SUNSET ADVISORY COMMISSION

P.O. Box 13066 ❖ Austin, Texas 78711-3066

RQ-0587-JC

August 1, 2002

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-42742-02
I.D. # 42742

Dear General Cornyn:

In 1999 the voters approved House Joint Resolution 29, an amendment to Section 30a, Article XVI, Texas Constitution, proposed by the 76th Legislature. Before the 1999 amendment, Section 30a allowed members of a state board or commission to exceed the general two-year limitation on the length of a term of office imposed by Section 30, Article XVI, Texas Constitution, and serve a six-year term of office on the condition that one-third of the members' terms expired every two years. This had the practical effect of requiring that the number of members on a state board or commission be divisible by three if the members were serving six-year terms under Section 30a. Under the 1999 amendment to Section 30a, the new condition for having six-year terms on a state board or commission is that the board or commission must be composed of an odd number of three or more members, with one-third or as near one-third as possible of the members' terms expiring every two years. An exception to this new condition is that a board "required by [the] constitution" may still be composed under the old divisible-by-three rule. House Joint Resolution 29 requires that the transition in state agency composition from the old divisible-by-three rule to the new rule of an odd number of three or more members be accomplished not later than September 1, 2003. We ask your opinion on four legal questions that have arisen in preparing for the transition.

The first question concerns the status of advisory boards and committees for which the legislature has by statute established an even number of members divisible by three with the members serving staggered six-year terms. The second question concerns whether voting ex officio members of a state board or commission are counted in determining whether a state board or commission has an odd number of three or more members. The third question concerns which of certain state boards and commissions with an even number of members are "required by [the] constitution" for purposes of Section 30a. The fourth question concerns whether the Texas Military Facilities Commission is subject to Sections 30 and 30a, Article XVI, Texas Constitution.

Advisory Boards and Committees With Terms Fixed by Statute

In general, we seek your guidance regarding the relevant rules of law to be followed for present purposes when confronted with a state advisory board or committee that, by statute, has an even number of members divisible by three and whose members serve staggered six-year terms.

We have found one attorney general opinion, Op. Tex. Att'y Gen. No. H-998 (1977), that seems to assume that the fact that the members of an advisory board by statute serve staggered six-year terms is of itself sufficient to establish that the members of the advisory board are public officers whose terms of office are subject to Section 30a, Article XVI. If this were the case, the number of members on every advisory board or committee with an even number of members whose members by statute serve staggered six-year terms would have to be changed to an odd number or the length of the members' terms would have to be reduced to two years or less. However, we hesitate to rely on H-998 for a variety of reasons, including the fact that H-998 appears to have been impliedly overruled by subsequent authority that applies the rule for determining whether a person holds an office in Texas adopted by the Texas Supreme Court in Aldine Independent School District v. Standley, 280 S.W.2d 578 (Tex. 1955). In Aldine the court adopted the following rule: "[T]he determining factor which distinguishes a public officer from an employee 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." Id. at 583. (Emphasis added by the court.) *See* Op. Tex. Att'y Gen. Nos. MW-415 (1981), DM-149 (1992), and DM-218 (1993) and Tex. Att'y Gen. LA-94-021 for subsequent authority that applies this rule from the Aldine case in a way that casts doubt on the continued validity of H-998. See also the enclosed memorandum from the staff of the Texas Legislative Council that discusses this question in more depth.

We seek your guidance on the rule to apply. If an advisory body is created by statute with an **even** number of members divisible by three and the members by statute serve staggered six-year terms, but the duties of the advisory body do **not** meet the test of the language quoted from the Aldine case as elaborated by subsequent authority such as the cited attorney general opinions, is it necessary to conform the membership of the advisory body to comply with the 1999 amendment to

Section 30a, or alternatively, to reduce the terms of the members to two years or less? Or may it be concluded that the advisory body is not subject to Sections 30 and 30a?

Assuming that such an advisory body is not subject to Sections 30 and 30a, we also seek your guidance on the following questions. While many advisory bodies will serve a purely advisory function, others may exercise minor functions, incidental to their advisory function, that are not purely advisory. If, in applying the language quoted from the Aldine case, it appears that in exercising those incidental functions an advisory body **is not** acting "largely independent" of the control of the governmental entity it exists to advise, may it be concluded that the advisory body is not subject to Sections 30 and 30a based on the failure to meet the "largely independent" part of the Aldine test?

Alternatively, in applying the Aldine test it may appear that an advisory body **does** exercise incidental functions that are not purely advisory largely independent of the control of the governmental entity it exists to advise but that the incidental functions are **few and de minimis**. May one apply the reasoning of Op. Tex. Att'y Gen. No. JM-141 (1984) to this situation and conclude that the advisory body is not subject to Sections 30 and 30a? In determining whether the incidental functions are truly few and de minimis for present purposes, we assume that one should be guided by authority such as DM-149, M-136, and Op. Tex. Att'y Gen. Nos. H-1221 (1978), JM-578 (1986), JM-993 (1988), DM-430 (1997), and DM-49 (1991) and Tex. Att'y Gen. LA-95-039 and LA-98-059.

Ex Officio Members

There is authority for the proposition that ex officio members of a board or commission are not counted in determining whether the composition of the board or commission complied with the old divisible-by-three rule of Section 30a, Article XVI. *See* Op. Tex. Att'y Gen. Nos. M-305 (1968), M-504 (1969), M-505 (1969), and M-901 (1971). M-505 determined that the term of office of ex officio members on the Texas Civil Judicial Council were not subject to Sections 30 and 30a of Article XVI. The opinion reasoned that "[e]x officio members of a board do not hold separate and distinct offices. Rather, the same constitutes additional duties imposed upon an officeholder." M-505 at 2. An ex officio member's "term of office is not governed by the provisions of Section 30 or 30a of Article XVI of the Constitution of Texas for the reason that the same is not a separate and distinct office." M-505 at 3. M-901 noted that the composition and terms of office of the Texas Board of Licensure for Nursing Home Administrators, which consisted of six appointed members serving staggered six-year terms and two ex officio members, complied with Section 30a, Article XVI. M-901 at 3. At the time M-901 was decided, the divisible-by-three rule applied under Section 30a, so by implication the ex officio members must not have counted in determining whether the number of board members was divisible by three.

We do not question the reasoning or conclusions of these opinions. However, an argument can be made that the legislature in proposing H.J.R. 29 essentially expressed a policy preference for having an odd number of voting members on state boards and commissions to minimize the possibility of tie votes. Under this argument, the cited attorney general opinions would be considered overridden, without regard to the soundness of their reasoning, **only** to the extent that the opinions established that ex officio members are not counted in determining whether the **number** of members of a state board or commission complies with Section 30a. See the enclosed memorandum from the staff of the Texas Legislative Council for citations to and a description of legislative history that is relevant to this point.

We note that as a practical matter, the question of whether ex officio members are counted in determining whether the composition of a board or commission complies with Section 30a leads to a rather complicated situation under which it has been necessary to attempt to identify all boards and commissions that have voting ex officio members. If the old rule that ex officio members are not counted prevails, the legislature will need to change the composition or reduce the terms of those boards and commissions that have an even number of **appointed** members without regard to the existence of voting ex officio members. If the text of amended Section 30a together with its legislative history leads you to conclude that the old rule should be overridden and that all voting members must be counted in determining whether a board or commission has an odd number of members for purposes of Section 30a, the legislature will need to examine all boards and commissions with ex officio members and change the composition or reduce the terms of each one that has an even number of **voting** members without regard to whether there are an odd number of appointed members.

Is it your opinion that the old rule that appears to derive from the cited attorney general opinions continues to prevail, so that only appointed members are counted in determining whether a board or commission is composed of an odd number of members for purposes of Section 30a? Or is it your opinion that the old rule has been effectively overridden by the constitutional amendment, so that all voting appointed and voting ex officio members should now be counted for this purpose?

From a theoretical standpoint it may seem possible to meld the two rules and hold that for purposes of Section 30a there must be both an odd number of appointed members and an odd number of voting members. One consequence of such a rule would be that voting ex officio members would have to be added to boards in pairs, since adding one or any other odd number of voting ex officio members to an odd number of voting appointed members would always equal an even number of voting members. We note that attempting to meld the two approaches in this manner would lead to a complicated rule that would reduce the legislature's discretion in creating or refining boards and commissions. There is legislative history for H.J.R. 29 that should be considered before deciding on this result. See the enclosed memorandum from the staff of the Texas Legislative Council for a discussion of legislative history that is relevant to this point. The legislative

history appears to indicate that there was interest in having a simpler and more flexible rule than the divisible-by-three rule. Assuming that a decision to meld together the old rule (count only the appointed members) with the new rule suggested by the legislative history regarding tie votes (count all the voting members) is not compelled by an analysis of the relevant constitutional provisions, it seems that operating under either the old rule or the possible new rule would be simpler and more flexible than operating under a combination of both rules.

Boards Required by Constitution

Section 30a as amended by H.J.R. 29 states in its last sentence, "The Legislature may provide by law that a board required by this constitution be composed of members of any number divisible by three (3) who serve for a term of six (6) years, with one-third of the members elected or appointed every two (2) years."

Some boards, such as the Board of Pardons and Paroles, are clearly required by the constitution. Other boards are only mentioned by the constitution, and there is authority for the proposition that a mere mention by the constitution is not sufficient to make a board a constitutionally required board. *See* Cowell v. Ayers, 220 S.W. 764 (Tex. 1920); Op. Tex. Att'y Gen. LA-139 (1977). We ask you which of the following eight boards and commissions with an even number of members are required by the constitution for purposes of Section 30a:

Board of Pardons and Paroles (See Section 11, Article IV, Texas Constitution; Section 508.031, Government Code)

Board of Pardons and Paroles Policy Board (See Section 11, Article IV, Texas Constitution; Section 508.036, Government Code)

State Medical Education Board (See Section 50a, Article III, Texas Constitution; Article 4498c, Vernon's Texas Civil Statutes)

Employees Retirement System of Texas (See Sections 67(a)(3) and (b)(2), Article XVI, Texas Constitution; Section 815.001, Government Code)

Texas Municipal Retirement System (See Sections 67(a)(3) and (c), Article XVI, Texas Constitution; Section 855.001, Government Code)

Texas Water Development Board (See Section 49-c, Article III, Texas Constitution; Section 6.052, Water Code)

Prepaid Higher Education Tuition Board (See Section 19, Article VII, Texas Constitution;

Section 54.606, Education Code)

Texas Higher Education Coordinating Board (See Sections 50b-4 and 50b-5, Article III, Texas Constitution; Section 61.022, Education Code)

With regard to the Board of Pardons and Paroles Policy Board, assuming it is **not** a board required by the constitution, is it nevertheless not subject to Sections 30 and 30a under the reasoning of M-505 because all members of the policy board should be considered to be performing superadded duties of their office as members of the Board of Pardons and Paroles?

Texas Military Facilities Commission

In Texas National Guard Armory Board v. McCraw, 126 S.W.2d 627 (Tex. 1939), the Texas Supreme Court held that the terms of the members of the Texas National Guard Armory Board were not subject to Section 30 or 30a of Article XVI because membership on the board was a military office, not a civil office, and Sections 30 and 30a applied only to civil offices. In reaching this conclusion, the court noted the purposes and duties of the board and the fact that all three members of the board under the law as it then existed were ranking officers of the Texas National Guard. *See* McCraw, 126 S.W.2d at 632. The Texas Military Facilities Commission is the direct successor to the Texas National Guard Armory Board. *See* Chapter 1168, Acts of the 75th Legislature, Regular Session, 1997. Since the time that the McCraw case was decided, the legislature has changed the composition and terms of the members of the commission. Under Section 435.004, Government Code, the commission is now composed of six members who serve staggered six-year terms, one of whom must be an actively serving senior officer of the Texas National Guard appointed by the governor with the advice and consent of the senate from a list submitted by the adjutant general, and five of whom must be members of the general public appointed by the governor with the advice and consent of the senate who are not actively serving as members of the Texas National Guard.

In your opinion, does the change in the composition and terms of the members of the commission and the fact that the membership is now primarily civilian sufficiently distinguish the current status of the commission from the situation that existed in 1939 so that the McCraw holding regarding the applicability of Sections 30 and 30a no longer applies, and the commission is now subject to Sections 30 and 30a? If so, are the terms of all members on the commission subject to Sections 30 and 30a or is the one slot reserved for a senior officer of the guard still a military office (or a superadded duty of an underlying military office) not subject to those sections? If the slot reserved for a member of the guard is a military office (or a superadded duty of an underlying military office) not subject to Section 30 or 30a, how do we apply by analogy the opinion we requested from you regarding voting ex officio members to the situation of the military facilities commission? (Even if being a senior officer of the guard is more properly termed a qualification for office than a circumstance that makes the senior officer an ex officio member of the commission, the situation would still seem to be functionally equivalent to the ex officio situation for present

purposes if the senior officer of the guard is still held to hold a military office not subject to Sections 30 and 30a while the remaining members of the commission hold offices that are subject to those sections.) In general, is it necessary to conform the membership of the military facilities commission, or alternatively to reduce the members' terms to two years or less, to comply with the 1999 amendment to Section 30a, and if so, what rules of law should guide the legislature in deciding how to conform the membership?

Sincerely,

Senator Jane Nelson

Sincerely,

Representative Warren Chisum

Enclosure

cc: Sunset Advisory Commission Members
Lt. Governor Bill Ratliff
Speaker Pete Laney