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EXECUTIVE ADMINISTRATION

STATE OF TEXAS
DEPARTMENT OF ECONOMIC DEVELOPMENT

2495

October 23, 2001

John Cornyn
Attorney General
209 W. 14th Street
Austin, TX 78701

FILE # ML-42258-01
I.D. # 42258

RQ-0457-JC

Dear General Cornyn:

A member of the Texas Economic Development Governing Board (TxED), whose term expires February 1, 2005, wishes to seek party nomination in the primary to be a candidate for the Texas House of Representatives for a term beginning in January 2003. TxED has the following questions related to the applicability of Article III, Section 19, of the Texas Constitution to members of its Governing Board:

1. Is a board member who does not receive compensation, but who is entitled to receive reimbursement for actual expenses, eligible to serve in the Legislature during the term for which he or she was appointed?
2. Does it make any difference if the board member waives reimbursement?
3. If required, when must the board member resign in order to seek party nomination for the Texas Legislature?
4. If the board member does not have to resign to seek party nomination in the primary for the Texas Legislature, at what point must he or she resign in order to serve in the Legislature?

Article III, Section 19, of the Texas Constitution provides:

No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

Section 481.0043(c) of the Government Code, relating to the TxED Governing Board provides:

(c) A member of the governing board may not receive compensation for service on the governing board. A member is entitled to receive reimbursement, subject to any applicable limitation on reimbursement provided by the General Appropriations Act, for actual and necessary travel expenses incurred in performing services as a member of the governing board.

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John Cornyn
October 23, 2001
Page 2

In *Whitehead v. Julian*, 476 S.W.2d 844 (Tex. 1972), the Texas Supreme Court held that a city mayor who received a \$50 per month expense allowance, but no salary, fees, or compensation, did not hold a lucrative office within the meaning of Article III, Section 19, and was eligible to be a candidate for state representative. In *Dawkins v. Meyer*, 825 S.W.2d 444 (Tex. 1992), the Court held that a board member of the Texas Department of Mental Health and Mental Retardation (MHMR) who received a \$30 per diem, independent of expenses, did hold a lucrative office and was ineligible to be a candidate for the House of Representatives according to Article III, Section 19. The Dawkins court stated:

Had Dawkins received only reimbursement for her expenses and no compensation for her activities with MHMR, her position would not be considered lucrative. Reimbursement for expenses alone does not render an office lucrative. *Dawkins*, at 446, 447.

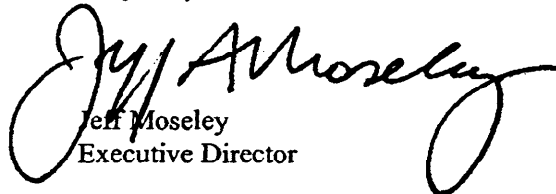
Therefore, it appears that a TxED Board Member, who receives only reimbursement for actual expenses, does not hold a lucrative office within the meaning of Article III, Section 19. If, however, it is determined that the board member does hold a lucrative office as contemplated by that section, TxED would appreciate guidance regarding whether this determination would change if the board member waived reimbursement.

TxED would also appreciate guidance regarding when the board member must resign in order to run for and serve in the Legislature. Attorney General Letter Opinion No. 95-069 (1995) indicates that when Article III, Section 19 is at issue, an officeholder must resign before filing for office. *Wentworth* and *Dawkins* suggest that when Article III, Section 19 is not at issue, a board member does not need to resign until after elected and before qualifying for elective office. *Wentworth*, at 767 (while *Wentworth* resigned four years before election to Senate, he resigned only one day before taking office as a state representative); *Dawkins*, at 456, n. 4 (Gammage, J., dissenting) (noting that *Dawkins*' board membership would be automatically vacated upon taking legislative office).

Finally, because our board member must file for office no later than January 2, 2002, and might have to resign prior to filing, TxED would greatly appreciate an expedited response to this request.

Thank you very much for your assistance. If I can provide you with additional information, please contact me at 936-0100 or jmoseley@txed.state.tx.us.

Very truly,



Jeff Moseley
Executive Director

cc: Massey Villarreal, Chairman, TxED Governing Board
TxED Governing Board members