FILE # ML-41912-01
I.D. # 41912

RQ-0362-JC

TARRANT COUNTY

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March 2, 2001

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OPINION COMMITTEE

Honorable John Cornyn
Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

RE: Attorney General Opinion
Re: MetroWest

Dear General Cornyn:

The Tarrant County Criminal District Attorney's Office represents the Tarrant County Hospital District (hereinafter, "the District) and we make this request for opinion on the District's behalf. The District was created and is operated by authority of Article IX, Section 4 of the Texas Constitution and Chapter 281 of the Texas Health and Safety Code (previously Article 4494n, Vernon's Texas Civil Statutes and, hereinafter, "Ch. 281"). It is governed by its Board of Managers, presently eleven in number, the members of which are appointed by the Tarrant County Commissioners Court in accordance with Ch. 281. The District owns and operates John Peter Smith Hospital in Fort Worth, Texas, as well as a system of community health centers and other health care facilities throughout Tarrant County, Texas. The District has established a health maintenance organization (hereinafter, "HMO") called MetroWest Health Plan, Inc. (hereinafter, "MetroWest") pursuant to Section 281.0515 of the Health and Safety Code and Chapter 20A of the Texas Insurance Code.

We petition for answers to the following questions:

May the Board of Managers of the Tarrant County Hospital District appoint some of its own members to the Board of Directors of MetroWest, the District's HMO ?

Is MetroWest subject to the Open Meetings Act as long as its corporate documents or policies do not require it to comply with the Act? *

Factual Background.

In 1993, the Legislature amended Ch. 281 by adding Section 281.0515, which states:

> A district may establish a health maintenance organization in accordance with the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code) to provide or arrange for health care services for the residents of the district.

MetroWest was established in April of 1997 as a Texas non-profit taxable corporation, with the District as its sole member. District funds are utilized to establish the necessary reserves for MetroWest to qualify and serve as an HMO. The primary reason for the creation of MetroWest was to establish a health care delivery system suitable to the State of Texas and enabling participation by the District in the State's Medicaid STAR program. Its Articles of Incorporation and Certificate of Incorporation are submitted herewith as Exhibit A.

Reviewing the original Articles, we note that upon the dissolution of MetroWest its assets are to be distributed to the District. The primary purpose of MetroWest is to serve Medicaid recipients and the Articles require that MetroWest apply to the Texas Department of Insurance for a Certificate of Authority to become a health maintenance organization under Chapter 20A, Texas Insurance Code. That Certificate of Authority was obtained on September 12, 1997, a copy of which is submitted herewith as Exhibit B.

On January 5, 1999, MetroWest filed Articles of Amendment to its Articles of Incorporation. The Articles of Amendment, along with the Certificate of Amendment, are submitted herewith as Exhibit C. The amendments were effected in conjunction with MetroWest's efforts to qualify as a tax exempt entity. They reflect that the Corporation is formed exclusively to promote social welfare in accordance with Section 501(c)(4) of the Internal Revenue Code of 1986 and that it may not engage in activity which would prevent it from obtaining or cause it to lose tax exempt status under that Section. MetroWest has obtained federal tax exempt status as evidenced by the copy of the Internal Revenue Service letter dated November 8, 2000 submitted herewith as Exhibit D. The primary purpose of MetroWest - to serve Medicaid recipients as contemplated by its original Articles of Incorporation - has remained the same. We note that the Amended Articles currently require that the meetings of the Corporation be conducted in accordance with the Texas Open Meetings Act, Chapter 551 of the Texas Government Code.

The Second Amended and Restated Bylaws of MetroWest, submitted herewith as Exhibit E, reflect the same corporate purposes stated in its Articles of Incorporation, including the primary purpose of serving Medicaid recipients by way of an HMO. The Bylaws further provide, in part:

1. that the District is the sole member of the Corporation.

2. that all meetings of the member of the Corporation shall be conducted in accordance with the Texas Open Meetings Act.

3. that the members of the Board of Directors shall be elected "by a majority vote of the District's Board of Managers".

4. that the Directors must be residents of the State of Texas, at least twenty one years of age, and "in good standing in the community."

5. that the meetings of the Board of Directors are to be held in Tarrant County, Texas

6. that the meetings of the Corporation's Board of Directors are to be conducted in accordance with the Texas Open Meetings Act, "including all notice provisions contained therein."

7. that vacancies are to be filled "by the affirmative vote of a majority of the TCHD Board of Managers."

8. that a directorship created by an increase in the number of members be filled by election of the Board of Managers of TCHD.

9. that any Director or the entire Board may be removed, "with or without cause, by a vote of the majority of the Board of Managers of TCHD" at a meeting expressly called for that purpose.

10. that the Directors are to serve without compensation; provided, however, that the Bylaws do not "preclude any Director from serving the Corporation in any other capacity and receiving compensation therefor."

11. that meetings of committees which consist entirely of Directors must be conducted in accordance with the Texas Open Meetings Act.

12. that the Corporation shall indemnify the Directors, officers, employees and agents of the Corporation to the extent permitted under V.A.T.S., art. 1396-2.22A.

There are no provisions in the aforementioned corporate documents requiring, prohibiting, or otherwise discussing the possibility of the District's Board of Managers appointing its own members to the MetroWest Board of Directors.

As was contemplated for MetroWest by the District's Board of Managers and as has been reflected in its corporate documents, MetroWest has contracted with the State of Texas to arrange for managed health care services for Medicaid beneficiaries in the community served by the District. MetroWest has executed a contract with the District whereby the District is compensated for providing Metrowest with administrative personnel and services, office space, equipment and supplies. MetroWest has arrangements with the District and other entities and individuals to provide health care services to enrollees. In addition, MetroWest provides administrative services with regard to the dental plans of a number of local governmental entities as well as for the District's employee health plan.

Most recently, the Board of Managers has adopted a resolution establishing and acknowledging MetroWest as a "charitable organization" under Section 281.0565 of the Texas Health and Safety Code. A copy f this Resolution is submitted herewith as Exhibit F hereto. This provision allows Ch. 281 hospital districts to create organizations that are exempt from federal income taxation to facilitate the management of a district health care program by providing or arranging for health care services, developing resources for health care services, or providing ancillary support services for the district. The statute provides that such an entity is a unit of local government for purposes of Chapter 101, Civil Practice and Remedies Code.

Legal Analysis.

Question: **May the Board of Managers of the Tarrant County Hospital District appoint some of its own members to the Board of Directors of MetroWest, the District's HMO ?**

We are not aware of any statute that prohibits the District's Board of Managers from appointing its own members to the Board of Directors of MetroWest. For example, the only provision in Ch. 281 addressing such an HMO is the aforementioned Section 281.0515. There is no language addressing the manner of appointment of the HMO's

Board of Directors or the qualifications for membership.

The Texas Non-Profit Corporation Act does not prohibit such an appointment. Article 1396-2.30 deals with directors having interests in other entities with which the corporation does business. Even if this Article were applicable to the situation we discuss, it would not prohibit service on behalf of both entities.

The Texas Insurance Code has two provisions addressing the matter of an HMO's governing body. Article 20A.07(a) provides that

> The governing body of any health maintenance organization may include physicians, providers, or other individuals, or any combination of the above.

Article 20A.08 provides that

> Any director, officer, member, employee, or partner of a health maintenance organization who receives, collects, disburses, or invests funds in connection with the activities of such an organization shall be responsible for such funds in a fiduciary relationship to the enrollees.

We see no provision in the Insurance Code that prohibits a member of the District's governing body from serving on the Board of Directors of MetroWest.

We next consider whether the prohibition on dual office holding would preclude the contemplated appointments. Article XVI, Section 40 of the Texas Constitution provides, with exceptions not relevant to our discussion, that

> No person shall hold or exercise at the same time, more than one civil office of emolument...

We do not conclude that serving as a Director of MetroWest would constitute service in a "civil office". Further, in view of the fact that service on the TCHD Board must be without compensation and noting in MetroWest's Bylaws that service on its Board is also to be without compensation. There is no "emolument" as to either position; therefore, we do not believe that the constitutional prohibition on dual office holding would preclude a TCHD Board member from also serving on the Board of MetroWest.

We have also considered whether the common law "doctrine of incompatibility" precludes the District's Board of Managers from appointing its members to the Board of Directors of MetroWest. For the reasons discussed below, we contend that this

doctrine does not preclude the appointments. Having reviewed the applicable opinions, we note that a number of cases and Attorney General opinions have referred to the Texas Supreme Court case of *Ehlinger v. Clark*, 8 S.W.2d 666 (1928) for an authoritative statement of the doctrine.

In *Ehlinger*, the Commissioners Court of Fayette County contracted with the County Judge to serve as the County's attorney in a suit to recover monies due the County on two notes assumed by another party as part of the consideration for an oil lease on the County's school lands. The County appealed unfavorable rulings by the trial court and Court of Appeals, both having found that the Commissioners Court did not have the authority to make such a contract. The Supreme Court reversed, finding that the Commissioners Court did indeed have the authority to make the contract, that the contract on the oil lease was valid, and that the County was entitled to certain damages; however, the Court concluded that the County was not entitled to attorney's fees and it is *this* finding that results in the Court's discussion of the doctrine of incompatibility.

The Supreme Court noted that the Commissioners Court had by its Order "employed" the County Judge in the matter as an attorney at law and had agreed to pay him a ten percent collection fee. In concluding that the employment agreement between the County and the County Judge was void, the Supreme Court engages in its discussion of the doctrine of incompatibility which is so frequently cited in subsequent cases and Attorney General opinions. *Ehlinger,* 674.The Court discusses the constitutional and statutory duties of the Commissioners Court, noting that the County Judge is its presiding officer. The Supreme Court notes that those duties include the making of appointments (such as that of serving as the County's attorney) as well as the possible need to relieve the appointee when the appointee is not properly performing his duties. The Court then refers to the "obvious incompatibility" of being both a member of the body making the appointment and an appointee of that body and states that the courts have

> with great unanimity throughout the country declared that all officers who have the appointive power are disqualified for appointment to the offices to which they may appoint.

The Court finally concludes that the employment of the County Judge as attorney for the County comes within the rule that the appointing body is prohibited from appointing one of its own members to the position.

We contend that the situation present here for review is significantly different from that in *Ehlinger* in the following respects:

1. Unlike the situation in *Ehlinger*, the appointees would receive no compensation for their services as Directors of MetroWest.

2. The authority of the District's Board of Managers to appoint the Directors of MetroWest derives from the Bylaws of MetroWest. They are neither required nor expressly authorized by any statute to make the appointments.

3. MetroWest is in fact a separate legal entity created pursuant to the Texas Non-Profit Corporation Act and, except for being a unit of local government for purposes of Chapter 101, Texas Civil Practice and Remedies Code (the Tort Claims Act), it simply is not a governmental entity and, therefore, the position of Director is not an appointed "office" as contemplated by and subject to the doctrine of incompatibility.

4. As a Section 281.0565 "charitable organization" intended to facilitate a District health care program, as well as an HMO created pursuant to Section 281.0515, MetroWest's purposes, interests and goals are by nature consistent with those of the District. While the potential for conflicting interests cannot be denied, each entity is established primarily to serve needy and indigent persons requiring health care and the District perceives the likelihood for serious conflict as minimal in view of the commonality of the interests of the two entities.

We contend that the doctrine applies to situations where the governing body of a governmental entity is required or expressly empowered by law to make appointments. First, there is no provision of law which requires or expressly authorizes the District's Board to make the appointments. The Texarkana Court of Appeals, in addressing the doctrine of incompatibility, stated that

> 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. (emphasis added)

See *St. Louis Southwestern Railway Co. of Texas v. Naples ISD* , 30 S.W. 2d 703 (Tex. Civ. App.-Texarkana, 1930). We contend that the power to appoint must be expressly bestowed by statute for the doctrine of incompatibility to apply. With the MetroWest situation described above, there is no express statutory power.

Second, we contend that the appointed position must be a public office or office of government. While it is acknowledged that members of the District's Board of Managers are public officers when serving in that capacity, it is not believed that the position of Director of MetroWest is a public office. In a recent opinion, you stated that the doctrine of incompatibility bars one person from holding two "offices" if their duties conflict. See Att'y Gen. Op. No. JC-0399 (2001). In that opinion, you refer to the Supreme Court's test for determining whether an individual holds a public office, which is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others. See *Aldine ISD v. Standley*, 280 SW2d 578,583 (Tex. 19513). We contend that this definition rules out the Directors of an entity created pursuant to the Texas Non-Profit Corporation Act, even one whose creation is authorized by statute such as MetroWest.

In Letter Opinion No. 93-70 (1993), the Attorney General stated that the doctrine of incompatibility "has multiple facets" and that it may prohibit a member of a governing body of one governmental entity from serving on the governing body of another. We again point out that, except for purposes of the Tort Claims Act, MetroWest is not a governmental entity.

Question: **Is MetroWest subject to the Open Meetings Act as long as its corporate documents or policies do not require it to comply with the Act?**

As we mentioned above in our presentation of factual information, the Bylaws of MetroWest call for the meetings of the Board of Directors to be conducted in accordance with Chapter 551, Texas Government Code (the Texas Open Meetings Act). If this requirement was not imposed on MetroWest by its Bylaws, we believe that it would not be required to comply with the Open Meetings Act.

Chapter 551 of the Texas Government Code applies to the meetings of a "governmental Body". Subsection 551.001(3) defines the term by listing the types of entities intended. We note that the list includes one(*only* one) type of "nonprofit corporation" which clearly does not include entities such as MetroWest. Although the District's creation of MetroWest is authorized by Sections 281.0515 and 281.0565, MetroWest is a Texas Non-Profit Corporation. With the exception of being a unit of local government for purposes of Chapter 101 of the Texas Civil Practice and Remedies Code, it is not a governmental entity. We believe that its situation is similar to that

reviewed in Att'y Gen. Letter Op. No. 96-146 (1996). There the Texas Department of Commerce created a development corporation pursuant to Section 481.077(a) of the Government Code for the purpose of fostering certain business opportunities of interest to the Department. It was concluded that the corporation was not an entity of government subject to the Act.

We also cite Att'y Gen. Letter Op. No. 94-090 (1994) and Att'y Gen. Op. No. JM-596 (1986) in further support of our contention that a non-profit corporation such as MetroWest is not a governmental body subject to the Open meetings Act.

On behalf of the Tarrant County Hospital District, thank you for your assistance in this matter. Please contact our office if you require any further information.

Very truly yours,

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

Sullivan H. Bradley, Jr.
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Attorney for the Tarrant
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SHB/sb
Attachments

cc: Ron Stutes