



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 19, 1997

The Honorable Frank Madla  
Chair, Committee on Nominations  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711-2068

Letter Opinion No. 97-003

Re: When the senate does not act to confirm or reject a person nominated to an office by the governor during a legislative session, is the nominee considered rejected by law, so that he may not be reappointed to same office or board? (ID# 39211)

Dear Senator Madla:

You inquire about the application of article IV, section 12 of the Texas Constitution to a person nominated to an office by the governor during a legislative session, but not confirmed by the legislature. Article IV, section 12 provides in part:

(a) All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law by appointment of the Governor.

(b) An appointment of the Governor made during a session of the Senate shall be with the advice and consent of two-thirds of the Senate present.

(c) In accordance with this section, the Senate may give its advice and consent on an appointment of the Governor made during a recess of the Senate.

On May 4, 1995, the governor appointed Jerry Don Miller, Ph.D., to fill a vacancy on the Guaranteed Student Loan Corporation Board, with a term that expires on January 31, 1999.<sup>1</sup> The governor submitted a list of nominations that included this one to the senate for confirmation.<sup>2</sup> The Senate Committee on Nominations recommended confirmation of the nominations including

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<sup>1</sup>Governor's appointments made May 4, 1995, 20 Tex. Reg. 3523 (1995). Dr. Miller was appointed to fill the unexpired term of Yvette Clark of Nacogdoches, who resigned. *Id.*

<sup>2</sup>S.J. of Tex., 74th Leg., R.S. 1691, 1693 (1995).

Dr. Miller's,<sup>3</sup> but when the full senate considered the committee's report, Dr. Miller's nomination was severed from the motion to confirm and left pending.<sup>4</sup>

You state that the senate did not expressly confirm or reject this appointment during the remaining days of the session. An appointment made during the legislative session requires the joint action of the governor and senate before it becomes effective.<sup>5</sup> Thus, Dr. Miller's appointment never became complete and effective, and another individual was appointed to the vacancy on July 17, 1995, and served as an interim appointee until he resigned effective April 30, 1996. You wish to know whether the governor may appoint his original nominee to this position on the board, which became vacant due to the interim appointee's resignation.

An appointee who is not confirmed by a two-thirds majority of the senate is considered rejected.<sup>6</sup> In *Denison v. State*, 61 S.W.2d 1017, 1021 (Tex. Civ. App.--Austin 1933), *writ ref'd per curiam*, 61 S.W.2d 1022 (Tex. 1933), which arose from the senate's refusal to confirm a gubernatorial nomination made during the legislative session, the Austin Court of Civil Appeals stated as follows:

The language [of article IV, section 12], "If rejected, said office shall immediately become vacant, and the governor shall, without delay, make further nominations, until a confirmation takes place," clearly and by necessary implication denies to a nominee, whose confirmation has been rejected by the Senate, any right whatever to occupy the office or to discharge, after such rejection, any of the duties thereof.<sup>7</sup>

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<sup>3</sup>*Id.* at 1970.

<sup>4</sup>*Id.* at 2025, 2027.

<sup>5</sup>*Denison v. State*, 61 S.W.2d 1017, 1021 (Tex. Civ. App.--Austin 1933), *writ ref'd per curiam*, 61 S.W.2d 1022 (Tex. 1933); Attorney General Opinion O-4864 (1942); Attorney General Opinion (To Dr. G. Henry Aronsfeld, Jan. 3, 1930), 1928-30 TEX. ATT'Y GEN. BIENNIAL REP. 325; *see also* Attorney General Opinion H-948 (1977) at 2 (overruled by Attorney General Opinion JM-1161 (1990) as to interim appointments).

<sup>6</sup>Attorney General Opinion JM-1161 (1990) at 6 (failure to confirm by required vote works a rejection of appointment); WW-530 (1958) at 3; *see Denison v. State*, 61 S.W.2d 1022 (Tex. 1933) (*per curiam*).

<sup>7</sup>*Denison v. State*, 61 S.W.2d at 1021. The Texas Supreme Court refused the application for writ of error, agreeing in a *per curium* opinion with the Court of Civil Appeals on a question of jurisdiction and on the need for the governor's appointment to be confirmed by a two-thirds vote of the senate before it could become effective. *Denison v. State*, 61 S.W.2d at 1023.

The language quoted by the court still appears in article IV, section 12, with non-substantive changes. Subsections 12(e) and (f) of article IV provide as follows:

(e) If the Senate, at a regular session does not take final action to confirm or reject a previously unconfirmed recess appointee or another person nominated to fill the vacancy for which the appointment was made, the appointee or other person, as appropriate, is considered to be rejected by the Senate when the Senate session ends.

(f) *If an appointee is rejected, the office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place.* If a person has been rejected by the Senate to fill the vacancy, the Governor may not appoint the person to fill the vacancy or, during the term of the vacancy for which the person was rejected, to fill another vacancy in the same office or on the same board, commission, or other body.<sup>8</sup>

The court of civil appeals in *Denison* applied the predecessor of the italicized language to a gubernatorial appointment made during the session and not confirmed by the senate. The validity of the court's interpretation of this language has not been affected by amendments to article IV, section 12, adopted after *Denison*. A 1987 amendment to article IV, section 12, which authorized the legislature to enact laws limiting the authority of a governor who is not reelected to fill vacancies in office,<sup>9</sup> did not change this part of the constitutional provision.

A more comprehensive amendment to article IV, section 12, was adopted in 1990,<sup>10</sup> in response to Attorney General Opinion JM-1161, which had overruled opinions finding that the holdover provision in article XVI, section 17 of the Texas Constitution maintained recess appointees in office if the senate failed to act on them. Attorney General Opinion JM-1161 (1990) at 11. The amendment was proposed to clarify "the procedure by which the senate may give its advice and consent on proposed gubernatorial appointees . . . if the appointees are initially appointed when the senate is not in session."<sup>11</sup> It "would largely reinstate the traditional appointment and confirmation

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<sup>8</sup>Tex. Const. art. IV, § 12(e), (f) (emphasis added).

<sup>9</sup>S.J.R. 53, Act of May 28, 1987, 70th Leg., R.S., 1987 Tex. Gen. Laws 4115, 4115 (now codified as Tex. Const. art. IV, § 12(h)).

<sup>10</sup>S.J.R. 2, Act of June 6, 1990, 71st Leg., 6th C.S., 1990 Tex. Gen. Laws 176, 176-77.

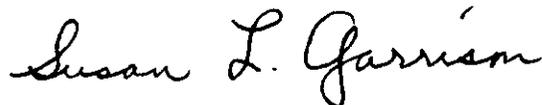
<sup>11</sup>TEX. LEGIS. COUNCIL, ANALYSIS OF PROPOSED CONSTITUTIONAL AMENDMENTS APPEARING ON BALLOT 9 (1990).

practice, with a few clarifications.”<sup>12</sup> Thus, the 1990 amendment was designed to affect procedures applicable to recess appointees, not persons appointed during the session. Accordingly, Dr. Miller was deemed to have been rejected by the senate when it failed to confirm his nomination to fill the vacancy on the Guaranteed Student Loan Corporation Board. As “a person rejected by the senate to fill a vacancy,” he may not be appointed by the governor “to fill the vacancy or during the term of the vacancy for which the person was rejected, to fill another vacancy in the same office or on the same board, commission, or other body.” Tex. Const. art. IV, § 12. Because Dr. Miller’s nomination to the vacancy on the Guaranteed Student Loan Board was rejected by the senate, the governor may not appoint him to the same position on the board following the interim appointee’s resignation, or to another vacancy on that board during the term of the vacant position to which he had been nominated.<sup>13</sup>

### S U M M A R Y

When the senate does not confirm or reject a person nominated to office by the governor during a legislative session, that person is considered to be rejected by the senate for purposes of article IV, section 12 of the Texas Constitution. The governor may not appoint that person to fill the vacancy, or, during the term of the vacancy for which the person was rejected, to fill another vacancy in the same office or on the same board, commission, or other body.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Opinion Committee

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<sup>12</sup>*Id.*

<sup>13</sup>The 1990 amendment to article IV, section 12, made a change applicable to all appointees rejected by the senate, whether appointed during a session or a recess. Under the former version of article IV, section 12, a person rejected by the senate could not be appointed to the same vacancy, but might be eligible for appointment to another position on the same board or commission. TEX. LEGIS. COUNCIL, *supra* note 11, at 10. “Such an action subverts the senate’s power to approve or reject gubernatorial appointees. The proposed amendment would prohibit reappointment to the same board or commission during the term of the vacancy for which the appointee was rejected.” *Id.* at 9-10. The policy of checks and balances underlying this change applies without distinction to appointments made during a legislative session or during a recess.