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August 14, 1992

RO-473

John W. Segrest
Criminal District Attorney

Hon. Dan Morales
Attorney General for the State of Texas
Opinions Division
P.O. Box 12548
Austin, Texas 78711

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RE: Request for Opinion

Opinion of Opinion Committee

Dear General Morales:

Pursuant to Section 402.043 of the Texas Government Code I am requesting your advice and opinion concerning the prosecution of an action before the District Court in which the State is interested. I have investigated the question involved and submit herewith briefs upon the matter.

The State's interest is based upon the fact that I may be required to take action concerning an employee of the McLennan County Community Supervision and Corrections Department, hereinafter called the "Department", due to possible violations of the Texas Nepotism Statute, Article 5996a, V.A.C.S.

My question, simply stated, is this:

Can a person related to a District Judge within the degree prohibited by Article 5996a, V.A.C.S., take employment with a Community Supervision and Corrections Department without causing a violation of the nepotism laws in light of the provisions of Article 42.131, V.A.C.C.P.?

The facts bearing upon this matter are as follows, and are more specifically set forth in the attached letter from Robert D. Thomas:

1. McLennan County has four district courts and two county courts at law, each of which can be considered as "trying criminal cases" in this judicial district;
2. On January 1, 1987, one-district judge-took-office after his election the previous November, and continues to serve to this date;

3. On September 12, 1988, all of the judges appointed Mr. Thomas as Department Director, a position he holds to this date;
4. The judges take absolutely no part in the personnel decisions of the Director or the Department;
5. On May 1, 1990 the Director hired the employee in question;
6. The Employee is the nephew of the Judge, being the son of the Judge's natural brother, and is thus related within the third degree of consanguinity;
7. Before April 22, 1992, no person familiar with the situation considered this as a nepotistic hiring. On this date Todd Jermstad, General Counsel of the Texas Department of Criminal Justice proffered an opinion putting this hiring in question. A copy of this opinion is attached.

As soon as Mr. Jermstad's opinion was received the Director contacted me for my opinion on the matter. A local attorney who has been representing the County in civil matters was also contacted and forwarded his opinion, a copy of which is also attached. Both Mr. Jermstad's and this attorney's opinions have merit, but they, of course, reach different conclusions.

RELEVANT STATUTES

THE NEPOTISM STATUTE

Article 5996a, V.A.C.S., as presently written, and as in effect during the time period in question, reads in its pertinent part:

"Sec. 1. (a) No judge of any court shall appoint, or vote for, or confirm the appointment to any employment of any person related within the second degree of affinity or within the third degree of consanguinity to the person so appointing or so voting, or to any other member of such board or court of which such person so appointing or voting may be a member, when the salary, fees or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds"

THE PROBATION STATUTE - ITS HISTORY

Article 42.12, Sec. 10(a) and (b), as amended by Acts 1987, 70th Leg., ch. 939, § 9, eff. Sept. 1, 1987, provided:

- (a) For the purpose of providing adequate probation services, the district judge or district judges trying criminal cases shall establish a probation office and employ district personnel as may be necessary
- (b) Where more than one probation officer is required, the judge or judges shall appoint a chief adult probation officer or director, who, with their approval,

shall appoint a sufficient number of assistants and other employees to carry on the professional, clerical, and other work of the court. **The chief probation officer or director shall also appoint the director of a community rehabilitation center established in his district. The appointment is subject to the approval of the district judge or judges.**

Article 42.12, Sec. 10(a) and (b), were renumbered as Sec. 27 and repealed by Acts 1989, 71st Leg., ch. 785, § 4.17 (See page 3519, General and Special Laws, vol. 3). At the same time the legislature enacted Article 42.131; Acts 1989, 71st Leg., ch. 785, § 3.02 (See page 3483, General and Special Laws, vol. 3). This enactment was effective September 1, 1989, and reads in its pertinent parts the same as the current statute.

Article 42.131, V.A.C.C.P., provides:

Establishment of Departments

Sec. 2 (a) The district judge or district judges trying criminal cases in each judicial district in the state shall establish a community supervision and corrections department and employ district personnel as may be necessary to conduct presentence investigations and risk assessments, supervise and rehabilitate probationers, enforce the terms and conditions of probation, and staff community corrections facilities. **Both the district judges trying criminal cases and the judges of statutory county courts trying criminal cases that are served by a community supervision and corrections department are entitled to participate in the management of the department.**

Department Director

Sec. 4. The judge or judges shall appoint a department director. **The department director shall employ a sufficient number of officers and other employees to perform the professional and clerical work of the department.**

Standards for Officers

Sec. 5. (a) **Officers appointed by the department director must comply with a code of ethics developed by the division.**

(b) To be eligible for appointment as an officer who supervises probationers a person:

(1)

Employees; Benefits

Sec. 6. (a) Except as provided by Subsection (c) of this section, department employees are not state employees. . . . [T]he employees are governed by the same personnel policies as the employees of that county.

(b) The judicial districts served by the department shall pay the salaries of department employees.

Counties' Financial Responsibilities

Sec. 8. (a) The county served by a department shall provide physical facilities, equipment and utilities for a department.

District's Financial Responsibilities

Sec. 9. (a) The district judge or judges may expend district funds in order to provide expanded facilities, equipment , and utilities if

COMMUNITY JUSTICE ASSISTANCE DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

At the same time that Article 42.131 was enacted, the legislature also created the Community Justice Assistance Division of the Texas Department of Criminal Justice. See Article 42.13, Acts 1989, 71st Leg., ch. 758, § 3.01, eff. Sept. 1, 1989, as amended. This Division was to propose reasonable rules governing Departments, that is Community Supervision and Corrections Departments established under Article 42.131, establish standards relating to the operation of departments, impose on departments certain reporting and tracking requirements, conduct inspections and audits, certify and establish certification programs, conduct examinations of officers, revoke or suspend certifications, provide training, and provide funds for the payment of salaries, etc.

Analysis

The Employee was hired by Mr. Thomas on May 1, 1990. Thus the probation statute applicable to the analysis would be Article 42.131, which was effective the previous September. There is no question in my mind that had the employee been hired prior to September 1, 1989, the nepotism statute would have been violated due to the wording of the statute then governing the situation, to wit: Article 42.12, §10 (a) & (b). That statute specifically gave the district judges the power and authority to

- (a) establish a probation office and employ district personnel as may be necessary

If more than one employee was required

- (b) the judge or judges appoint[ed] a chief adult probation officer or director

who, in turn, was empowered to

. appoint a sufficient number of assistants and other employees to carry on the professional, clerical, and other work of the court.

including a director of a community rehabilitation center. However, such appointments were valid only

. with their [the judge or judges'] approval

All appointments by the chief officer or director were

. subject to the approval of the district judge or judges.

As pointed out in Mr. Jermstad's opinion (page 3, ¶ 4), relying on Attorney General Opinion No. MW-286 (decided December 15, 1980), Article 42.12, §10(a) & (b), gave the judges and the chief probation officer a joint power to appoint employees, and both were subject to the nepotism laws. This is not in doubt due to the approval power of the judges and the general and overall wording of the statute.

However, just prior to the hiring in question, the Legislature changed the law and deleted all reference to the requirement that approval be sought, and provided only that the judges were entitled to participate in the management of the department, a new statement of the authority, which included not only the district judges but also the statutory county court judges. The new statute also referred to the power of the judges to appoint district personnel, and the power of the director to appoint department personnel, which one could assume to be two separate classes of employees.

ARGUMENTS

NEPOTISM LAW WAS NOT VIOLATED

By the enactment of Article 42.13, Acts 1989, 71st Leg., ch. 785, § 3.01, eff. Sept. 1, 1989, and subsequently amended in part, the Legislature created the Community Justice Assistance Division of the Texas Department of Criminal Justice. This enactment took the oversight duties of Departments from the district judges and gave them to the CJAD. When this is combined with Article 42.131, which limited the authority of District Judges to appointment of a director, and permissible, but not mandatory, participation in the management of the department, it is clear that it was the intent of the Legislature to remove from district judges the absolute authority over the Department which they held under old Article 42.12, §§ 10 (a) & (b). The Legislature clearly created two classes of officers and employees of Departments, to wit: district personnel and department personnel.

The nepotism statute is violated when a judge (1) appoints, (2) votes for, or (3) confirms the appointment of an employee. Clearly, one cannot evade the nepotism statute by delegating the authority to appoint, vote for, or confirm. So long as the power to appoint, vote for, or confirm exists the prohibitions of nepotism apply. Attorney General Opinion No. DM-2 (decided February 4, 1991). In addition, when there is more than one person appointing, voting or confirming, or authorized to do so, nepotism cannot be avoided by simply abstaining from the act of appointing, voting or confirming. Article 5996a, V.A.C.S., includes a prohibition against all members of any "court of which such person so appointing or voting may be a member".

It would appear that under the nepotism statute the act of:

- (1) "appointing" means the selection of who takes employment;
- (2) "voting for" includes:

- (a) selection between multiple candidates (and thus is akin to "appointment"); or
- (b) consideration and approval by majority vote of a single candidate selected by another, if the board or court is made up of more than one person (and thus is akin to "confirmation");

(3) "confirming" means to ratify the selection or appointment made by another.

"Voting for" and "confirming" constitute post-appointment approval.

By law, judges do not now "appoint" department personnel, including supervision officers. **The Director does.** With the obvious change upon the enactment of Article 42.131, limiting the judges authority to appointing district personnel, and permissible, but not mandatory, participation in department management, it is clear that the district judges have no legal authority to "appoint" supervising officers.

Judges will only "vote for" or "confirm the appointment" of a department employee, and thus violate the nepotism statute if:

(1) the employee "appointed" by the Director is actually submitted to the judges for a vote or confirmation; or

(2) the judges have the power to require that "appointments" by the Director be submitted to them for approval or confirmation, or by vote of if there is more than one judge.

In the present situation the appointment by Director Thomas was not submitted for approval, and thus there was never an actual vote or confirmation. The question then becomes do the district judges have the power to confirm appointments?

Since Article 42.12, §10 (a) & (b), which required the "appointment" of probation officers to be approved by the judges, was repealed as shown above, and in its place the Legislature enacted Article 42.131, § 2, which eliminated in its entirety the "approval" requirement, the law no longer requires or contemplates any "post-appointment approval" by the district judges. Since this power was specifically eliminated, it no longer exists. Thus, the district judges have no power to vote for or against, or confirm or reject the appointee selected of the Director.

The applicability of the nepotism law depends on whether the officer may exercise control over hiring decisions. Pena v. Rio Grande City Conslo. Indep. School Dist., 616 S.W.2d 658 (Tex.App. - Eastland 1981, no writ); Attorney General Letter Advisory LA-148 (1977); Opinion No. DM-2 (February 4, 1991). If, by law or city charter, the members of the governing body are prohibited from participating in hiring decisions, relationship to a member of the governing body would not violate the statute. Op.Atty.Gen. No. O-5275 (1943).

Under present Article 42.131 the district judges are statutorily prohibited from participating in hiring decisions, either by making them ("appointing") or by approving them ("voting or confirming"). The qualifications of a supervising officer is established by CJAD, the selection is made by the Director, and the approval requirement of former Article 42.12,

§ 10 (a) and (b), have been specifically eliminated. District Judges may make only one hiring decision, that of the Director. Thereafter they are only entitled, if they wish, to participate in the management of the department. So far as setting personnel policy is concerned, even that is delegated to the County Commissioners, for under Article 42.131,:

Sec. 6. (a) Except as provided by Subsection (c) of this section, department employees are not state employees. . . . [T]he employees are governed by the same personnel policies as the employees of that county.

Thus, with the repeal of Article 42.12, §10 (a) and (b), and the enactment of Article 42.131, both in 1989, judges may no longer participate in the hiring decisions of supervising probation officers, and are no longer subject to the nepotism law should a relative of a district judge be hired by the Department Director. The prohibitions of Article 5996a, V.A.C.S., now apply only to the Department Director.

NEPOTISM LAW WAS VIOLATED

Even with the enactment of Article 42.131, the nepotism laws apply to district judges and supervising officers of the Department. The law still provides that the judges are entitled to participate in the management of the Department, and that would include the right to consider any hiring decision made by the Director, and to veto that selection, or by inaction, confirm the appointment.

District judges maintain the joint power with the Director to appoint personnel, and thus under Attorney General Opinion No. MW-286 (1980), when the Director decides to hire anyone, whether it be a supervising officer, clerk, or person to answer the telephone, Article 5996a, V.A.C.S., would be violated, whether or not the judge was aware of the hiring, participated in it, or knew of the relationship he had to the hired individual.

It is unrealistic to conclude that the Legislature intended to remove district judges from the prohibitions of the nepotism statute by repealing the approval requirement of Article 42.12, § 10 (a) & (b). The evil sought to be addressed in the nepotism statute still exists, and would be made even worse, if this were the conclusion. District judges could not only allow the Director to hire their children, wives, cousins and nephews, but would be free to bring pressure upon the Director to do so, since such a hiring would not be nepotistic. Failure to hire a relative might encourage the district judge to take a more active part in the management of the department, and thereby interfere with the plans and procedures of the Department, and may even lead to the removal of the Director from that position.

Article 42.131, V.A.C.C.P., provides:

Establishment of Departments

Sec. 2 (a) The district judge or district judges trying criminal cases in each judicial district in the state shall establish a community supervision and corrections department and employ district personnel as may be necessary to conduct presentence investigations and risk assessments, supervise and rehabilitate probationers, enforce the terms and conditions of probation, and staff community corrections facilities.

It is clear from this provision that district judges have the power to employ supervising officers, such as the employee in question. This would appear to create a conflict between § 2 (a) of Article 42.131 and § 4 and 5(a) of the same Article, which gives the Director the authority to "employ" and "appoint" persons to perform the professional work of the department, including supervision of probationers.

Conflicts in statutes should be harmonized, if possible. One such harmonious interpretation is that the Director and the judges retain the joint authority to manage the Department, including the hiring decisions of the department, which was clearly spelled out in the former Article 42.12, § 10 (a) & (b). Under the statutes as they currently exist, the district judges could require that all hiring decisions made by the Director be submitted to them for approval or rejection. Whether or not the district judges decide to exercise this power, or decide to delegate personnel matters to the Director, is not determinative. The fact remains that district judges "may exercise control over hiring decisions". Pena v. Rio Grande City Consol. Indep. School Dist., 616 S.W.2d 658 (Tex.App. - Eastland 1981, no writ); Attorney General Letter Advisory LA-148 (1977); Opinion No. DM-2 (February 4, 1991).

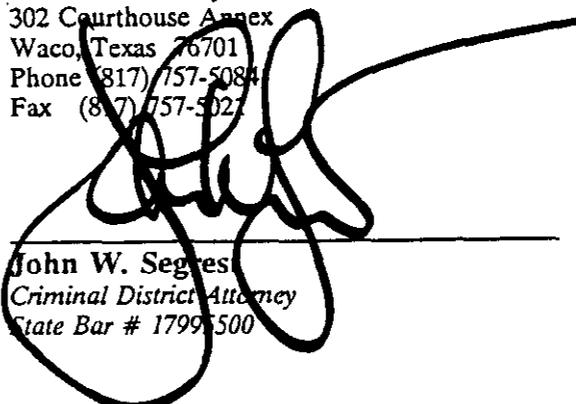
District Judges are therefore subject to the prohibitions of Article 5996a, V.A.C.S., should a relative of a district judge be hired as a supervising officer, probation officer, P.S.I. officer, or any other employee of a Community Supervision and Corrections Department.

Conclusion

Please issue your opinion on this question at your earliest convenience. Because there is a division of opinion, and there are sound arguments on both sides, I am withholding action on this matter pending your decision. If there are any questions, or if you need additional facts, please feel free to contact me.

Respectfully Submitted:

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