



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 27, 1998

Mr. C. Skeete Foster  
Chair, Upper Colorado River Authority  
P.O. Box 1482  
San Angelo, Texas 76902

Letter Opinion No. 98-029

Re: Whether member of Upper Colorado River Authority Board who moves to another area of the state may continue to serve on the board (RQ-989)

Dear Mr. Foster:

As chair of the Board of Directors of the Upper Colorado River Authority you ask whether a board member who moves to another area of the state may remain on the board. The legislature created the Upper Colorado River Authority ("UCRA") in 1935 pursuant to article XVI, section 59-a of the Texas Constitution,<sup>1</sup> which authorizes the legislature to create conservation and reclamation districts for the conservation and development of natural resources. The UCRA Board consists of nine directors appointed by the governor and confirmed by the senate.<sup>2</sup> Three directors "shall be resident citizens of Tom Green County," three "shall be resident citizens of Coke County," and the remaining three directors "shall be resident citizens of counties contiguous to the District, or in any County any part of which may be within twenty-five (25) miles of said District."

You inform us that a board member at time of appointment complied with the residency requirement stated in the statute, but that after being confirmed, the board member sold his or her home and moved to another area of the state.<sup>3</sup> The board member has informed the board that any change of residency was temporary because of work or family matters, and that the permanent residence is in the county of appointment. You ask whether this board member may continue to serve upon moving and whether the board may include in its by-laws limits as to residency not required by statute.

We first consider whether the board may adopt by-laws adding to the statutory limits on residency. The UCRA is authorized to "make by-laws for the management and regulation of its

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<sup>1</sup>Act of May 1, 1935, 44th Leg., R.S., ch. 126, § 1, 1935 Tex. Gen. Laws 336, 336.

<sup>2</sup>Act of May 24, 1995, 74th Leg., R.S., ch. 516, § 1, 1995 Tex. Gen. Laws 3264, 3265.

<sup>3</sup>You do not identify the area of the state. We assume it is not within a county comprising the district or within a county, any part of which is within twenty-five miles of the district.

affairs.”<sup>4</sup> A state agency may adopt only rules authorized by and consistent with its statute, and an agency rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.<sup>5</sup> This rule has been held to be applicable to rules of a political subdivision,<sup>6</sup> and we believe it also applies to the by-laws promulgated by the UCRA board. We conclude that the board has no authority to adopt by-laws adding to or changing the legislatively-established residency requirements for appointment to the board.<sup>7</sup>

We next consider whether this board member may continue to serve upon moving. You inform us that the board member does not agree with your conclusion that he or she has changed his or her residence. “Residence” is “a place where a person’s habitation is fixed, without any present intention of removing therefrom.”<sup>8</sup> Residence is lost “by leaving the place where one has acquired a permanent home and remov[ing] to another place without any present intention to return to the former place of residence.”<sup>9</sup> An individual’s residence depends upon the circumstances surrounding that person and largely depends upon his or her present intention.<sup>10</sup> We cannot in the opinion process resolve fact questions about the board member’s intent as to residence.<sup>11</sup> Although we cannot determine where the board member resides, we can advise you of the law relating to a public officer’s change of residence.

We first address article XVI, section 14 of the Texas Constitution, which requires civil officers to reside within the state and district and county officers to reside within their districts or counties. This provision has been held to be self-enacting, so that failure to reside in the district creates a vacancy in the office.<sup>12</sup> However, it does not apply to the officers of districts created

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<sup>4</sup>Act of May 1, 1935, 44th Leg., R.S., ch. 126, § 2, 1935 Tex. Gen. Laws 336, 338.

<sup>5</sup>*Railroad Comm’n of Texas v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 481 (Tex. App.--Austin 1994, writ denied).

<sup>6</sup>*Riess v. Appraisal Dist. of Williamson County*, 735 S.W.2d 633, 638 (Tex. App.--Austin 1987, writ denied).

<sup>7</sup>Attorney General Opinion H-1065 (1977) (state agency has no jurisdiction or control over qualifications of its own members); *see also Luna v. Blanton*, 478 S.W.2d 76, 78 (Tex. 1972) (legislature may not add to constitutionally prescribed qualifications for holding an office).

<sup>8</sup>*Prince v. Inman*, 280 S.W.2d 779, 782 (Tex. Civ. App.--Beaumont 1955, no writ).

<sup>9</sup>*Id.*

<sup>10</sup>*Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964).

<sup>11</sup>*See* Attorney General Opinion JM-611 (1986) at 2-3.

<sup>12</sup>*Prince*, 280 S.W.2d at 781.

pursuant to article XVI, section 59.<sup>13</sup> In *Kaufman County Levee Improvement District No. 10 v. National Life Insurance Co.*,<sup>14</sup> which related to a levee improvement district created pursuant to article XVI, section 59 of the Texas Constitution, the supervisors of the district did not reside in it, but they were not disqualified from service for that reason.<sup>15</sup> The court determined that article XVI, section 14, did not apply to officers of districts created under article XVI, section 59, basing its conclusion on the fact that the latter section was the later-adopted constitutional provision and on the long-standing legislative construction of article XVI, section 59 evidenced in statutes creating conservation and reclamation districts without requiring their officers to reside within their boundaries.<sup>16</sup>

There was no discussion in *Kaufman* of statutory requirements for appointment. The court noted that the three supervisors were nonresidents of the district when appointed by the commissioners court, thereby suggesting that there was no statutory residency requirement for supervisors. The present Water Code provisions on establishing a levee improvement district do not state a residency requirement for board members appointed by a commissioners court,<sup>17</sup> nor did the version of this statute in effect when the Kaufman County district was established.<sup>18</sup> Only when a levee improvement district elects its directors does the statute require a candidate for director required to reside in the precinct and county from which he or she is elected.<sup>19</sup> Although article XVI, section 14 does not ipso facto create a vacancy when a member of the UCRA board moves out of the district, that does not mean that a board member may ignore the residency requirements established by statute.

In *Phagan v. State*, 510 S.W.2d 655 (Tex. Civ. App.--Fort Worth 1974, writ ref'd n.r.e.), the state brought a *quo warranto* action to oust a district attorney who had been disbarred. Former article 332, V.T.C.S. (1925), provided that only a licensed attorney would be eligible to the office

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<sup>13</sup>*Walton v. Brownsville Navigation Dist. of Cameron County*, 181 S.W.2d 967, 969 (Tex. Civ. App.--San Antonio 1944, writ ref'd); *Kaufman County Levee Imp. Dist. No. 10 v. National Life Ins. Co.*, 171 S.W.2d 188, 190 (Tex. Civ. App.--Dallas 1943, writ ref'd).

<sup>14</sup>171 S.W.2d 188 (Tex. Civ. App.--Dallas 1943, writ ref'd).

<sup>15</sup>*Id.* at 190.

<sup>16</sup>*Id.* at 189-90.

<sup>17</sup>Water Code § 57.051 (adopted by Act of April 29, 1959, 56th Leg., R.S., ch. 176, § 1, 1959 Tex. Gen. Laws 364, 364).

<sup>18</sup>Article XVI, section 59 of the Texas Constitution, under which the Kaufmann County Levee Improvement District No. 10 was organized, was adopted in 1917. See Act of March 15, 1915, 34th Leg., R.S., ch. 146, § 15, 1915 Tex. Gen. Laws 229, 234-35 (statute authorizing organization of levee improvement districts).

<sup>19</sup>Water Code § 57.059.

of district attorney.<sup>20</sup> The court determined that this eligibility requirement was a continuing requirement, and the judgment of disbarment effected a loss of the office of district attorney by operation of law.<sup>21</sup>

This office has followed *Phagan* in opinions about appointive officers who are eligible for the office at the time of appointment but lose a condition of eligibility during the term of office. Attorney General Opinion H-578 considered a member of the Board of Private Investigators and Private Security Agencies who was appointed to a position set aside for a law enforcement officer and who subsequently resigned that position. The opinion concluded that

the Legislature, in specifically calling for varying qualifications for members of your Board, intended that those qualifications to be represented on the Board. And, following the dictates of the *Phagan* case, when a person no longer meets the qualifications for a position of the Board, it must be held that he loses his right to serve and the position is vacated.<sup>22</sup>

Attorney General Opinion H-1065 concluded that a member of the State Board of Morticians who became disqualified for the board through changing employment also vacated his office.<sup>23</sup> These opinions support the conclusion that a member of the UCRA board must comply with the statutory residence requirement throughout his or her tenure of office. Attorney General Opinion H-1065 (1977) at 3.

Moreover, a Texas court has determined that an elected officer who ceases to comply with the statutory residency requirement becomes disqualified for continuing in office. Section 141.001 of the Election Code, which establishes eligibility requirements for elective office, provides that a candidate for elective office must "have resided continuously in the state for 12 months and in the territory from which the office is elected for six months immediately preceding" the filing deadline for the election.<sup>24</sup> *Whitemarsh v. Buckley*, 324 S.W.2d 298 (Tex. Civ. App.--Houston 1959, no writ)

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<sup>20</sup>Former article 332, V.T.C.S. (1925) was repealed and recodified as section 41.001 of the Government Code by Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 26(1), 1985 Tex. Gen. Laws 1740, 2048.

<sup>21</sup>*Phagan v. State*, 510 S.W.2d 655, 662 (Tex. Civ. App.--Fort Worth 1974, writ ref'd n.r.e.).

<sup>22</sup>Attorney General Opinion H-578 (1975) at 2.

<sup>23</sup>See also Attorney General Opinion-H-1224 (1978) (teacher member of Board of Trustees of Teacher Retirement System vacates office upon retirement from teaching); Letter Opinion No. 96-061 (1996) (municipal utility district board member must remain registered voter of district and must own property in district to remain qualified for office).

<sup>24</sup>Elec. Code § 141.001(a)(5). A statute outside the Election Code supersedes section 141.001(a) to the extent of conflict. See Attorney General Opinion JM-909 (1988).

addresses the predecessor<sup>25</sup> of section 141.001 in connection with an action to enjoin two persons from serving as school trustees because they had become non-residents of the school district.<sup>26</sup> Although the Election Code provision refers only to a candidate's eligibility for office, the *Whitemarsh* court interpreted it as requiring the holder of an elective office to remain a resident during his or her term of office. The court stated as follows:

The evident purpose of the statute is to require representation of a political unit by one who is elected who resides in the unit which he is to serve. It is true that it does not deal specifically with removal from office upon cessation of residence once a person has been elected, but it would in effect be meaningless if it is interpreted as restrictive only of residence at the time of election and qualification. If it is so restricted, a person could be elected and qualify and then move out of the political unit and yet continue to act in an official capacity when he is no longer affected by the acts he performs.<sup>27</sup>

We believe that the court's reasoning applies with equal force to the residency requirements for appointive officers, such as the director of the UCRA board. On the basis of *Whitemarsh* and the Attorney General Opinions applying the rule of the *Phagan* case to appointive offices, we conclude that an UCRA board member who ceases to comply with the statutory residency requirement, will be disqualified from board membership, and will vacate his or her office.<sup>28</sup>

Attorney General Opinions H-578 and H-1065 concluded that officeholders vacated their offices when they became disqualified, but these opinions did not explain that the officeholders would "continue to perform the duties of their offices until their successors shall be duly qualified," pursuant to article XVI, section 17 of the Texas Constitution. Article XVI, section 17, the "holdover" provision of the Texas Constitution, "was placed in the constitution to prevent public

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<sup>25</sup>Article 1.05 of the Election Code, the predecessor of section 141.001 of the code, provided as follows:

No person shall be eligible to any State, county, precinct or municipal office in this State . . . unless he shall have resided in the State for the period of twelve (12) months and six (6) months in the county, precinct, or municipality, in which he offers himself as a candidate, next preceding any general or special election, and shall have been actual bona fide citizen of said county, precinct, or municipality for six (6) months.

Act of May 30, 1951, 52d Leg., R.S., ch. 492 , § 1, 1951 Tex. Gen. Laws 1097, 1098.

<sup>26</sup>The territory in which the school trustees lived had been transferred to another school district. *Whitemarsh v. Buckley*, 324 S.W.2d 298, 300 (Tex. Civ. App.--Houston 1959, no writ).

<sup>27</sup>*Whitemarsh v. Buckley*, 324 S.W.2d at 302.

<sup>28</sup>Article XV, section 7 of the Texas Constitution, which states that "[t]he Legislature shall provide by law for the trial and removal from office of all officers of this state, the modes for which have not been provided in this Constitution," applies only to officers of the state. *Bonner v. Belsterling*, 138 S.W. 571 (Tex. 1911).

convenience from suffering because of a vacancy in office."<sup>29</sup> A legal vacancy exists in the office, such that another person may be appointed to it, but the initial officeholder continues to perform the duties of office until his successor is qualified.<sup>30</sup>

Attorney General Opinion H-1224 determined that article XVI, section 17 of the Texas Constitution applies to an officer who vacates office through losing a qualification. A trustee of the teacher retirement system, who was appointed by the governor under a provision requiring membership in the retirement system,<sup>31</sup> accepted retirement and thereby terminated membership in the system.<sup>32</sup> Attorney General Opinion H-1224 held that the trustee had vacated his office by retiring from teaching, but found that despite his retirement, article XVI, section 17 of the Texas Constitution required him to continue to serve until a successor was qualified.<sup>33</sup>

Accordingly, the member of the UCRA board becomes disqualified for office if he or she no longer complies with the statutory residency requirements, but the officer will continue to perform the duties of office until the governor appoints his or her successor and the successor qualifies for office.<sup>34</sup>

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<sup>29</sup>Tex. Const. art. XVI, § 17 interp. commentary (Vernon 1993). Article XVI, section 17 of the Texas Constitution does not apply to an officer who vacates office pursuant to article XVI, section 40 of the Texas Constitution. *State v. Brinkerhoff*, 17 S.W. 109, 109-10 (Tex. 1886).

<sup>30</sup>See Attorney General Opinion H-161 (1973) at 2 (and authorities cited).

<sup>31</sup>Attorney General Opinion H-1224 (1978) at 1-2; see Gov't Code § 825.0032(c).

<sup>32</sup>Attorney General Opinion H-1224 (1978) at 1-2; see Gov't Code § 822.003(a)(2) (membership in retirement system terminated when an individual accepts retirement).

<sup>33</sup>Section 825.010 of the Government Code now provides that it is a ground for removal from the board if a trustee does not maintain the qualification required for the trustees's position.

<sup>34</sup>If judicial action is necessary to determine whether the officer has forfeited his or her position on the UCRA board, the board may request that the attorney general or the county or district attorney seek a writ of *quo warranto*. See Civ. Prac. & Rem. Code §§ 66.001(2), .002

S U M M A R Y

The board of the Upper Colorado River Authority ("UCRA") has no authority to adopt by-laws adding to or changing the legislatively-established residency requirements for appointment to the board. A member of the UCRA board becomes disqualified for office if he or she no longer complies with the statutory residency requirements, but the officer will continue to perform the duties of office until the governor appoints his or her successor and the successor qualifies for office.

Yours very truly,

A handwritten signature in black ink that reads "Susan Garrison". The signature is written in a cursive, flowing style.

Susan Garrison  
Assistant Attorney General  
Opinion Committee