



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 598

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*December 18, 2023*

### ISSUE

Whether the Chapter 572 of the Government Code revolving door provisions apply to a former State Board of Education member's appearing before the Texas Education Agency, the Texas Commissioner of Education, or the Texas Permanent School Fund Corporation. (*AOR-685*).

### SUMMARY

A former State Board of Education (SBOE) member must wait two years before appearing before or seeking to influence the Permanent School Fund Corporation on behalf of another because the Corporation board contains SBOE members. Tex. Gov't Code § 572.054(a).

A former SBOE member must wait two years after ceasing service as an officer before appearing before or seeking to influence the Commissioner of Education on behalf of another because the Commissioner is an officer of the SBOE for purposes of Section 572.054(a).

The requestor would be subject to the Section 572.054(a) restriction with respect to Texas Education Agency employees if they were also employees of the SBOE under the common law employee-employer test.

Section 572.054(b) would prohibit a former SBOE member from ever receiving compensation for working on contracts in which they participated as a SBOE member even if the SBOE subsequently amended these contracts to make the Permanent School Fund Corporation a party rather than the SBOE.

### FACTS

The requestor is a former member of the Texas State Board of Education (SBOE). The requestor asks a series of questions involving the revolving door provisions in Chapter 572 of the Government Code and their applicability to the SBOE and three related entities, the Commissioner of Education (Commissioner), the Texas Education Agency (TEA), and the Texas Permanent School Fund Corporation (Corporation).

## **Texas Education Agency**

The Texas Education Agency is comprised of agency staff and the Commissioner. Tex. Educ. Code §§ 5.001, 7.002(a). The Commissioner is the TEA’s “executive officer.” Tex. Educ. Code § 7.055(b)(1), (2). As TEA’s executive officer, the Commissioner is responsible for managing the powers and duties of the TEA laid out in Section 7.021 of the Education Code. The Legislature provides an appropriation for the TEA.

## **The Commissioner of Education**

The Commissioner is the “educational leader of the state,” appointed to a four year term of office as the “executive officer” of the TEA and the “executive secretary” of the SBOE by the governor, with the advice and consent of the senate. Tex. Educ. Code §§ 7.051, .052, .055(b)(1), (2). The Commissioner is only removable by the governor with the advice and consent of senate. *Id.* § 7.053.

As the executive secretary of the SBOE, the Commissioner both carries out duties imposed by the SBOE and advises and assists the SBOE with carrying out its duties. *See* Tex. Educ. Code §§ 7.055(b)(3), 7.102(b).

## **The SBOE**

The SBOE is comprised of 15 elected members. Tex. Educ. Code § 7.101. Under the heading of “officers,” the Education Code specifies that the chair of the SBOE is appointed by the governor with the advice and consent of the senate. Tex. Educ. Code § 7.107. The SBOE elects its own vice chair and a secretary. *Id.*

The SBOE has no staff. The Commissioner is its executive secretary and TEA provides staff for the SBOE. The SBOE must carry out the duties assigned to it in the Education Code “with the advice and assistance of the [C]ommissioner.” Tex. Educ. Code § 7.102(b).

The Legislature does not provide an appropriation for the SBOE. The SBOE has four standing committees, one of which is the Committee on School Finance/Permanent School Fund. *See* SBOE Operating Rules § 1.2. At issue here is the SBOE’s duty to manage and distribute the Permanent School Fund (PSF) through its own control or through a corporation it created to manage the fund. *See* Tex. Educ. Code ch. 43, Tex. Const. art. 7, §§3(b), 5.

## **The Corporation**

The PSF was created in 1845 as a perpetual fund to support the state’s public schools. Until 2021, the SBOE administered the Texas Permanent School Fund. In 2021, the Legislature authorized the SBOE to form a corporation and delegate to it the authority to manage the PSF. *See* Tex. Educ. Code § 43.052. The SBOE formed the Corporation on December 1, 2021, and effective January 1, 2023, transferred the PSF’s assets to the Corporation. The SBOE also transferred all contracts relating to the PSF to the Corporation, which were amended to specify that the contracts were now with the Corporation, despite initially being executed with the SBOE. Finally, the SBOE also delegated the authority to manage the PSF to the Corporation.

A nine-member board of directors governs the Corporation. Tex. Educ. Code § 43.053(a).

However, the SBOE still exercises some degree of control. Five members of the Corporation’s directors must be SBOE members, appointed by the SBOE. *Id.* § 43.053(a)(1). Any changes to the articles of incorporation or the Corporation’s bylaws must be approved by the SBOE. Tex. Educ. Code § 43.063(a), (b). Currently, the Corporation’s staff is composed of both new hires and individuals who were previously employed by TEA to manage the PSF. The Legislature does not provide an appropriation for the Corporation.

## ANALYSIS

Chapter 572 of the Texas Government Code contains three different “revolving door” provisions applicable to former state officers or employees. Tex. Gov’t Code §§ 572.054(a), 572.054(b), and 572.069.

### **The First Revolving Door Applies to the Requestor**

Section 572.054(a) prohibits a former member of the governing body or former executive head of a regulatory agency, for two years after ceasing to be a member or executive head of a regulatory agency from, “mak[ing] any communication to or appearance before an officer or employee of the agency in which the member or executive head served . . . if the communication or appearance is made: (1) with the intent to influence; and (2) on behalf of any person in connection with any matter on which the person seeks official action.” Tex. Gov’t Code § 572.054(a).

As a former member of the SBOE, the requestor is subject to Section 572.054(a). The requestor asks whether he must wait two years from ceasing to be an SBOE member before making communications or appearing before the Corporation, Commissioner, or TEA employees.

The answer to each depends on the relationship between the SBOE, the Commissioner, the Corporation, and the TEA. The overlapping structure and responsibilities of each make this a novel question. Even the TEA’s own organization chart reflects the ambiguity by placing the SBOE on its organizational chart, level with the Commissioner, but with arrows touching no other part of the chart.<sup>1</sup>

### *Communications with the Corporation*

The requestor must wait two years before appearing before or seeking to influence the Corporation on behalf of another because the Corporation board contains SBOE members.

Section 572.054 prohibits certain communications or appearances before “*an officer or employee of the agency in which the member . . . served.*” Tex. Gov’t Code § 572.054(a). Although the SBOE and Corporation are separate entities, five SBOE members sit on the Corporation’s board. Appearing before the Corporation will therefore inevitably require the requestor to appear before “*an officer . . . of the agency in which the member . . . served.*” *Id.*

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<sup>1</sup> <https://tea.texas.gov/about-tea/welcome-and-overview/tea-organization-chart.pdf>.

### *Communications with the Commissioner*

The requestor must wait two years before appearing before or seeking to influence the Commissioner on behalf of another because the Commissioner is an officer of the SBOE.

Chapter 572 of the Government Code defines a “state officer” 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.” Tex. Gov’t Code § 572.002(12).

An appointed officer is, in relevant part, “an officer of a state agency who is appointed for a term of office specified by the Texas Constitution or a statute of this state.” Tex. Gov’t Code § 572.002(1).

In our opinion, the Commissioner is an officer of the SBOE for purposes of Chapter 572 because he is appointed to a term of service as the “executive secretary” of the SBOE. Tex. Educ. Code § 7.055(b)(2); *see also* Tex. Ethics Comm’n Op. No. 381 (1997) (EAO 381) (finding a salaried, solitary gubernatorial appointee who serves for a specific term pursuant to statute and oversees an agency’s daily operation is an “appointed officer”). As executive secretary, the Commissioner plays an integral role for the SBOE. The Commissioner provides staff for the SBOE through the TEA and the SBOE is required to carry out its duties “with the advice and assistance of the [C]ommissioner.” Tex. Educ. Code § 7.102(b). Similar to the appointed official in EAO 381, the Commissioner is an officer of the SBOE.

### *Communications with TEA employees*

As noted above, Section 572.054(a) prohibits certain communications or appearances “before an officer or *employee* of the agency in which the member or executive head served.” Whether Section 572.054(a) would apply to communications or appearances before TEA employees turns on whether some or all TEA employees can be considered employees of the SBOE.

The SBOE does not have staff. Instead, the TEA provides administrative staff to the SBOE. However, in interpreting the terms “employee” or “employed,” in Chapter 572, we have applied the common law test of employment. Tex. Ethics Comm’n Op. No. 545 (2017). Generally, an employer’s right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship. *See id.*

An individual also may be the employee of more than one employer. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 538 (Tex. 2002). An individual is an employee of two or more joint employers if: (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services. Restatement (Third) of Employment Law: Employees of Two or More Employers § 1.04(b) (2015).

The requestor would be subject to the Section 572.054(a) restriction with respect to TEA employees if they were also employees of the SBOE under the common law employee-employer test. Whether TEA employees are also employees of the SBOE depends on specific facts not provided in the advisory opinion request. We are not able to resolve disputed facts in an advisory opinion. 1 Tex. Admin. Code § 8.3(d).

## **Revolving Door #2**

The requestor next asks whether the revolving door prohibition that generally prohibits a former state officer or employee from receiving compensation for working on the same particular matter in which the officer or employee participated as a state officer applies to contracts that were originally entered into by the SBOE, but amended to be contracts with the Corporation. The requestor specifically asks:

Does Texas Government Code § 572.054(b) prohibit former SBOE members from ever receiving compensation under contracts in which they participated when the contracts were with the SBOE if the contracts were subsequently amended to be contracts with the Corporation?

For the reasons stated below, Section 572.054(b) would prohibit such activity.

Section 572.054(b) prohibits *all* former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person “regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer’s or employee’s official responsibility.” Tex. Gov’t Code § 572.054(b).

The statutory definition of “particular matter” is “a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding.” Tex. Gov’t Code § 572.054(h)(2). We have previously opined that the “term ‘particular matter’ refers to a particular proceeding rather than to a particular subject matter ....” Tex. Ethics Comm’n Op. No. 496 (2011). Similarly, former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id.* (citing Tex. Ethics Comm’n Op. No. 364 (1997)). Furthermore, in Ethics Advisory Opinion No. (“EAO”) 397, we determined that “[s]eparate contracts are separate ‘matters’ for purposes of the revolving door provision in Government Code section 572.054(b).” Tex. Ethics Comm’n Op. No. 397 (1998).

The facts provided by the requestor presume that the requestor participated in the contracts that the SBOE later transferred to the Corporation. In this case, it is irrelevant whether the original contract with the SBOE and the amended contract with the Corporation are different particular matters. Even if the amended contract is a different particular matter, the SBOE member would have participated in that matter by effecting the transfer as a board member. Therefore, the requestor would be prohibited from receiving compensation under contracts in which they participated as a SBOE member regardless of whether the contract was subsequently transferred to the Corporation.

## **Revolving Door #3**

Finally, the requestor asks whether the third revolving door provision, related to procurements and contract negotiations, applies to previously executed investment transactions conducted by the Corporation that were ratified by the SBOE.

Section 572.069 prohibits all former state officers and employees who “participated on behalf of a state agency in a procurement or contract negotiation” from accepting employment from a

“person” involved in that procurement or contract negotiation for two years after the contract is signed or the procurement is terminated or withdrawn. Tex. Gov’t Code § 572.069.

The Government Code does not define procurement or contract negotiation. However, we have looked to the State of Texas Procurement and Contract Management Guide, published by the Texas Comptroller of Public Accounts, which identifies “common characteristics between all procurements,” including “defin[ing] the business need,” “select[ing] the vendor that provides the best value to the State,” and “ensur[ing] that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives.” Tex. Ethics Comm’n Op. No. 571 (2022).<sup>2</sup> We have emphasized that a procurement involves an agency’s acquisition of goods and services. *Id.*

Although Section 572.069 does not define the word “participated,” we have previously applied the definition found in a companion revolving door law prohibition, Section 572.054. *See* Tex. Ethics Comm’n Op. Nos. 568 (2021), 586 (2023). We apply that same definition here. “Participated” means “to have taken action as an officer or employee through *decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.*” Tex. Gov’t Code § 572.054(h)(1) (emphasis added).

The requestor asks whether ratification by the SBOE of previously executed investment transactions constitutes participation in a procurement under Section 572.069. The SBOE often votes to ratify the purchase and sale of investments executed by the PSF staff. The requestor asserts that the SBOE never engaged in contract negotiations for these purchases and sales before voting to ratify the transactions.

The purchase or sale of investments clearly constitutes a procurement or contract negotiation. Ratification is a form of approval by the SBOE of these procurements or contract negotiations. *See* 572.054(h)(1) (participation includes decision, approval, or disapproval). Therefore, regardless of the involvement in the contract negotiations before ratification, the requestor participated in a procurement for each transaction subject to a ratification vote for purposes of Texas Government Code § 572.069.

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<sup>2</sup> <https://comptroller.texas.gov/purchasing/docs/96-1809.pdf>