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DEPARTMENT OF JUSTICE

CIVIL DIVISION

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BATON ROUGE

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OPINION 18-0134

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Senator Barrow Peacock
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77 OFFICERS - Local & Municipal; Selection,
Qualifications & Tenure; Vacancies

La. R.S. 34:2301, *et seq.*, and La. R.S. 46:76-79.

Filling a vacancy in the parish membership of the Commission, it is imperative that the appointing authorities follow the statutory appointment scheme whereby the nominating entities submit nominations to the governor, and the governor appoints from among the nominees submitted to him. Any member appointed contrary to statute holds the office unlawfully and is subject to challenge.

Dear Senators and Mr. Harrison:

Our office is in receipt of a request for an opinion concerning the procedures for filling vacancies on the Board of Commissioners of the Red River Waterway District pursuant to La. R.S. 34:2303 as well as the validity of recent appointments to the Board.

In answering your questions, we first look to the law, La. R.S. 34:3201, *et seq.*, under which the Red River Waterway District (the "District") was created and established. The District was created for the purpose of establishing, operating, and maintaining a navigable waterway system to be known as the Red River Waterway. La. R.S. 34:2302. The District is governed by the Red River Waterway Commission (the "Commission") in which the corporate powers and authority of the District shall be vested and exercised. La. R.S. 34:2303(A).

The Commission is composed of twelve members as follows:

- (1) The director of public works of the State of Louisiana who shall be ex-officio chairman of the commission with full voting powers and may duly appoint a representative to represent him at any meeting of the commission with the same effect as though he were in attendance himself.

- (2) Four members-at-large who shall be residents of, own real property subject to taxation in, and be qualified voters of the seven parishes in the district, and who shall be appointed by the governor.
- (3) One member from each of the seven parishes of the district (hereinafter sometimes called "parish members"), to be appointed by the governor in the manner hereinafter provided.

The parish members of the Commission are appointed by the governor initially and upon each new term from a list of nominees submitted to him by (1) the police jury of each parish in the district, (2) the governing body of each levee district situated wholly or partly in the district, and (3) the Red River Valley Association. Each of those entities separately nominates one person, and from the list of nominees, the governor appoints the members of the Commission. La. R.S. 34:2303(C).

When a vacancy occurs on the Commission, as in this instance, the vacancy is filled by the same nomination and appointment process required for initial membership or a new term. In that regard, La. R.S. 34:2303(D) provides:

D. Within thirty days prior to the expiration of the term of office of any member or within thirty days after occurrence of a vacancy prior to the expiration of the term of office of any member, the aforesaid respective nominating bodies so entitled shall, in the parish where appropriate, designate a nominee for the new term or to fill the vacancy. Such nominations shall be made on the same basis, in the same manner and in accordance with the same procedures required for nominations for initial membership on the commission. From the list or panel of names submitted, the governor shall appoint the parish member for the new term or to fill the vacancy as soon as possible after the names of the nominees of the respective nominating bodies have been received by him, subject to the requirements heretofore specified for such membership.

Filling a vacancy in the office of parish board member within the framework of the statute requires a joint effort on the part of the nominating entities in nominating candidates and on the part of the governor in appointing the parish member from among those nominations. The use of the mandatory "shall" in the statute unequivocally expresses the respective parties' mandatory duties. The nominating entities "shall" put forward nominations, and the governor "shall" appoint from among the nominees. Unless the nominating entities present one or more nominees for appointment and the governor appoints a member to fill the vacancy from among those nominees, the appointment cannot be regarded as a lawful appointment, and a candidate so appointed cannot be said to lawfully hold the office. La. R.S. 42:76-79.

The critical nature of the nomination component for filling vacancies on the Commission is reinforced by La. R.S. 34:2303(E), which provides that even if one of the nominating bodies ceases to exist or function, the governor must nonetheless fill a vacancy on the Commission from among the nominees of the remaining bodies entitled to make a nomination. Nothing in the statute, however, authorizes the governor to ignore the nominations of the local entities and proceed in disregard of the nominating requirement.

Turning to the circumstances that occasion your request, the information provided to this office and readily available in public documents reflect that a vacancy on the Commission occurred as a result of the death of Commission member, Rogers Meredith "Mickey" Prestridge, on February 5, 2018. The Commission notified the Governor of the vacancy by letter dated February 16, 2018. The Commission then notified the Caddo Levee District, the Red River Valley Association, and the Caddo Parish Commission of the vacancy by letter on or about February 23, 2018 and asked them as nominating entities for a parish member to provide their respective nominations for an appointment to fill the vacancy.

The nominating entities forwarded their nominations for filling the vacancy on March 8, March 13, and March 28, 2018, respectively, and the entities unanimously nominated Carolyn Prator for appointment to the office. However, the Governor did not appoint Carolyn Prator, the unanimous nominee. Rather, several months after the nominations were provided to him, the Governor appointed a candidate to the Commission from outside the local entities' nominations.

Assuming the foregoing facts to be correct, the failure to fill the vacancy in accordance with the mandates of La. R.S. 34:2303(D) casts doubt on the legitimacy of the appointment as well as actions and votes that may have been taken or that may be taken in the future by the involved board member(s). The occupation of the office by a candidate not lawfully appointed to it further invites a challenge to the appointment by mandamus, (Code Civ. P. arts. 3861, *et seq.*), quo warranto (Code Civ. P. arts. 3901, *et seq.*), and the Intrusion Into Office Act (La. R.S. 42:71, *et seq.*). Moreover, whether the Commission is lawfully composed under the existing circumstances is doubtful in our view. La. R.S. 34:2303(A).

We also understand that a question has been raised as to whether the Governor is free to abandon the statutory process if the nominations by the local entities are not made in strict compliance with the 30 day provision of the vacancy statute. We find nothing in the statute that would exempt the Governor under any circumstances from the statutory scheme for filling vacancies on the Commission. The process of appointment from nominations is rendered no less enforceable by reason of a momentary delay in the issuance of nominations, unless there is a failure to timely nominate and the necessity of appointment is urgent. Even then, however, the appropriate course is for the Governor to request expedited nominations, not to abandon the process altogether. See, e.g. *Murill v. Edwards*, No. 92-1758 (La. App. 1 Cir. 12/21/92), 613 So. 2d 185,

194. As we appreciate the applicable law, the Governor is not given license to depart from the statutorily mandated appointment process and enter upon a "frolic of his own" merely because the nominations reach him a few days after the deadline.

Moreover, as we understand the facts in this instance, the Governor was provided with the nominations of the local entities some months before the appointment was made, and there was ample time to consider the qualifications of the nominee prior to making the appointment. We have no information to suggest, however, that the Governor made any effort to determine the qualifications of the nominee before going forward with his appointment.

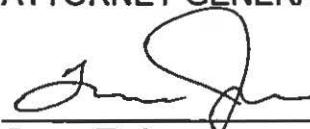
Accordingly, it is the opinion of this office that in filling a vacancy in the parish membership of the Commission, it is imperative that the appointing authorities follow the statutory appointment scheme whereby the nominating entities submit nominations to the governor, and the governor appoints from among the nominees submitted to him. Any member appointed contrary to statute holds the office unlawfully and is subject to challenge.

We trust that this opinion adequately addresses the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JEFF LANDRY
ATTORNEY GENERAL

By:



Carey T. Jones
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