



ATTORNEY GENERAL OF TEXAS

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December 10, 2010

The Honorable Florence Shapiro
Chair, Committee on Education
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. GA-0829

Re: Whether the Governor must appoint an additional member to the Texas Higher Education Coordinating Board to serve from September 1, 2011 to August 31, 2013 (RQ-0896-GA)

Dear Senator Shapiro:

You inform us that the Texas Higher Education Coordinating Board (the “Board”) formerly consisted of eighteen members but currently consists of nine. *See* TEX. EDUC. CODE ANN. § 61.022 (West 2006) (requiring that the Board have nine members).¹ The reduction in Board membership began in 2003 when the Legislature enacted Senate Bill 286, a 2003 amendment to section 61.022. Act of June 1, 2003, 78th Leg., R.S., ch. 820, § 2, 2003 Tex. Gen. Laws 2579, 2579–80. Senate Bill 286 incrementally reduced Board membership by requiring the appointment of three new Board members in 2003 for terms expiring in 2009, four new members in 2005 for terms expiring in 2011, two new members for terms expiring in 2013, and two new members every two years thereafter. *Id.* You are concerned that this schedule of appointments would result in eight rather than nine members serving on the Board from August 31, 2011 to August 31, 2013. Request Letter at 1–3. This concerns you because article XVI, section 30a, of the Texas Constitution requires that boards “established by law[] may be composed of an odd number of three or more members.” Request Letter at 1; TEX. CONST. art. XVI, § 30a. Accordingly, you ask whether the Governor should appoint an “additional” Board “member to fill a vacancy on September 1, 2011 to expire on August 31, 2013.” Request Letter at 2–3.

The Board would have a vacancy if it had eight members with unexpired terms serving from September 1, 2011 to August 31, 2013. *See* TEX. EDUC. CODE ANN. § 61.022 (West 2006) (requiring that the Board have nine members); *Denison v. State*, 61 S.W.2d 1017, 1021 (Tex. Civ. App.—Austin 1933, writ ref’d) (holding that a vacancy exists when an appointed officer’s term expires). Article XVI, section 30a, requires that “vacancies in such offices . . . be filled as may be provided by law.” TEX. CONST. art. XVI, § 30a.² Thus, the Texas Constitution recognizes that there

¹Request Letter (*available at* <http://www.texasattorneygeneral.gov>).

²This provision applies to “such boards as have been, or may hereafter be established by law.” Tex. H.R.J. Res. 9, 32d Leg., R.S., 1911 Tex. Gen. Laws 286, 286–87, *reprinted in* 15 H.P.N. GAMMEL, THE LAWS OF TEXAS 1911 (continued...)

could be a vacancy on the Board and assigns the Legislature the duty to decide how the vacancy should be filled. *Id.* The Legislature performed this duty when it enacted Senate Bill 286. *See supra* Act of June 1, 2003, at 2601 (providing, “To achieve an orderly transition from 18 to 9 positions on the Texas Higher Education Coordinating Board . . . the governor shall appoint only two members to the coordinating board for terms expiring on August 31, 2013.”). Consequently, the Governor may make appointments to the Board as Senate Bill 286 prescribes. He need not appoint an additional member to serve from September 1, 2011 to August 31, 2013.

It is important to note that 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.” TEX. CONST. art. XVI, § 17. Therefore, one of the Board members whose terms expire on August 31, 2011, would continue to perform the member’s duties until his or her successor is qualified to serve on the Board. An officer continuing to perform his or her duties after the expiration of the officer’s term would be a *de jure* officer retaining all the authority he or she had before the officer’s term expired. *Delamora v. State*, 128 S.W.3d 344, 356 (Tex. App.—Austin 2004, pet. ref’d).


²(...continued)

(Austin Printing Co. 1911) (enacting article XVI, section 30a) (added Nov. 5, 1912). The Board was established by law. *See* Act of Feb. 25, 1965, 59th Leg., R.S., ch. 12, §§ 1–2, 1965 Tex. Gen. Laws 27, 27 (creating the Coordinating Board, Texas College and University System), *amended by* Act of June 1, 1987, 70th Leg., R.S., ch. 823, § 1.03, 1970 Tex. Gen. Laws 2839, 2840 (stating that the Coordinating Board, Texas College and University System would thereafter be known as the Texas Higher Education Coordinating Board).

S U M M A R Y

The Governor may appoint members to the Texas Higher Education Coordinating Board as provided by Senate Bill 286 of the 78th Legislature, Regular Session. He need not appoint an additional member to serve from September 1, 2011 to August 31, 2013.

Very truly yours,


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