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County of Nueces



Opinion Committee

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RQ-0123-JC

July 23, 1999

Honorable John Cornyn
Attorney General for the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attn: Opinions Committee

FILE # Mh 41036-99
I.D. # 41036

Dear General Cornyn:

The Chief of Police for the City of Corpus Christi has a son and a nephew who are both employed as Senior Officers with the department. The employment of both the son and the nephew with the department preceded by several years the appointment of their relative to the chief position. Likewise, each had achieved his rank prior to the chief's appointment.

Years after the chief's appointment, the son and nephew were transferred. The son was transferred from the Uniform Division to the Organized Crime Unit. The son received no salary increase and no change in rank, but this transfer significantly altered his regular duties and required him to wear plain clothes instead of the department uniform. As a result of the transfer, he received a standard clothing allowance, and he was required to drive an unmarked department vehicle which he kept at all times and which could be used only for official duty.

The nephew was transferred from the Uniform Division to the Criminal Investigation Division. The conditions of his transfer were very similar to those of the son: no salary increase; no change in rank; substantial change in duties; plain clothes instead of a uniform; clothing allowance and use of an unmarked department vehicle.

Pursuant to Chapters 143 and 174, Local Government Code, the City and the Corpus Christi Police Officers Association have entered a collective bargaining agreement. (A copy is attached for your consideration.) The collective bargaining agreement, Article V, section I(5), gives the chief exclusive authority to approve finally all transfers. After the moves were recommended to him by the supervisors of the respective divisions, the transfers of both the son and the nephew were finally approved by the chief.

The following background information is also pertinent to your determination whether the transfer would constitute a change of status. Candidates apply for the generic position of police officer. See attached materials provided to applicants for July 16, 1999 written examination. The duties of police officers are described in the attached job description for Police Officer. (This job description also applies to Senior Police Officers as well because, as indicated below, the duties of the positions are interchangeable.) A police officer becomes a senior officer by taking a pass/fail exam. See attached Announcement for Proficiency Examination for Police Senior Officer. The duties of Senior Police Officers and Police Officers are interchangeable. See attached City of Corpus Christi Budget Ordinance; Article XII(A) 1998-2000 Collective Bargaining Agreement. *Police Officers and Senior Officers may be assigned to any division of the Police Department. As indicated by the budget, of 435 certified peace officers in the department 373 are Police Officers/Senior Police Officers. Attached are a general organizational chart and an organizational chart showing the assignment of Police Officers and Senior Officers within different divisions.*

We ask you to assist us in determining whether the transfers described above violate the nepotism prohibitions of Chapter 573, Government Code.

Section 573.041 of the Government Code provides in part:

“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 the third degree by consanguinity or the second degree by affinity.”

Appointed by the city council, we believe the chief of police is a “public official” covered by the nepotism prohibition. Factually, the chief is authorized to make all personnel decisions of the department at his own discretion and without the approval of the city manager or the city council. Atty. Gen. Op. DM-163 (1992); Atty. Gen. Op. LO-98-034 (1998); *Pena v. Rio Grande City Consol. Ind. School. Dist.*, 616 S.W. 2d 658 (Tex. Civ. App. — Eastland 1981, no writ).

Both the son and the nephew are relatives within the proscribed degrees to invoke the provisions of the nepotism statute: in the first degree and third degree of consanguinity, respectively.

The transfers conferred no change of rank or salary upon the relatives, but, as stated, their duties changed substantially. The clothing allowance, the change from uniform to plain clothes and use of the unmarked vehicle conferred no appreciable monetary benefit upon the relatives. The clothing allowance is an annual amount determined in the collective bargaining agreement and

intended to reimburse plain-clothes officers for the expense of providing the clothing necessary to carry out the duties of their positions, as compared the uniforms paid for by the city for uniformed officers. Likewise, the use of the car is essential to the effective performance of the duties of plain-clothes officers and can be used only for department business.

We believe, however, the transfers of the relatives constituted "changes of status" contemplated within the nepotism prohibitions, as provided in Section 573.062(b), Government Code:

"(a) A nepotism prohibition proscribed by Section 573.041 or by a municipal charter or ordinance does not apply to an appointment, confirmation of an appointment, or vote for an appointment or confirmation of an appointment of an individual to a position if:

(1) the individual is employed in the position immediately before the election or appointment of the public official to whom the individual is related in a prohibited degree; and

(2) that prior employment of the individual is continuous for at least:

(A) 30 days if the public official is appointed;

(B) six months, if the public official is elected at an election other than the general election for state and county officers; or

(C) one year, if the public official is elected at the general election for state and county officers.

(b) If, under Subsection (a), an individual continues in a position, the public official to whom the individual is related in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, re-employment, change in status, compensation, or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees."

We find Attorney General Opinion JM-371 which considers a teacher related in a prohibited degree to a trustee of a school board who was "transferred" to assume duties of registrar with no increase in salary. The Attorney General concluded that while the teacher was continuously employed prior to the election of the trustee, the transfer constituted a change of the teacher's employment status which could be valid only if the related trustee abstained from deliberation and vote on the issue.

Our circumstances are similar. Both the son and the nephew satisfied the continuous employment provisions of Section 573.062 (a), but it has been factually determined that the chief of police gave final approval to the transfers. We will not attempt in this request to detail the involvement of the chief of police in the respective transfers except to note that the transfers were not completed until the chief considered them and executed documents customarily appropriate to that end. Whatever else might be said about the chief's minimal involvement in the decisions related to these transfers, it cannot be said that he played no role whatsoever. We ask whether this final approval of the transfers under the circumstances described above constitutes participation in the deliberation or voting on the change of status of the relatives in violation of the nepotism prohibitions.

If you conclude that the chief's action violates the nepotism prohibitions under the circumstances described above, we would ask your consideration of the effect of the collective bargaining agreement which grants to the chief sole authority to make transfers within the department. The agreement provides, in Article V, section I:

"The Chief shall have the exclusive right to:

1. Establish departmental rules and procedures;
2. Discipline or discharge for cause;
3. Determine work and overtime schedules in a manner most advantageous to the City;
4. Establish methods and processes by which work is performed; and
5. Transfer employees within the department in a manner most advantageous to the City."

The collective bargaining agreement negotiated between the police union and the city requires the chief to make final approval of all transfers, and no other city official is left with the authority to approve transfers. Pertinent to the questions raised herein, we request your consideration of Section 174.005, which provides:

"This chapter preempts all contrary local ordinances, executive orders, legislation, or rules adopted by the state or by a political subdivision or agent of the state, including personnel board, civil service commission, or home-rule municipality."

Additionally, Section 174.109 provides:

"An agreement under this chapter is binding and enforceable

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against a public employer, an association, and a firefighter or police officer covered by the agreement.”

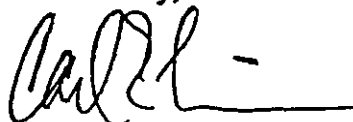
If you have determined that the transfers violated the nepotism statute, we ask whether they are made valid by the authority placed in the chief by the collective bargaining agreement. Can the nepotism prohibitions be superceded by the collective bargaining agreement?

We find no authority indicating municipalities and police bargaining units have been authorized by Chapter 174, Local Government Code, or any other statute, to create terms of their agreements that supercede nepotism prohibitions. We find Attorney General Opinion LA-152 (1978), in which your office considered the application of the nepotism statute to police departments which are under civil service law.

In that instance, the city’s chief executive officer had authority to appoint new officers to fill vacancies from a list of finalists derived from competitive examinations. The chief of police did not participate in that decision. Under the civil service rules adopted, however, the chief made the final recommendation to keep or to discharge appointees at the end of a six-month probation period. The chief’s recommendation regarding his brother-in-law was found to violate the existing nepotism prohibitions. That opinion seems to maintain in our circumstances.

We would appreciate your discussion of these issues, and we will promptly provide any additional information you may need. Thank you.

Yours truly,



Carl E. Lewis
Nueces County Attorney

Attachments enclosed

Cc: Mr. Jimmy Bray
City Attorney
City of Corpus Christi
(Without attachments)

County of Nueces

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FILE # RD-0123-JC
 I.D. # 41046

October 8, 1999

Beverly McGaffee
 Assistant Attorney General
 Office of Attorney General
 P.O. Box 12548
 Austin, Texas 78711-2548

Re: Request for an Opinion / ID#41036
 Letter dated July 23, 1999 by the former
 Nueces County Attorney, Carl Lewis

Dear Ms. McGaffee:

This letter is to confirm the need for an opinion as previously requested by the former Nueces County Attorney, Carl Lewis. Although the letter is dated July 23rd and mailed October, 1st 1999, I also join Mr. Lewis in that request for an opinion.

Please excuse the confusion. The letter of request was prepared during a period of consolidation between the County Attorney and District Attorney's offices. I am sure that the mailing was an oversight.

If there are any questions, please do not hesitate to call.

Sincerely,

Laura Garza Jimenez
 Laura Garza Jimenez