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OPINION COMMITTEE

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Michael I. Williams

RQ-1172-GA

November 26, 2013

The Honorable Greg Abbott
Texas Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711

Re: Nepotism Inquiry

Dear General Abbott:

At the request of the Cumby Independent School District, I am writing to seek your opinion regarding the continued applicability of Texas Education Code § 11.1513(g) to counties whose population exceeds 35,000. Section 11.1513(g) is an exception to Chapter 573 of the Texas Government Code (nepotism prohibitions). Section 11.1513(g) of the Texas Education Code allows at-will employment of a person who is related to a school board trustee in a prohibited degree, if: (1) the district is located in a county with a population of less than 35,000; and (2) the board has delegated full hiring authority of its at-will personnel to the superintendent. Your office has previously determined this interpretation of the law to be accurate. See Tex. Att'y Gen. Op. No. GA-0794 (August 26, 2010). Specifically, the question for which we seek your opinion relates to districts that legally hired at-will employees under this exception, and continuously employ that person after the county population has risen above the 35,000 threshold.

LEGAL QUESTION PRESENTED

If an employee was legally hired under the nepotism exception found in Texas Education Code § 11.1513(g) and remains continuously employed, may a school district continue to employ the person after the county's population increases to a number greater than 35,000, presuming the related board members appropriately abstain from all deliberation and votes concerning the employee with whom they are related?

FACTUAL SUMMARY

The following scenario recently developed in a Texas independent school district and has prompted this request for an opinion from your office. Several employees related to board members within a prohibited degree were hired to serve the district in an at-will capacity. The board members with whom they were each related had already taken office when these employees were hired. However, at the time of hire, the county in which the school district is located had a population of less than 35,000. Local policy at this particular school district delegates the hiring of at-will personnel to the district's superintendent. There is no question that

the initial employment decisions regarding these at-will employees were legally made pursuant to Texas Education Code § 11.1513(g).

After the time these employees were hired, the county population has risen beyond 35,000. No change in employment status has occurred for these employees and the employees were continuously employed in the same position for which they were legally hired when the county population was less than 35,000. The employees have not come before the board in an individual capacity for any reason, employment or otherwise, and have remained continuously employed.

SUMMARY OF APPLICABLE AUTHORITY

The nepotism prohibition states: "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 ... the individual is related to the public official within a degree described by Section 573.002." Tex. Gov't Code § 573.041. Section 573.002 states that "this [nepotism] chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity." Tex. Gov't. Code § 573.002.

The Texas Education Code clarifies that, as a general rule, school district board members remain subject to the nepotism prohibitions regardless of whether the board delegates final hiring authority to the superintendent to select district personnel. Tex. Educ. Code § 11.1513(f). When the superintendent is delegated final hiring authority for the employee in question (i.e., at-will employees of a school district), then the superintendent is also a public official for purposes of the nepotism prohibitions with respect to any hiring decision made under that delegation of authority. *Id.* In short, delegating hiring authority to the superintendent subjects him or her to the nepotism prohibitions, and each member of the board remains subject to the nepotism prohibitions with respect to all district employees. *Id.*

However, when a district is located within a county that has a population of less than 35,000, persons hired at the sole discretion of the superintendent may be related to board members within a degree that would otherwise be prohibited were the board making the employment decision. Tex. Att'y Gen. Op. No. GA-0794 (August 26, 2010). Texas Education Code § 11.1513(g) carves out this exception to the general rule in subsection (f) that prevents school districts from hiring a board member's relative within the prohibited degree regardless of whether final hiring authority is delegated to the superintendent. Tex. Educ. Code §§ 11.1513(f)-(g). This exception was added to the Texas Education Code by the Legislature in 2007.

LEGAL ANALYSIS AND APPLICATION OF FACTS TO THE LAW

A. Section 11.1513(g) Resembles Texas Government Code § 573.061(4).

The Texas Government Code contains a similar nepotism exception based on county population that specifically pertains to school bus drivers. Tex. Gov't Code § 573.061(4).¹

¹ Section 573.041 does not apply to... (4) an appointment or employment of a bus driver by a school district if:

(A) the district is located wholly in a county with a population of less than 35,000; or

(B) the district is located in more than one county and the county in which the largest part of the district is located has a population of less than 35,000 ...

Section 573.061(4) uses the same county population threshold of 35,000 and predates the § 11.1513(g) exception by many years. Judicial and/or administrative interpretations of this similar exception would be persuasive; however, neither the courts nor your office has considered the question presented in this request.

B. Subsections 11.1513(f) & (g) Contemplate County Population at the Time of Hire.

When the employees were hired, subsection (f) of Texas Education Code § 11.1513 did not apply pursuant to subsection (g).² In other words, the provision that required all board members of the board of trustees to remain subject to Chapter 573 of the Texas Government Code despite whether the hiring authority belonged to the board or the superintendent, did not apply because the district was located in a county of less than 35,000 total population. The at-will employees in question were legally hired at a time when the nepotism prohibitions did not apply according to subsection (g)'s express language. Section 11.1513 contemplates the county population at the time of employment. Similarly, Texas Government Code § 573.061(4) contemplates county population at the time of employment as well. Therefore, it may be reasonably interpreted that continued employment for these employees (in the same position for which they were originally hired) is allowable, regardless whether the county population subsequently exceeds the 35,000 threshold.

C. This Fact Scenario Is Comparable to the Continuous-Employment Exception.

The nepotism prohibitions do not apply to certain employees continuously employed prior to a related board member taking office. Tex. Gov't Code § 573.062.³ If legally hired under

2 (f) If, under the employment policy, the board of trustees delegates to the superintendent the final authority to select district personnel:

(1) the superintendent is a public official for purposes of Chapter 573, Government Code, only with respect to a decision made under that delegation of authority; and

(2) each member of the board of trustees remains subject to Chapter 573, Government Code, with respect to all district employees.

(g) Subsection (j) does not apply to a school district that is located:

(1) wholly in a county with a population of less than 35,000; or

(2) in more than one county, if the county in which the largest portion of the district territory is located has a population of less than 35,000.

3 (a) 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:

(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, reemployment, 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.

the continuous-employment exception, an individual under this exception may continue to be employed in his or her position. However, the public official related to the employee in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, 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. *Id.*

Legal employment under the exceptions within § 11.1513 (g) of the Texas Education Code and § 573.061(4) of the Texas Government Code relates back to the county population at the time of employment. The same concept is true for the continuous employment exception. The continuous-employment analysis begins on the date the employee is employed by a district. Tex. Att'y Gen. Op. No. GA-1016 (Aug. 13, 2013). Employees legally hired under the continuous-employment exception may continue to be employed so long as certain abstention rules are followed, and the same abstention procedures should logically extend to employees hired through the small county nepotism exceptions. Board members' relatives who were employed when the population of a district was less than 35,000 should remain at-will employees of the district, regardless of whether the county population subsequently surpasses 35,000. The related board member(s) must abstain from any participation, deliberation, or vote concerning employment decisions, much as board members would do under the continuous employment exception.

CONCLUDING REMARKS

A reasonable and logical interpretation of the state laws in question allow an employee legally hired under the § 11.1513(g) or § 573.061(4) exceptions to continue employment with the district in the original capacity for which he or she was hired. The district would then remain in compliance with the nepotism prohibitions, so long as the related board members abstain from deliberation or action when said employee comes individually before the board. However, due to the unique nature of this issue and the interrelated code provisions in state law, this office seeks your opinion.

I look forward to your response. If you need any further briefing, please do not hesitate to contact David Anderson, General Counsel for the Texas Education Agency.

Sincerely,



Michael Williams
Commissioner of Education

cc: Ms. Tiffany Duncan, Powell & Leon LLP