to a member of the commission or commission employee.

now exercise "sovereign function[s] of the government . . . largely independent of the control of others," *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955) (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740-41 (Tex. Civ. App.--Galveston 1949, writ ref'd)); *see also* Attorney General Opinion JM-594 (1986). Thus, in our opinion, an appointed member of the committee has, at least since 1993, thereby held an "office." We conclude, therefore, that appointed members of the committee whose terms have expired continue to serve until they are either replaced or reappointed.

S U M M A R Y

Pursuant to the provisions of article XVI, section 17, of the Texas Constitution, appointed members of the Texas Peace Officers' Memorial Advisory Committee to the Texas Commission on Law Enforcement Officer Standards and Education continue to serve after the expiration of their terms until they are either replaced or reappointed.

Yours very truly,



Rick Gilpin
Deputy Chief
Opinion Committee