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OPINION COMMITTEE



Ori T. White
Pecos County Attorney

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OPEN RECORDS DIVISION

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Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

CMRRR#7006-0810-0001-4531-8581
June 18, 2015

RQ-0030-KP

**RE: NEPOTISM QUESTION REGARDING THE COUNTY HOSPITAL'S
EMPLOYMENT OF THE COUNTY JUDGE'S WIFE.**

Dear Sir or Madame:

At the request of Pecos County Judge Joe Shuster, I am presenting this question to your office.

FACTS.

Background.

1. The wife of Judge Shuster is Linda Shuster and she began her employment as the Administrative Assistant for the County Hospital's Chief Executive Officer Jim Horton on October 9, 2012. At that time, Judge Shuster was the duly elected County Judge.
2. Prior to Mrs. Shuster's employment, Judge Shuster sent the County Policy to Texas Association of Counties Attorney Jim Allison, who advised that the employment of the Judge's wife would neither violate the County's nepotism policy nor Texas Law. See the Judge's email to Mr. Allison attached hereto as EXHIBIT 1 and Mr. Allison's response attached hereto as EXHIBIT 2.
3. In addition, CEO Horton communicated with PCMH Board Attorney Blake Hansen who advised that the employment of the Judge's wife Linda Shuster was alright. See letter from Attorney Blake Hansen attached hereto as EXHIBIT 3.

Hospital Governance.

4. Pecos County Memorial Hospital (hereinafter "PCMH") is governed by a hospital board consisting of six board members. Historically, each Pecos County Commissioner

nominates one citizen to serve on the board for a total of four Board Members. The County Judge appoints two citizens to serve on the Board. Then the Pecos County Commissioners Court votes to either approve or disapprove the persons nominated. See Health & Safety Code § 263.041.

5. The Court usually selects one Commissioner to serve on the board. Presently, Pecos County Commissioner Santiago Cantu is serving on the Board.

6. All the board members serve at the pleasure of the Commissioners Court.

7. The Pecos County Hospital is a County Hospital and is classified as a "Free Enterprise Fund" of Pecos County. The County subsidizes PCMH. See Pecos County Budget page attached hereto as EXHIBIT 4.

8. In addition, the Commissioners Court of Pecos County approves the PCMH list of salaries for PCMH employees. See attached Minutes of the Pecos County Commissioners Court attached hereto as EXHIBIT 5.

9. The Board approves PCMH's budget and the Pecos County Auditor reviews the hospital's accounts payable each month. Each Commissioners Court regular session agenda includes this agenda items:

PCMH

A. Court to examine and approve or disapprove Transfer of Funds for PCMH.

B. Court to consider and/or approve payment of Overtime for PCMH.

C. Court to examine and approve or disapprove Accounts Payable for PCMH.

See attached Minutes of the Pecos County Commissioners Court attached hereto as EXHIBIT 6.

10. Furthermore, Health & Safety Code § 263.042(d) requires that "[t]he board of managers shall hold an annual meeting before the beginning of the third week preceding the date of the meeting of the commissioners court at which the court considers appropriations for the following year."

11. The PCMH Board is also required to comply with Health & Safety Code § 263.053 which states:

(a) The board of managers shall keep a proper record of its proceedings in a book provided for that purpose. The record must be open for inspection at all times to the board, the commissioners court, and any resident of the county.

(b) The board of managers shall certify all bills and accounts, including salaries and wages, and transmit them to the commissioners court, which

shall provide for their payment in the same manner that other charges against the county are paid.

(c) The board of managers shall report to the commissioners court annually, and at other times as directed by the court, on the details of the operation during the year of the hospital dispensaries and school for children suffering from tuberculosis. The report must contain:

(1) the number of patients admitted and the methods and result of their treatment, together with suitable recommendations and other material required by the court; and

(2) full and detailed estimates of the appropriations required during the following year for all purposes, including maintenance, building construction, repairs, renewals, extensions, and improvements.

(d) The board of managers shall incorporate into its report to the commissioners court the accounts and records prepared by the superintendent of the hospital under Section 263.077.

(Emphasis Added.)

12. The Tax Payer Identification Number for Pecos County is 74-6000866. The Tax Payer Identification Number for PCMH is 74-6002963. Pecos County has a separate payroll from PCMH. However, each participates in the same retirement system and medical insurance program.

13. Chief Executive Officer Jim Horton is under contract with PCMH and the contract is approved by the PCMH Board who has the power to terminate Mr. Horton pursuant to his contract. See Contract with Mr. Horton which is attached hereto as EXHIBIT 7.

14. When Mrs. Shuster was hired by Mr. Horton, the hospital's human resources department conducted a salary survey which is attached hereto as EXHIBIT 8.

15. Based on Mrs. Shuster's considerable work experience, she was hired at \$17.25 per hour and received raises during her employment. See the Payroll Action Form attached hereto as EXHIBIT 9. The Hospital's Human Resource Director Malissa Trevino has advised my office that Mrs. Shuster's position is a salaried position without overtime. See Statement from Jim Horton attached hereto as EXHIBIT 10.

16. The hospital's employees may participate in a grievance procedure outlined in the PCMH Personnel Policy Handbook – Employee Problem Resolution which is attached hereto as EXHIBIT 11. The PCMH Board can hear grievances and vote to resolve any grievance. In the event of a Board tie, the County Judge may be called to break the tie under Health & Safety Code § 263.042. The last time this occurred was in 2006.

17. In the event of a PCMH Board tie on *other* matters on their agenda, the County Judge may be called to break the tie. See Health & Safety Code § 263.042.

QUESTIONS PRESENTED.

Question 1: Does the PCMH CEO's hiring of the County Judge's wife violate the State's nepotism laws?

18. Section 573.041 of the Government Code provides that 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" to be compensated from public funds if the individual is related to the public official or to another member of the appointing board "within the third degree by consanguinity or within the second degree by affinity." See Gov't Code § 573.002. A husband and wife are related to each other in the first degree by affinity, *id.* § 573.025(a), a degree within section 573.002 of the code. Thus, the Judge's wife is within the degree of relationship affected by section 573.041 of the Government Code. An individual who violates this provision is subject to removal and a charge of committing an offense involving official misconduct. See *Id.* § 573.081 and 573.084.

19. The nepotism statute applies to officers who have the "exclusive right and sole legal authority to appoint or employ" personnel under the statute. *Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658, 659-60 (Tex. Civ. App.--Eastland 1981, no writ). An officer with statutory authority to appoint or employ personnel does not avoid the application of the nepotism statute by simply delegating hiring authority to another. See *id.* at 660. See Tex. Att'y Gen. Op. GA-0595 (2008) which was relied upon by the hospital's attorney.

20. From that opinion, we know that the nepotism statutes did not apply where a city's charter gives the city manager the exclusive power to appoint and remove all officers and employees in the administrative service of the city (with the exception of the city attorney) and expressly prohibited the city commission from taking any part in the appointments. Tex. Att'y Gen. Op. No. O-5274 (1943) at 1-3.

21. However, Tex. Atty. Gen. Op. LO-89-50 (1989) addressed the following question: "[W]hether the wife of the Tyler County Judge may be employed by the Tyler County Hospital as head of a new Cardiac Rehabilitation Department?" That opinion reached the following conclusion:

Since statutory authority to hire hospital employees is vested in the board of managers, the nepotism law prevents the hospital district from hiring any person related within a prohibited degree to a board member. Accordingly, the Tyler County Hospital District may not employ the wife of the Tyler County Judge. (*Id.* at Page 2).

Question 2: Could Judge Shuster do anything to avoid this being a potential nepotism violation such as abstaining from voting on PCMH salaries and abstaining from voting on all PCMH agenda items which may come before the Pecos County Commissioners Court?

Respectfully,



Ori T. White,
County Attorney
Pecos County, Texas

cc:

George Riggs, Commissioner Pct. 1	(with enclosures)	
Lupe Dominguez, Commissioner Pct. 2	(with enclosures)	
J. H. Kent, Commissioner Pct. 3	(with enclosures)	
Santiago Cantu, Commissioner Pct. 4	(with enclosures)	
Kay Hardwick, Pecos County Auditor	(with enclosures)	
Barry McCallister, Pecos County Treasurer	(with enclosures)	
Judge Joe Shuster, County Judge	(with enclosures)	CMRRR
Jim Horton, CEO of PCMH	(with enclosures)	CMRRR