



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 615

December 3, 2024

ISSUE

Whether an officer of a state agency meets the definition of an “appointed officer” in Chapter 572 of the Government Code when the officer is not appointed to a term of service fixed in statute or state constitution beyond the default maximum term specified by Article XVI, Section 30(a) of the Texas Constitution. (AOR-717-CI)

SUMMARY

When the Constitution or statute does not fix a term of service for a particular officer of a state agency, the officer nevertheless serves a default term of not more than two years. Such an officer of a state agency is required to file a personal financial statement. Therefore, the TEC overrules prior advisory opinions to the extent they are inconsistent with this opinion.

FACTS

A recently issued Attorney General Opinion has called into question the TEC’s long-standing interpretation of the definition of “appointed officer,” as that term is used in Chapter 572 of the Government Code. Whether an individual is an “appointed officer” will affect whether several provisions of Chapter 572 apply to the individual, including the obligation to file a personal financial statement.

ANALYSIS

A “state officer” must file a personal financial statement (PFS). Tex. Gov’t Code § 572.026.

Included in the definition of “state officer” is “appointed officer,” which is also a defined term. *Id.* § 572.002(1), (12).

Chapter 572 defines an appointed officer to include, “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.”¹ *Id.* § 572.002(1)(C).

¹ The definition of appointed officer also includes the secretary of state, an individual appointed with the advice and consent of the senate to the governing board of a state-supported institution of higher education and certain ex officio members of state boards and commissions. Tex. Gov’t Code § 572.002(1).

At times state offices are created in statute or the Texas Constitution with a specific term of service. For example, the Constitution expressly states that TEC commissioners are appointed to a four year term. Tex. Const. art. II, § 24(a). Other times, the Constitution and statutes are silent as to an express term of service. *E.g.*, Tex. Gov't Code § 403.503. Still other agencies have appointed officers that serve at the pleasure of the appointing authority. *E.g.*, *id.* § 481.005(a).

The TEC has consistently held that if the Constitution or statute does not set a specific term of service for a particular officer of a state agency, that officer is not an “appointed officer” for purposes of Chapter 572 because they do not serve for a “term of service.” *See* Tex. Ethics Comm'n Op. Nos. 124 (1993), 138 (1993), 180 (1994). Under this interpretation, such an officer would not be required to file a PFS. *See* Tex. Ethics Comm'n Op. Nos. 124 (1993), 138 (1993), 180 (1994).

This year, the Office of the Attorney General held that even if the statute or the Constitution do not provide an express term of service for a particular office “the Texas Constitution does by default.” Tex. Att'y Gen. Op. No. KP-0466 (2024) at *4 citing Tex. Const. art. XVI, § 30(a). The Constitution states “the duration of all offices not fixed by this Constitution shall never exceed two years.” Tex. Const. art. XVI, § 30(a). The Office of Attorney General (OAG) relied on this provision to find that “a court would likely conclude” that voting members appointed to the Texas Opioid Abatement Fund Council are “appointed officers” despite not having a particular term of service fixed in statute or the Constitution, beyond the default two-year maximum term. Tex. Att'y Gen. Op. No. KP-0466 (2024).

The TEC's past opinions concerning when an officer of a state agency serves without a fixed term are in conflict with the OAG's recent opinion. TEC must “rely” on opinions issued by the attorney general. Tex. Gov't Code § 571.096(c). The attorney general's opinion is reasonable and has the effect of broadening the number of state officers who must disclose potential conflicts, furthering the purpose of Chapter 572. *Id.* § 572.001. We therefore embrace the logic of KP-0466, and find that when the Constitution or statute do not fix a term of service for a particular officer of a state agency, the officer nevertheless serves a default term of not more than two years. Such an officer of a state agency is therefore required to file a personal financial statement, provided they meet the other elements of the definition of an “appointed officer.” Therefore, the TEC overrules prior advisory opinions to the extent they are inconsistent with this opinion. *E.g.*, Tex. Ethics Comm'n Op. Nos. 124 (1993), 138 (1993), 180 (1994).

This opinion has prospective application.

The TEC recognizes that this change of position prompted by the OAG opinion will impact a class of officers of state agencies that have not filed a PFS in reliance on past determinations of the TEC.

The Texas Supreme Court embraced the three-factor test adopted by the U.S. Supreme Court to determine if a decision should have only prospective application. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 518 (Tex. 1992) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971)). In issuing its opinions, the OAG has also applied the test employed

by courts to determine whether its opinion should apply only prospectively. *E.g.*, Tex. Att’y Gen. Op. No. JM-1179 (1990). We do the same here. For the reasons stated below, we believe this opinion should apply prospectively.

The test for determining whether a new or novel decision should apply prospectively only is as follows:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, . . . [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Finally, [the court must] weigh the inequity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 518 (Tex. 1992) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971)).

First, this opinion overrules past ethics advisory opinions. The TEC is also required to “conduct a continuing survey to determine whether all individuals required to file financial statements under [Chapter 572] have filed statements . . .,” send those individuals notice to file a PFS, impose a civil penalty on those who file late, and notify the appropriate prosecuting attorney of those who have failed to file. Tex. Gov’t Code § 572.030, .031. Following past advisory opinions, when conducting its survey of individuals required to file a PFS, the TEC has found officers of a state agency without an express fixed term of service were not required to file a PFS. Consequently, such officers were not provided notice of an obligation to file a PFS and were not assessed late filing civil penalties for not filing. These state officers reasonably relied on the TEC’s past interpretation of law, which weighs in favor of non-retroactive application.

Second, prospective application will not substantially impede the effect of the disclosure statute. The stated legislative intent of Chapter 572 of the Government Code is to prevent a state officer or state employee from having financial, business, or other interests in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest. *Id.* § 572.001(a). Retroactive application requiring the filing of PFSs for former state officers would not substantially benefit public disclosure.

Finally, Chapter 572 is also meant to provide “a basis of discipline of those who *refuse* to abide by its terms.” *Id.* § 572.001(c) (emphasis added). In terms of enforcement, it cannot be said a person “refused to abide” by the terms of Chapter 572 by not filing a PFS when they were acting

in reliance of a TEC interpretation of law. A retroactive application would potentially subject state officers to civil and criminal penalties, working an injustice on state officers who did not file a PFS in reliance on TEC guidance. Therefore, retroactive application would produce substantial inequitable results.