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The Texas Senate
Committee on Criminal Justice

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MAR 08 2002

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March 6, 2002

OPINION COMMITTEE

Ms. Susan Gusky
Division Chief, Opinions Committee
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-42504-02
I.D. # 42504

Dear Ms. Gusky,

I would appreciate an Attorney General's opinion regarding the forwarded information from Senator Chris Harris' office.

Thank you in advance for the time and consideration for this request. If you have any questions, please call Steve Foster in my committee office at (512) 463-0345 or Peggy Dodson in Senator Harris' office at (512) 463-0110 or (817) 861-9333.

Sincerely,

A handwritten signature in cursive script that reads "Ken Armbrister".

Kenneth Armbrister



CHRIS HARRIS
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The Senate of
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February 15, 2002

The Honorable Ken Armbrister
Chair, Senate Criminal Justice Committee
P.O. Box 12068
Austin, Texas 78711

Dear Chairman,

My office has been contacted regarding the need for an Attorney General Opinion for the City of Azle and I would appreciate you making a formal request for me. They need an opinion as to whether the Nepotism Section of the Azle City Charter or any State Statute has been violated in the promotion of the son of an elected council member to a higher position in the Police Dept. Azle is a Home Rule City and their Charter can be accessed on line at www.ci.azle.tx.us, but for your convenience I have noted two sections which address this situation:

SECTION 11.03 - NEPOTISM:

No person related within the second degree by affinity, or within the third degree by consanguinity to any elected officer of the City, or to the City Manager, shall be appointed to any office, position or clerkship or other service of the City.

SECTION 3.08 - CITY COUNCIL NOT TO INTERFERE IN APPOINTMENTS:

Neither the City Council nor any of its members shall direct the appointment of any person to office by the City Manager or by any of his subordinates. Except for the purpose of inquiry, the City Council and its members shall deal with the administrative services solely through the City Manager and neither the City Council nor any member thereof shall give orders to any subordinate of the City Manager, either publicly or privately.

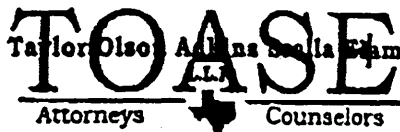
Upon reviewing both the Azle Charter and all of the applicable state statutes, I request that an opinion be offered as soon as possible in this matter. This is extremely timely and a prompt response would be appreciated. For additional background material I have attached a letter from the Texas Municipal League and a letter from the City Attorney addressing this matter.

Sincerely,

A handwritten signature in cursive script that reads "Chris Harris".
Chris Harris



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ELIZABETH ELAM
EXT. 211

November 7, 2001

Jerry Guillory
City Manager
City of Azle
613 S.E. Parkway
Azle, Texas 76020

RE: Interpretation of Azle's Nepotism Prohibition

Dear Jerry:

You have asked for a more detailed opinion from this office about whether Azle's Charter and state law preclude the appointment of a relative of a council member to the position of interim police chief. The facts in this instance are that Councilmember Arrington's son had been on the police force for more than two years prior to her election to the council in May of 2001. He has recently been appointed interim police chief by the city manager. Under the charter, the city council has no role in the appointment of interim police chief. Nepotism prohibitions are found in Chapter 573 of the Texas Government Code and Section 11.03 of Azle's Home Rule Charter. The issue presented is whether state law preempts and precludes the applicability of Azle's Charter. As we have discussed, this office has rendered an opinion that the charter is not preempted. However, a reasonable interpretation could be made to the contrary. Therefore, in this letter I will attempt to explain the basis of the opinion this office previously rendered and the argument that the charter is preempted by state law.

Your charter is much broader than the state nepotism statute and provides no exceptions. Section 11.03 of your charter reads as follows:

No person related within the second degree of affinity or within the third degree by consanguinity between the elected officer of the city or to the city manager shall be appointed to any office, position or clerkship, or any other service of the city.

While state law regulates only the appointment of a relative of a member of the governing body or appointing officer, by the governing body or appointing officer, to a compensated position, your charter applies to the appointment of a relative of a council member by anybody to any office or position of service within the city. Therefore, the clear language

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of your charter prohibits the city manager from appointing the son of a council member to the position of police chief. However, your charter is prospective in application and does not preclude the continued service of a person employed by the city prior to the election of his relative to the council. Under your charter, the related employee may retain the position he held at the time his relative was elected to office, but may not be appointed to any other office, position or service in the city while his relative is serving on the council.

State law is both less strict in its nepotism prohibition and broader in its application. Chapter 573 of the Texas Government Code is less strict because it prohibits only the appointment of a relative of a member of the governing body or appointing official to a compensated position. (As opposed to Azle's Charter which prohibits the appointment of any relative of the council or city manager by any person to any position of the city, whether compensated or not.) State law is broader in its application because by inference, it requires any relative of a member of the city council to resign his or her position with the city if the employee was appointed by the city council to the position or employment less than six months prior to the election of his relative. Section 573.062 reads in relevant part:

A nepotism prohibition prescribed 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 . . .

. . . .

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

Therefore, under state law, the nepotism prohibition relates back to a time prior to the election or appointment of a relative. The issue presented is whether this provision preempts the application of Azle's charter nepotism prohibition. Azle is a home rule city authorized by Article XI, Section 5 of the Texas Constitution. A city with a population of at least 5,000 inhabitants is authorized to adopt or amend its city charter by a majority vote of the qualified voters of the city, although a city may not adopt or amend its charter in a manner that contravenes the State Constitution or general laws that the Legislature has enacted. Therefore, home rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power. *M.J.R.'s*

Fare of Dallas v. City of Dallas, 792 S.W. 2d 569, 573 (Tex. App. - Dallas 1990 writ denied). An ordinance or charter of a home rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute. See, *City of Brookside Village v. Comeau*, 633 S.W. 2d 790, 796 (Tex. 1982, cert. denied). However, the mere fact that the Legislature has enacted a law addressing a subject does not completely remove the subject matter from regulation by a home rule city. *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W. 2d 17, 19 (Tex. 1990). Instead, a court must consider whether it reasonably can construe a general law and a city charter so as to effectuate both. If so, the court will not hold the city ordinance or charter provision void. A general law and a city charter will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. *City of Beaumont v Fall*, 116 Tex. 314, 291 S.W. 2d 202, 206 (1927). Thus, if the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home rule city, it must do so with unmistakable clarity.

In Attorney General Letter Opinion 93-30 the Attorney General determined that a charter provision similar to Azle's nepotism provision could be construed to effectuate both, and therefore, was fully enforceable. In the opinion, the Attorney General did not address the applicability of the grandfather section, Section 573.062, except by reference in a footnote.

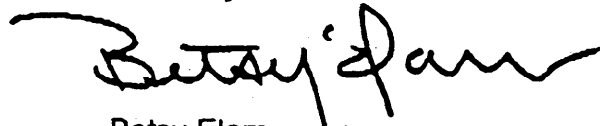
This office has rendered an opinion that the preemption is inapplicable because there is no "unmistakable clarity" in the legislative intent, and Chapter 573 addresses a different type of nepotism provision than Section 11.03. We have interpreted the preemption in Section 573.062 to apply only to nepotism provisions that, like Chapter 573, deal with the appointing authority of an elective body or appointing officer. The exception in Section 573.062(b) would only be relevant in that instance. Furthermore, Section 573.062 is a grandfather provision that precludes the resignation of an employee when the relative is elected if the employee meets the continuous employment requirements of that section. Azle's charter is prospective only, and does not require the resignation of an existing employee. Therefore, it is not in conflict with Section 573.062.

Given that opinion, Wayne and I admit that the law is not a science, and legal provisions are subject to interpretation, especially if there is no case law on point, as in this instance. The position we have taken is a conservative one. The preemption language in Section 573.062 cited above is worded very broadly and can be read to preempt the application of a municipal charter nepotism provision to any previously appointed employee, both retroactively and prospectively. It is not unreasonable to interpret Section 573.062 to apply to all charter or ordinance nepotism provisions and to determine that Section 11.03 is preempted. If 11.03 is preempted, then our city manager would be permitted to appoint a relative of a council member, so long as the council member does not participate in the appointment.

If the city desires, we can take steps to request an Attorney General opinion on this matter. Chapter 402 of the Government Code, a copy of which is enclosed herein, lists persons who are authorized to request an opinion. The most common method is to ask your legislator to request an opinion as a member of a legislative committee.

I know this has been a difficult issue, and hope this letter has clarified it somewhat. If not, or if you have any questions at all, please do not hesitate to call.

Sincerely,



Betsy Elam

EAE/kb



February 7, 2002

Ms. Linda Arrington
Councilmember, City of Azle
P.O. Box 405
Azle, Texas 76098-0405

Dear Linda,

Via Mail

Thank you for your inquiry to our legal department. Please accept this in response to your letter. The City of Azle is a home rule city whose charter provides for the city manager form of government. Your letter indicated that your son was hired as a police officer by the city's police department in 1996. In 1997, he was promoted to Lieutenant, a position he continuously held until October of 2001, when he was appointed to the position of Chief of Police. In May of 2001, you were elected as a city councilmember. Upon his appointment, concerns grew regarding your status with the city, and whether either of you might be legally required to resign. According to your letter, you have been requested to resign your post, and you are asking whether you are legally required to do so under Texas nepotism laws in order for your son to remain as Police Chief.

It is my opinion that you are not required to resign in order for your son to keep his job, and that he is not required to resign in order for you to keep your post. My reasoning follows:

The Azle City Charter addresses nepotism and specifically states that:

No person related within the second degree by affinity, or within the third degree by consanguinity to any elected officer of the City, or to the City Manager, shall be appointed to any office, position or clerkship or other service of the city.

SECTION 11.03, AZLE CITY CHARTER. The charter further establishes that:

Neither the city council nor any of its members shall direct the appointment of any person to office by the City Manager or by any of his subordinates. Except for the purpose of inquiry, the city council and its member shall deal with the administrative services solely through the City Manager...

SECTION 3.08, AZLE CITY CHARTER. The charter does not address nor contain any provisions dealing with any exceptions to the nepotism provisions.

Chapter 573 of the Texas Government Code generally prohibits public officials from appointing, confirming the appointment of, or voting on the appointment of a close relative to a paid position. "Close relatives" include those related within the third degree of consanguinity, i.e. blood or adoption, or within the second degree of affinity, i.e. marriage. TEX. GOV'T CODE ANN. § 573.041. A paid position is one that is paid from public funds,

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directly or indirectly. It is important to also note that the statute does not simply apply to any person employed by the city. Instead, it specifically, and only applies to "public officials", which includes any officers of state or local government. The term is also defined to include individuals upon whom the law confers a sovereign function of government, to be exercised largely independent of the control of other. *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578 (Tex. 1955); *Pena v. Rio Grande Consol. Indep. Sch. Dist.*, 616 S.W.2d 658 (Tex. App.-Eastland 1981, no writ).

In other words, the statute applies to any city official who is the "final hiring authority" or is a member of the governing body who has final hiring authority. Therefore, if a city council has final hiring authority, then the nepotism limitations would apply to "close relatives" of any members of the city council. If the city manager has such authority, then he or she is prohibited from hiring his or her close relative, but may hire a councilmember's close relative.

The delegation of this hiring authority will not operate to eliminate the prohibition. Tex. Atty. Gen. Op. DM-208 (1993). Because the key determination is whether the official may exercise the power, city councilmembers, for example, may not avoid a nepotism problem by delegating their hiring authority. A home rule city, however, may successfully delegate this hiring authority as long as it is done through a charter provision. If the delegation is by ordinance, it will not be effective and the statute will stand. A Home rule city also has the authority to provide for stricter limitations provided they do not conflict with state law.

Generally, in a city manager form of government, the city manager has the final hiring. Consequently, the city manager will be prohibited from hiring his or her close relatives, but may hire those of councilmembers. Azle has, as permitted by law, enacted stricter nepotism rules by not only prohibiting the hiring of close relatives, but by also prohibiting city councilmembers from even interfering with the hiring process by the city manager. In addition, the city manager is also specifically prohibited from hiring and appointing the close relatives of any councilmembers, which is even more restrictive than the statutory prohibition.

The Azle charter, however, does not appear to address the exceptions for continuous employment provided for in Chapter 573. In the absence of the city charter specifically addressing this issue, the statutory provisions will apply. These exceptions provide that although an employee may be forced to resign his or her job if a close relative is elected or appointed to city council, under certain circumstances, the employee would not be required to resign his or her post. Specifically, Section 573.062(A)(1) & (2)(B) provide that if a relative has been continuously employed by the city for at least six (6) months prior to the councilmember assuming office after being elected, then the employee is not required to resign his or her position. TEX. GOV'T CODE ANN. §573.062. If the official was appointed, then the employee must have worked continuously for the city for thirty (30) days in order for the exception to apply. *Id.* To qualify for either exception, "prior continuous employment" must be immediately prior to and uninterrupted employment.

Clearly, had you been elected to office at a time when your son would have been employed as Lieutenant for than six month, then he would have been legally required to resign his job. However, he had been employed in the same position for approximately four (4) years prior to your election. Your letter did not indicate that upon your assuming office that he was requested to resign, nor was he required to do so. This is so because the continuous employment exception applied and operated to keep him in office. Tex. Atty. Gen. Op. DM-45. The fact that he was later promoted to Police Chief does not give rise to any legal requirement that he resign or that you resign. The nepotism limitation that would have required him to resign his job existed when you were elected to office, and not when he was promoted. In addition, I do not believe that there are any legal requirements mandating that you resign your post as councilmember. Unless your charter specifically addresses the same set of circumstances that exist now with your son, there are no statutory requirements that would force you to resign under nepotism rules or any other rules.

I hope that this has answered your question. Should you require any further information, do not hesitate to contact me personally at (512) 231-7400

Sincerely



Omniah Z. Ebeid

Assistant General Counsel