



TEXAS EDUCATION AGENCY

1701 North Congress Ave. ★ Austin, Texas 78701-1494 ★ 512/463-9734 ★ FAX: 512/463-9838 ★ <http://www.tea.state.tx.us>

Mike Moses
Commissioner of Education

RECEIVED

AUG 30 1999

Opinion Committee

RECEIVED

AUG 26 1999

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Building
P. O. Box 12548
Austin, Texas 78701-2548

ATTORNEY GENERAL'S OFFICE

Liz Robinson

FILE # ML - 40960 - 99

I.D. # 40960

RQ-0104-JC

Dear General Cornyn:

Please find enclosed a letter from legal counsel for the La Joya Independent School District that presents questions related to the application of nepotism exception for continuous employment to a person employed by a school district as a "permanent substitute." I am requesting your opinion on the issue presented in the enclosed letter.

If you have any questions regarding this request, you may contact David Anderson, Chief Counsel, at 463-9720.

Sincerely yours,

Mike Moses
Commissioner of Education

Enclosure

cc: Jose R. Guerrero

MONTALVO & RAMIREZ

Attorneys at Law
900 N. Main

McAllen, Texas 78501
Phone: (956) 631-1185
Fax: (956) 631-1187

MARCUS MONTALVO
ROXANNA SALINAS
EDUARDO CANTU

LEO MONTALVO
JESUS RAMIREZ
JOSE R. GUERRERO

July 20, 1999

99 JUL 22 AM 10:01
TEXAS DEPARTMENT OF EDUCATION
OFFICE OF THE ATTORNEY GENERAL

VIA CERTIFIED MAIL

Mr. Mike Moses
Texas Commissioner of Education
TEXAS EDUCATION AGENCY
1701 N. Congress
Austin, Texas 78701-1494

CMRRR NO. Z 444 467 530

Re: Request for Attorney General Opinion on Nepotism Question
Our file No. 99-160G

Dear Mr. Moses:

This firm serves as general counsel to the La Joya Independent School District. On behalf of the La Joya ISD we ask that you request an opinion from the Office of the Attorney General for the State of Texas concerning the subject matter of nepotism, as set forth herein. We believe that the question affects the public interest.

Facts

In August 1996, La Joya ISD hired a teacher who had obtained a two-year probationary certification under the Alternative Certification Program (ACP). The teacher was employed under a term contract. The teacher earned a salary of \$26,325.00 for 1996, and a salary of \$27,773.00 for 1997. The teacher remained employed under a term contract until November 2, 1998, at which time the teacher resigned his contract after losing his certification for failing the EXCET exam. Although the teacher resigned his contract, there is no lapse in time between the two assignments. The individual remains employed as a permanent substitute teacher in the same teaching position, at a daily rate of \$95.00. The duties and responsibilities remain the same. In May 1999, the teacher's sister gets elected to the La Joya ISD Board of Trustees. The district acknowledges that the permanent substitute teacher and the board member, as brother and sister, are within the prohibited degree of consanguinity under the nepotism law.

The district wants to know if it can hire the individual as a full-time teacher, should the individual subsequently obtain a teaching certificate while employed as a permanent substitute and while his sister is on the board of trustees. In order for the district to be able to do this without running afoul of the nepotism statute, the individual must be considered to have been "continuously" employed the requisite statutory period of time when his sister was elected to the school board.

Question Presented

Whether a teacher who loses his term contract for loss of certification, but remains employed as a permanent substitute teacher in the same teaching assignment he had as a contract teacher, may be considered to be “continuously” employed under the nepotism statute?

Nepotism Law

Texas Government Code §573.041 provides:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within a degree described by Section 573.002; or

(2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

Exemptions To Nepotism Law

There are two basic exemptions to the nepotism law: Texas Government Code Section 573.061 , entitled General Exemptions, and Texas Government Code Section 573.062, entitled Continuous Employment.

1. Section 573.061, General Exemptions.

Texas Government Code Section 573.061, sub-section 6, provides that a substitute teacher is exempt from the nepotism prohibitions of Section 573.041. Under this exemption, a person may continue employed as a substitute teacher or be employed in such position after a relative, within the prohibited degree of consanguinity or affinity, is elected to office.

2. Section 573.062, Continuous Employment.

When a person is not specifically exempted from the nepotism prohibitions under the general exemptions in §573.061, the person may be exempted if he or she meets the “continuous employment” test under §573.062. This exemption covers all positions of employment not covered by § 573.061. Under the “continuous employment” exemption, a person may remain employed

in a position if he or she has been continuously employed for at least six months prior to the election of a relative who is within the prohibited degree of consanguinity or affinity.

3. Difference Between Exemptions: Subsequent Promotion.

Section 573.062 (b) provides that if an individual is exempted from the nepotism prohibitions under the "continuous employment" test, the individual may not only remain employed in his/her position, but may subsequently be promoted to a higher position, so long as the affected relative abstains from all deliberation and vote on the question of the individual's promotion. This is not found in Section 573.061.

Argument for "Continuous" Employment

Prior to the enactment of the "substitute teacher" exemption from the nepotism statute (Tex. Gov. Code §573.061 (6)), the Attorney General had opined that a substitute teacher or substitute employee, regardless of the length of time of employment (even if called a "regular substitute") could not be considered to be "continuously" employed under the nepotism statute. See, e.g., Tex. Atty. Gen. Op. No. JM-861 (1988)(substitute teacher) and Tex. Atty. Gen. LO No. 92-75 (1992)(substitute cafeteria worker).

The decisions in Tex. Atty. Gen. Op. No. JM-861 (1988)(hereinafter "JM-861") and Tex. Atty. Gen. LO No. 92-75 (1992)(hereinafter "LO No. 92-75"), were based on the nature of employer-employee relationship between the school district and the substitute. In both instances, the affected individuals had been placed on a substitute list, and they would be called as needed. The Attorney General determined that being placed on a substitute list created no obligation for the district to offer the individual any substitute assignments, nor an obligation for the individual to accept any substitute assignment, if offered any. The Attorney General further determined that under this employment relationship, where the individual is intermittently called to work, each offer of assignment constituted a separate employment relationship, and thus, could not be considered as "continuous" employment. It is the repeated severance of the employment relationship which prevents the employment from being considered as "continuous".

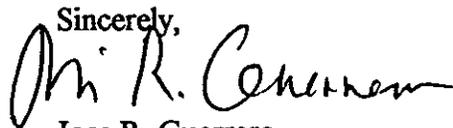
The school district contends under the facts of the instant case, the permanent substitute teacher may be considered to be "continuously" employed. The instant case may be distinguished from JM-861 and LO No. 92-75, on two grounds. First, the district characterizes a "permanent" substitute as a non-certified person who is employed to fill a teaching vacancy until such vacancy can be filled with a certified teacher. The permanent substitute teacher, unlike other substitute teachers,

Mr. Mike Moses
July 20, 1999
Page 4

is not placed on a substitute list¹, but rather is given the assignment and is expected to report to work everyday until a certified teacher is employed to fill the position or until he is terminated for any other reason. He has been offered a continuous assignment for an indefinite period of time, so he is like any other at-will employee with the school district. Second, his employment relationship with the district is not being continuously severed. In fact, his employment with the district has not been severed, only the nature of his employment relationship has changed, i.e. one day he is a contract employee, and the next day he is an at-will employee. The fact that the individual may in effect have sustained a demotion by, virtue of a lower pay rate for the same work of a certified teacher, should be of no consequence. The Attorney General has opined that the nepotism statute applies to promotions, and not to demotions, that occur prior to the election of the affected individual's relative to the governing body. See Tex. Atty. Gen. Op. No. JM-288 (1984). For these reasons the district believes that the permanent substitute in this case had been "continuously" employed with the district since August 1996 at the time when his sister was elected to the school board in May 1999. As such, he may not only continue his employment, but he may also be promoted to full-time teacher if he obtains his certification while his sister is on the school board, so long as his employment with the school district is not severed between now and then.

Without waiving its foregoing argument, the school district contends that at the very least the individual may remain employed as a permanent substitute teacher and may obtain future employment as a permanent substitute teacher under Tex. Gov. Code §573.061 (6)

Please call me if you require any additional information.

Sincerely,

Jose R. Guerrero

cc: Dr. Roberto Zamora, LJISD Superintendent

¹ The district maintains a list of names of persons who are interested in being called for substitute teaching assignments. These lists are maintained at each campus. Whenever a teacher is out on leave, a person on a list may be called to substitute for the absent teacher. These assignments are intermittent and of short duration. The campuses also maintain substitute lists for custodial, cafeteria, and other unskilled positions.