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January 29, 2015

The Honorable Ken Paxton
Attn: Opinion Committee
Attorney General of Texas
PO Box 12548
Austin, TX. 78711

FILE # ML-47691-18

I.D. # 47691

RQ-0007-KP

RE: Whether a current elected Texas School Board Trustee, whose powers have been suspended due to the Texas Education Commissioner installing a Board of Managers, may run for or serve in a city council position of an incorporated town within the boundaries of the school district.

Dear General Paxton:

On July 21, 2014, Texas Education Agency (TEA) Commissioner Michael Williams installed a seven member Board of Managers to govern the Beaumont Independent School District (BISD), pursuant to Texas Education Code (TEC) Section 39.112 (e) and the authority granted to him by TEC §§39.057 (d), 39.102(a) (9) and 19 Texas Administrative Code §§97.1057-1059. Commissioner Williams had previously announced that a need to replace the then current BISD Board of Trustees existed because of “the serious nature of the ongoing and systemic operating deficiencies facing the district, and the importance of preventing further harm to the welfare of the Beaumont ISD’s students and to the public interest”.¹

By appointing a Board of Managers to govern the BISD, the powers of the prior Board of Trustees were suspended and the Board of Managers were granted “all of the powers and duties assigned to a board of trustees of a school district by law, rule or regulation.”²

On January 28, 2015, the prior Board President of the BISD Board of Trustees, Gwen Ambres, filed to run for a position on the Beaumont City Council in an election that is scheduled for May 9, 2015. The City of Beaumont is an incorporated town that lies wholly within the boundaries of the BISD. Pursuant to the city charter of Beaumont, Texas, city council positions are for two year terms and all city council positions are up for election in 2015.

¹ See, letter of April 14, 2014 from Commissioner Williams to BISD Board President, Gwen Ambres.
² See, Texas Education Code, Sections 39.112 (a) and 39.112 (b).

It has been previously determined both judicially and in prior letter opinions from your office that the common law rule of incompatibility prohibits a member of a school board of trustees from serving as a city councilman for an incorporated town situated within the boundaries of the school district.³

The incompatibility of the offices of school board trustee and city councilmember, having been previously established, would seem to prevent Gwen Ambres from serving as both a school board trustee and as a city councilmember. Although Ms. Ambres has had her duties as a member of the Board of Trustees of BISD suspended by operation of Sections 39.112 (a) and 39.112 (b) of the Texas Education Code, she remains an elected trustee of the BISD. When Commissioner Williams appointed the seven member Board of Managers, he did not specifically state the period of the appointment, noting only that the Board of Managers would be required to call for an election of a Board of Trustees within two years of their appointment.⁴ In the event that Commissioner Williams were to dissolve or to terminate the appointments of the Board of Managers, it would appear that the deposed Board of Trustees would resume their positions of authority of the BISD.

Your office has previously addressed the consequences of the incompatibility of two offices and opined that such a situation would invite the application of the common law doctrine of vacation. In Attorney General Opinion JM-133, it was written that, "Persons who accept and qualify for offices that are incompatible with offices they already hold ipso facto relinquish their prior posts" (citing Attorney General Opinion MW-170 (1980)). However, the interplay of the incompatibility doctrine and the effect of Article 16, Section 17 of the Texas Constitution may not have been fully considered in some of the prior opinions.

The Texas Constitution states that "all officers within the State shall continue to perform the duties of their offices until their successors shall be duly qualified." Tex. Const. art. XVI, § 17. The commentary to this section provides that this provision was placed in the Texas Constitution, in part, to "prevent public convenience from suffering because of a vacancy in the office...." TEX. CONST. art. XVI, § 17 interp. commentary (Vernon 1993); see also, *Plains Common Consol. Sch. Dist. No. 1 v. Hayhurst*, 122 S.W.2d 322, 326 (Tex.Civ.App.-Amarillo 1938, no writ). Even where an officer resigns, under this section, he or she is held over in the performance of their duties until a successor is elected or appointed and has been qualified. See, Op. Tex. Att'y Gen. H-161 at 2 (1973). This holdover provision becomes operative only after the officer's term has expired. Op. Tex. Att'y Gen. JC-0293 at 3 (2000). On the other hand, the right to holdover does not reside in one who has been removed from office. See, *Manning v. Harlan*, 122 S.W.2d 704, 707 (Tex.Civ.App.-El Paso 1938, writ dism'd). However, as noted above, Ms. Ambres was not technically **removed** from office, rather, her powers, along with the powers of her fellow BISD trustees, were suspended.

Article XVI, section 17 of the constitution, is known as the "holdover provision". Where it applies, the holdover provision is mandatory. Accordingly, an officer's authority and responsibilities continue undiminished during such holdover service. An officer who holds over pursuant to the constitution is a de jure officer possessing all the authority of the office, as well

3 See, Attorney General Opinion, JM-364, *Thomas v. Abernathy County Line Independent School District*, 290 S.W. 152, (Tex. Comm'n App.1927).

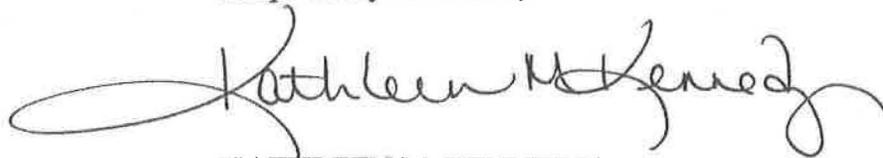
4 See, Texas Education Code Section 39.112 (e). Since the Board of Managers were installed into office on July 21, 2014, they are required to call for an election no later than July 21, 2016 with the election to take place on a Uniform Election Date that is at least 180 days after the date the election is ordered. Under these circumstances, the latest date that a BISD trustee election could be called would be in May of 2017.

as the right to continue receiving compensation. See, *Delamora v. State*, 128 S.W.3d 344,356 (Tex. App.-Austin 2004, pet. ref d). Not even an officer's voluntary resignation will terminate the officer's duty to serve as a holdover officer under article XVI, section 17. See, *Willmann v. City of San Antonio*, 123 S.W.3d 469,481 (Tex. App.-San Antonio 2003, pet. denied) (citing Tex. Att'y Gen. Op. No. H-161 (1973) at 2); *Crawford v. State*, 153 S.W.3d 497, 505 (Tex. App.-Amarillo 2004, no pet.) (holding that constable who resigned continued as a holdover officer even though commissioners court failed to select a successor and was unlikely to select a successor). "Under the Constitution an officer cannot arbitrarily divest himself of the obligation and authority to perform the duties of his office until his successor qualifies; and even though he resigns and his resignation is accepted, the law operates to continue him in office until his successor qualifies." *Hayhurst*, 122 S.W.2d at 326-27 (quoting 34 TEX. JUR. 370-71 (1934)).

When trying to determine the interplay between the holdover provision of the Texas Constitution and the common law doctrine of vacation in the unique circumstances presented in this case, we have found an absence of controlling authority either in case law or in attorney general opinions. It would appear that Ms. Ambres finds herself in the rather unique position of being unable to voluntarily resign until her successor is either appointed or elected. As noted above, there will be no election of BISD trustees until May of 2017. And it is also unlikely that the Board of Managers appointed by the TEA Commissioner of Education to serve the BISD will appoint a successor for Ms. Ambres. It is certainly arguable that the public convenience is not suffering and will not suffer by Ms. Ambres having had her powers suspended as a BISD trustee, however, as noted above, the holdover provision is mandatory. This appears to be true even given the provisions of Texas Election Code 201.025, which provides that if an officer accepts another officer and the two offices may not lawfully be held simultaneously, a vacancy in the first office occurs on the date the person qualifies for the other office.

Given the fact that a person cannot serve in office both as a city councilperson and as a school board trustee, and given the fact that the holdover provision of the Texas Constitution is mandatory thus preventing Ms. Ambres from being able to resign or vacate the office of BISD trustee until her successor is duly qualified, either through election or appointment, this office would appreciate your opinion as to the legality of Ms. Ambres being able to be a candidate for election for the position of councilperson for the City of Beaumont or her ability to serve in that position should she be elected.⁵

Respectfully submitted,



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⁵ Gwen Ambres was most recently elected to a four year term to the BISD Board of Trustees in May of 2011. She would be scheduled to be up for re-election in May of 2015, however, the appointed BISD Board of Managers has opted to not call for an election in May of 2015 and they are not legally required to call for an election prior to July 21, 2016.