

SENATE COMMITTEE ON INTERNATIONAL RELATIONS AND TRADE
82ND LEGISLATURE

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OPINION COMMITTEE

July 15, 2011

FILE # ML-46793-11
I.D. # 46793

RQ-0987-BA

The Honorable Greg Abbott
Attorney General of Texas
209 West 14th Street
Austin, Texas 78701

Dear General Abbott:

As chairman of the Senate Committee on International Relations and Trade, I have been asked by South Texas College to respectfully request on their behalf an expedited attorney general opinion request on the following questions:

1. What legal procedures are available to determine whether a member of the board of trustees of a junior college district whose trustees are elected from single-member trustee districts has vacated the position by ceasing to reside in the single-member district from which the member was elected?
2. May the board of trustees of a junior college district whose trustees are elected from single-member trustee districts order a special election to fill a vacancy on the board? If so, what term would the trustee elected at the special election serve?

Section 130.0822, Education Code, applies to a junior college district that orders all or a majority of trustees of the district to be elected from single-member districts. The South Texas College board of trustees has ordered that all trustees of the South Texas College District be elected from single-member districts.

Section 130.0822(h), Education Code, provides in pertinent part that "[a] candidate for trustee must be a resident of the trustee district the candidate seeks to represent. A trustee . . . vacates the office if he or she ceases to reside in the trustee district he or she represents." It is my opinion that this provision means the vacancy occurs immediately on the cessation of residency and that the trustee does not continue to serve until replaced. In the instance when the trustee no longer resides in the district but does not voluntarily cease carrying out the duties of the office, applicable precedent indicates that a quo warranto proceeding may be brought by the attorney general or the district or county attorney, or a declaratory action may be taken by the board of trustees.



A quo warranto proceeding is normally the exclusive remedy afforded to the public to protect itself against the unlawful occupancy of a public office (*Cox v. Perry*, 138 S.W.3d 515 (Tex. App.--Fort Worth 2004, no pet.)) and is brought in the name of the state by the attorney general or by the appropriate district or county attorney. *Robinson v. Neeley*, 192 S.W.3d 904, 909 (Tex. App.--Dallas 2006, no pet.). However, the Corpus Christi Court of Appeals held that in the case of a trustee of a board of an independent school district who was asserted to have vacated the office by ceasing to be a resident of the trustee district from which elected, a declaratory action by the other members of the board was appropriate to determine whether the trustee had vacated the office. *Tovar v. Bd. of Trustees of Somerset ISD*, 994 S.W.2d 756, 759 (Tex. App.--Corpus Christi 1999, pet. denied). Based on *Tovar*, it appears that the trustees of a junior college district could bring a declaratory action for that purpose in the circumstances described by this request.

Section 130.0822(c), Education Code, provides that the appointment and election of trustees of a junior college district are subject to Section 130.082, Education Code, "except as otherwise provided by [Section 130.0822]."

Section 130.082(d), Education Code, provides in part:

(d) . . . Any vacancy occurring on the board through death, resignation, or otherwise, shall be filled by a special election ordered by the board or by appointment by resolution or order of the board. . . . The person appointed to fill the unexpired term shall serve until the next regular election of members to the board, at which time the position shall be filled by election for a term appropriately shortened to conform with what regularly would have been the length of the term for that position. . . .

Section 130.0822(i), Education Code, provides:

(i) Any vacancy on the board shall be filled by appointment made by the remaining members of the board. The appointed person serves for the unexpired term.

Concerning the manner of filling a vacancy, it would appear at first blush that the provision of Section 130.0822(i) stating that vacancies shall be filled by appointment precludes the board of South Texas College from filling the vacancy by ordering a special election under Section 130.082(d). However, under the Code Construction Act, Chapter 311, Government Code, in construing statutes a court may consider the object sought to be attained, the legislative history, and the consequences of a particular construction. See Section 311.023, Government Code. In addition, under settled rules of statutory construction, statutes should be construed harmoniously to the extent possible. *H & C Communications, Inc. v. Reed's Food Int'l, Inc.*, 887

The Honorable Greg Abbott

July 20, 2011

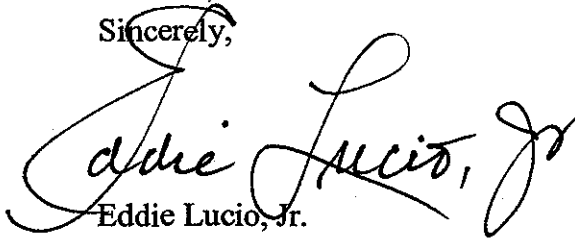
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S.W.2d 475, 478 (Tex. App.--San Antonio 1994, writ denied). It is my opinion that the two statutes discussed above can be harmonized to give effect to both, based on the legislative history of the provisions. Section 130.0822, Education Code, was added by Section 1, Chapter 1029, Acts of the 71st Legislature, Regular Session, 1989, at which time it duplicated the provision of existing Section 130.082 that a vacancy shall be filled by appointment. At that time, Section 130.082 did not have a provision for filling a vacancy by special election. In the following special session, Section 130.082 was amended by Section 1, Chapter 2, Acts of the 71st Legislature, 1st Called Session, 1989, to provide authority for a junior college district to fill a vacancy on its board of trustees by special election. Because there was no express authority in Section 130.082 for filling a vacancy through a special election when the legislature enacted Section 130.0822, the legislature did not see a conflict between the two sections when it chose the words "except as otherwise provided." When the legislature subsequently amended Section 130.082 to provide for a special election to fill a vacancy, it appears to have intended that method of filling a vacancy to be an addition rather than an exception to the other method of filling a vacancy by a junior college district that elects trustees from single-member districts.

In the case of a special election, Section 130.082(d), Education Code, is silent about the length of the term of office for a trustee elected to fill a vacancy, but Section 27, Article XVI, Texas Constitution, provides that a person elected to fill a vacancy in public office serves the unexpired term. Section 130.082(d) does provide that "[t]he person appointed to fill the unexpired term shall serve until the next regular election of members to the board . . ." and Section 130.0822(i) provides that "[t]he appointed person serves for the unexpired term." Because Section 130.0822(i) is in direct conflict with Section 130.082(d) regarding the term of a person appointed to fill a vacancy, I believe that Section 130.0822(i) prevails, and that a trustee either appointed or elected to fill a vacancy shall serve the unexpired term.

In light of the upcoming November elections, an expedited handling and response to this attorney general opinion request would be greatly appreciated. Please do not hesitate to contact me if you have any questions or need further information.

Sincerely,



Eddie Lucio, Jr.

Chairman, Senate Committee on International Relations and Trade

CC: South Texas College Board of Trustees