



Office of the Attorney General
State of Texas

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May 8, 1997

The Honorable David Counts
Chair, Committee on Natural Resources
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 97-047

Re: Whether a former regent of the Texas State
Technical College System may be appointed
executive officer of the system (ID# 39533)

Dear Representative Counts:

You have requested our opinion as to whether a member of the Board of Regents of the Texas State Technical College System ("TSTCS") may be appointed chancellor of the system if he resigns prior to the offer of employment.

Under the provisions of chapter 135 of the Education Code, TSTCS is a coeducational two-year institution of higher education offering courses of study in technical-vocational education for which there is demand within the State of Texas. Educ. Code § 135.01(a). The system is composed of a number of campuses and extension centers operating throughout the state. *Id.* § 135.02. The board awards "associate of applied science degrees, certificates, and diplomas limited to those appropriate to technical education." *Id.* § 135.51. Control of TSTCS "is vested in a board of nine regents," section 135.21, each of whom is appointed by the governor for a term of six years. *Id.* §§ 135.22, .23. A prior opinion of this office held that TSTCS is a state agency. *See* Attorney General Opinion H-1116 (1978) at 1.

As you indicate, section 130.089 of the Education Code prohibits a public junior college from employing or contracting "with an individual who was a member of the board of trustees of the junior college before the first anniversary of the date the individual ceased to be a member of the board of trustees." TSTCS, however, is not a "junior college" for purposes of the Education Code, and the provisions of chapter 130 are not applicable to it. Chapter 135, which governs TSTCS, contains no similar ban on the employment of former regents.

You also ask about section 47 of article IX of the current General Appropriations Act, which provides: "None of the funds appropriated by this Act may be used to enter into a consultant contract with any individual who has been previously employed by the department or agency within the past twelve months." General Appropriations Act, Act of May 25, 1995, 74th Leg., R.S., ch. 1063, art. IX, § 47, 1995 Tex. Gen. Laws 5242, 6095. Under the terms of chapter 135 of the Education Code,

an "executive officer" or chancellor of TSTCS, appointed by the board of regents, is responsible for the "general management" of TSTCS. Educ. Code § 135.27(d). In our opinion, this "executive officer" cannot reasonably be said to be a "consultant" for purposes of the section 47 restriction. Furthermore, a regent is not an individual who is "employed" by TSTCS, since he or she is prohibited from receiving "salary or compensation" for his or her services. *Id.* § 135.26. We conclude therefore that section 47 does not itself bar a former regent from appointment as chancellor of TSTCS.

Finally, you inquire about section 572.054(a) of the Government Code which prohibits a former member of a "regulatory agency" from making

any communication to or appearance before an officer or employee of the agency in which the member or executive head served before the second anniversary of the date the member or executive head ceased to be a member of the governing body or the executive head of the agency if the communication or appearance is made:

- (1) with the intent to influence; and
- (2) on behalf of any person in connection with any matter on which the person seeks official action.

"Person" is defined as "an individual or a business entity." Gov't Code § 572.002(7). A "regulatory agency" is defined as

any department, commission, board, or other agency, except the secretary of state and the comptroller, that:

- (A) is in the executive branch of government;
- (B) has authority that is not limited to a geographical portion of the state;
- (C) was created by the Texas Constitution or a statute of this state; and
- (D) has constitutional or statutory authority to engage in regulation.

Id. § 572.002(8).

It is not clear whether the authority of TSTCS might more properly be characterized as "statewide" or as "limited" to those specific counties designated in the statute. Furthermore, it is not

apparent that TSTCS may be deemed a "regulatory agency" at all.¹ For reasons explained below, however, we need not address those issues here.

Even if it is assumed, however, that TSTCS is a "regulatory agency" of "statewide jurisdiction," it does not follow that section 572.054(a) would act to prohibit the appointment of a former regent as chancellor. In Ethics Advisory Opinion No. 278, the Ethics Commission held that a former member of the Commission on Fire Protection was not prohibited from serving on an advisory committee to the commission. The opinion acknowledged that, as a member of the advisory committee, "the former board member would communicate with members of the commission in order to influence commission action." Ethics Advisory Opinion No. 278 (1995) at 2. The Ethics Commission found, however, that such communications would be made, not "on behalf of any person," as prohibited by the statute, but "on behalf of [the] advisory committee." *Id.* Since "the advisory committee is neither an individual nor a business entity,"² the revolving door prohibitions would not apply to such communications." *Id.*

Likewise, in the situation you describe, any communication made by the former board member to the board would not be a communication "on behalf of any person," *i.e.*, "an individual or business entity," *see* Gov't Code § 572.002(7), but rather a communication in his capacity as chancellor, or executive officer, of TSTCS. In such a case, the revolving door prohibition would not be applicable.

Although no statute absolutely prohibits a former board member from being appointed chancellor of TSTCS, the common-law-doctrine of incompatibility restricts the timing of such appointment. It is a well-settled principle that a public board may not appoint one of its members to an office or position while that person is still a member of the board. *Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); Attorney General Opinions JM-934 (1988), C-452 (1965); Letter Opinion Nos. 94-020 (1994), 92-008 (1992). As the court stated in *St. Louis Southwestern Railway Company of Texas v. Naples Independent School District*, 30 S.W.2d 703, 706 (Tex. Civ. App.—Texarkana 1930, no writ),

¹A number of opinions of the Texas Ethics Commission have considered the meaning of "regulatory agency." *See, e.g.*, Ethics Advisory Opinion Nos. 154 (1993) (Commission on the Arts is a "regulatory agency" under V.T.C.S., art. 6252-9b, V.T.C.S., the predecessor statute to Gov't Code ch. 572); 79 (1992) (Board of Pardons and Paroles is a "regulatory agency"; 52 (1992) (Texas Low-Level Radioactive Waste Disposal Authority is a "regulatory agency"). Indeed, in Ethics Advisory Opinion No. 246 (1995), the Ethics Commission held that the State Board of Education is a "regulatory agency" under chapter 572.

In Ethics Advisory Opinion No. 220 (1994), the Ethics Commission stated that "[t]he chapter 572 provision is very broad, including any statewide executive agency having the power to promulgate rules . . ." Under such a strict standard, TSTCS, too, would probably be deemed a "regulatory agency," since section 135.24 of the Education Code directs its board of regents to "enact bylaws, rules and regulations as it deems necessary for the successful management and operation of the system." On the basis of this authority, one might conclude that TSTCS is a "regulatory agency" under the terms of chapter 572 of the Government Code.

²"Person" is defined in section 572.002(7) of the Government Code as an individual or a business entity.

It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

Id. at 706 (quoting 46 C.J., *Power of Appointment or Membership in Appointing Body*, § 43, at 940). Furthermore, since, under the terms of article XVI, section 17 of the Texas Constitution, a board member who resigns continues to hold office until his successor has qualified, he may not be appointed to the position of chancellor until the governor has appointed his successor, and that individual has taken the oath of office. *See* Attorney General Opinion JM-934 (1988).

S U M M A R Y

A former member of the Board of Regents of the Texas State Technical College System is eligible to be appointed executive officer of the system, provided his successor as regent has qualified for and taken the oath of office prior to the appointment.

Yours very truly,



Rick Gilpin
Deputy Chief
Opinion Committee