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OPINION COMMITTEE



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April 3, 2012

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL
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No. 7007 0710 0005 4691 8595

Dear General Abbott:

The County of El Paso seeks an Attorney General Opinion regarding the following issues:

1. Whether a school district trustee who resigns before and does not hold over after January 1, 2015 is required to file a personal financial statement under Education Code § 11.0641 for calendar year 2014?
2. Whether a school district trustee who resigns and does not hold over between January 1, 2015 and April 29th 2015, is required to file a personal financial statement under Education code § 11.0641 for calendar year 2014?
3. May the El Paso County Commissioners Court adopt a rule requiring school trustees who resign before and do not hold over after January 1, 2016 to file a personal financial statement under the new statute such that a trustee must file a financial statement for every year, or part of a year, during which he held office after January 1, 2015?

DISCUSSION:

During the 2013 Texas Legislative Session, the Texas Legislature adopted House Bill 343 which added Texas Education Code §11.0641¹², the provisions of which will apply beginning January 1, 2015.³ Education Code § 11.0641 applies only to the board trustees of independent school districts located in a county located on the international border and in which a municipality with a population of 600,000 or more is located.⁴ Currently, only El Paso County meets this definition. Each board trustee must file a financial statement with the school board of trustees and the county commissioners court of the county in which the school district's central administrative office is located. The provisions of Subchapter B, chapter 572, Government Code governing the timeliness of filing and public inspection of a report apply to the statement "as if the trustees were a state officer and the Commissioners Court of the county was the Texas Ethics Commission."⁵

The term "state officer" is defined within the Government Code as an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency."⁶ Pursuant to Government Code §572.026 a state officer must file a required personal financial statement not later than April 30th of each year.

Therefore, in conjunction with Government Code §572.026, and Education Code §11.0641, a public school trustee in El Paso County is analogous to a "state officer" who must file required personal financial statements no later than April 30th of each year beginning April 30th, 2015. A trustee is not required to include financial activity occurring before January 1, 2014.⁷ A trustee is also not required to file a statement under §11.0641 for financial activity occurring on or after January 1, 2018. Section 11.0641 is set to expire on January 1, 2019.⁸

We have been advised that some local school board trustees do not want to disclose financial information as required of state officers by the new Education Code provisions. Therefore, rather than be subject to public disclosure, some trustees intend to resign on or before December 31st 2014. Since the provisions of the statute do not apply until January 1, 2015, we ask whether persons who resign before January 1, 2015 and that do not hold over after January 1, 2015 may avoid having to file their financial statement by April 30, 2015. Since the filing date is not until April 30th, a question has also arisen as to whether these trustees may avoid the April 30th filing requirement by resigning without holding over some time after January 1st, but before April 30th, 2015.

² Acts 2013, 83rd Leg., ch. 853 (H.B.343) (hereafter "H.B.343")

³ H.B.343 § 3

⁴ Educ. § 11.0641 (b)

⁵ Id. §(c)

⁶ Tex. Gov't. Code section 572.002(12)

⁷ H.B.343 §3

⁸ Educ. §11.0641(f)

Question #1: Whether a trustee who resigns before and does not hold over after January 1, 2015 is required to file a personal financial statement under Education Code § 11.0641 for calendar year 2014?

Question #2: Whether a trustee who resigns and does not hold over between January 1, 2015 and April 29th 2015, is required to file a personal financial statement under Education Code § 11.0641 for calendar year 2014?

Pursuant to Article XVI Section 17 of the Texas Constitution “[a]ll officers within this State shall continue to perform the duties of their offices until their successors have been duly qualified.” Under this article a state officer cannot divest himself of an office until his successor qualifies. A school trustee who resigns before January 1, 2015, but does not have a person appointed to fill the office until after January 1, would continue in office for that calendar year under the holdover provision until a replacement is appointed.

In construing the first predecessor statute similar to Government Code §572.026, which required that a financial disclosure statement be filed by April 30th, the Texas Ethics Commission concluded that with respect to the annual filing for that first filing period, any service as a state officer during the period between and including January 1 to April 30 of the year in which the statement has to be filed gives rise to the filing requirement since the statute was effective on January 1, 1992. However, that opinion only addressed the first filing period after enactment of the applicable filing requirement statute.⁹

As stated above, pursuant to § 11.0641 a school trustee is not required to report financial activity occurring before January 1, 2014 in a statement filed under that section.¹⁰ In light of the effective date of §11.0641, Article XVI Section 17 of the Texas Constitution, comparison with related statutes, prior Texas Ethics Commission Advisory Opinions, and discussion with attorneys from the Texas Ethics Commission, we have concluded that if a school trustee resigns and does not hold over after January 1, 2015, then they would not be required to file a personal financial statement on April 30th, 2015 for the first filing requirement for calendar year 2014 due on April 30, 2015. We have further have concluded however, that if a trustee serves during any time on or after January 1, 2015, including in a holdover capacity, after the effective date of §11.0641 then that trustee would be required to file a personal financial statement for calendar year 2014 by April 30, 2015.

⁹ Texas Ethics Advisory Opinion No. 28, June 4, 1992 (Modified in part.)

¹⁰ H.B.343 §3

Question #3: May the El Paso County Commissioners Court adopt a rule requiring school trustees who resign before and do not hold over after January 1, 2016 to file a personal financial statement under the new statute such that a trustee must file a financial statement for every year, or part of a year, during which he held office after January 1, 2015?

It has also been argued that for subsequent years after the effective date of the statute, once a trustee resigns or his term expires, he is not required to file a report the following year for the preceding calendar year during which he resigned or his term expired. By way of example, if a trustee were to resign on December 15, 2015 and have a replacement appointed prior to January 1, 2016, then the resigned trustee would not have to file a personal financial statement on April 30, 2016 for calendar year 2015. It is also important to note that El Paso County school district trustees are elected on the uniform May election date and their terms of office run from June-May.

It appears counterintuitive that a trustee could resign or have his term expire and not have to file the financial statements for items of value received during his last period in office. In essence, this would always serve as a pass on financial disclosure for at least the entire last five months a trustee held office before the end of the June-May term of office if he is not reelected.

Pursuant to Education Code §11.0641 (c) the provisions of Subchapter B, chapter 572, Government Code govern ONLY “the contents, timeliness of filing, and public inspection of a statement”¹¹. The other requirements appear to have been left to the discretion of the commissioners court. The Legislature left open the possibility for a commissioners court to adopt rules requiring additional disclosure of financial activities such as those desired by the El Paso County Commissioners Court.

Over the last several years, El Paso County has witnessed the unraveling of public trust due to the pernicious and corrosive corruption emanating from illegal behavior by certain former school trustees and other former public officials. As part of the authority granted by Education Code Section 11.0614 and the County’s efforts to promote a new governance ethos of transparency, openness, and public service before private gain, the El Paso County Commissioners Court has adopted a rule which would require, after the effective date of the statute, public school trustees who leave office in a calendar year to file a personal financial statement in the subsequent year reporting items of value which they received while still serving as a public school trustee in the preceding year, notwithstanding whether they were replaced prior to the end of the calendar year in which they resigned. Failure to file the financial statement would subject the former trustee to the same penalties as a current trustee who fails to file.

For example, a trustee who leaves office during 2015 and is replaced before the end of the 2015 calendar year either by resignation or end of term would still be subject to filing a personal financial statement in April of 2016 for the period of time he served as a

¹¹ Id. §(c)

trustee during 2015. Otherwise, a trustee whose term of office ends in June of any year would never have to file the financial statement for his last five months in office.

Some have argued that adoption of a prior-year reporting requirement for personal financial statements by trustees is a retroactive law which violates the Texas Constitution. The proposed rule does not criminalize past financial transactions or acceptance of gifts, nor does it impair or destroy vested rights; it merely requires that the financial transactions and gifts be reported in a subsequent time period.¹² It is not the financial transactions and acceptance of gifts which is regulated; it is the failure to timely and publicly report them. Trustees could reasonably expect that gifts received and financial transactions engaged in while serving in public office would be subject to public review.

The Texas Attorney General has more than once reaffirmed the principle that governments have a strong interest in promoting ethical behavior on the part of its officials. For example in Attorney General Opinion H-190, the Attorney General addressed provisions of House Bill 1 of the 63rd Legislature dealing with financial disclosures under the one of the original ethics statutes. The Attorney General citing to an earlier opinion dealing with financial disclosures stated:

"It is our opinion that the public does have a legitimate interest in the current financial condition and recent financial history of those of its servants who are in positions of authority where the temptation to improperly exercise public discretion for private gain may coincide with the opportunity to do so, and that the public inquiries may be searching in their scope so long as they are reasonably related to a purpose such as this bill implements."¹³ (Emphasis in original.)

The Commissioners Court believes adopting a full disclosure rule would be consistent with this view and help avoid public school trustees resigning their public offices shortly before the end of a calendar year merely for the purpose of evading disclosure of gifts and other items of value they received while serving in a public office. The proposed rule would help augment public confidence in local public school trustee offices, many which have been tainted by admitted graft and malversation. There is a reasonable relationship between deciding what would encourage greater consideration before accepting gifts, and emphasize the sense that public service is conditioned in part upon review of such public service by the public. We have noted that under Government Code Chapter 572, appointed officers have been specifically excluded from having to file a financial statement that is due because of service in an office after the effective date of a resignation.¹⁴ If the Legislature had wanted to also exclude resigned trustees from being subjected to a disclosure rule such as that which is being proposed, the Legislature could have expressly done so.

¹² See: Deacon v. Eules, 405 S.W.2d 59 (Tex. 1966)

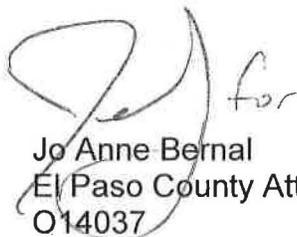
¹³ Op. Tex. Att'y Gen. No. H-190 (1973).

¹⁴ Tex. Gov't. Code §572.0211

Before proceeding further El Paso County respectfully requests your opinion as to whether under the provisions of recently enacted Education Code §11.0641, the El Paso County Commissioners Court may adopt a rule requiring public school trustees whose term ends or who resign prior to and are replaced prior to the end of a calendar year, to nonetheless file a personal financial statement for that calendar year or part of a calendar year during which they held office.

Thank you for your attention to this matter and we look forward to your response. Please feel free to contact us at if you have additional questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jo Anne Bernal" with a stylized flourish at the end. The signature is written over the typed name and title.

Jo Anne Bernal
El Paso County Attorney
O14037