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April 24, 2013

Via Certified Mail, Return Receipt Requested

Honorable Gregg Abbott
Attorney General of Texas
Opinion Division
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Abbott:

Pursuant to Texas Government Code § 402.043, the Brazoria County District Attorney's Office respectfully submits this request for the Attorney General's opinion concerning the continuous employment exception to the nepotism prohibitions found in Texas Government Code, Chapter 573.

LEGAL BACKGROUND

Texas Government Code, Chapter 573, regulates and in some circumstances prohibits the employment of persons related to a public official, including a member of a school district board of trustees. Section 573.041 states that a public official may "not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment" of someone related to the official within the prohibited degree. *See* Tex. Gov't Code § 573.041(1). Chapter 573 applies to persons related to a public official within the third degree by consanguinity or within the second degree by affinity. *Id.* § 573.002.

There are, however, exceptions that may apply to the nepotism prohibition. Section 573.062 provides a continuous employment exception for persons who were employed in a position prior to the related official being appointed or elected. *See id.* § 573.062. In particular,

Section 573.062(a) states that the section 573.041 nepotism prohibition does not apply to an employee who has completed the requisite period of continuous service before his relative is elected or appointed to the school board. If the public official is elected at an election other than the general election for state and county officers, the prior service must be continuous for six months, and, if the public official is elected at the general election, it must be continuous for one year. *See id.* § 573.062(a).

FACTUAL BACKGROUND

A current member of the Alvin Independent School District Board of Trustees was initially elected to his position in May 2008 for a three-year term and was re-elected in May 2011.

Beginning in June 2006, the board member's blood grandson was employed with the District on a periodic, part-time, at-will basis, mainly with the District's Technology Department. Starting in June 2007, the grandson began working for the District on a more consistent, part-time basis. Prior to the board member's election in May 2008, the grandson had worked for the District consistently for approximately 11 months and continued to work with the District subsequent to the election.

In August 2008, the grandson left to attend college. However, based on an oral agreement between the District and the grandson, the understanding between the District and the grandson was that the grandson would continue his to work with the District in the summer of 2009. The grandson's supervisor, the Assistant Superintendent for Human Resources at that time, and even the Superintendent of the District at that time all understood, expected, and agreed that the grandson would return to work with the District the following summer. According to the Assistant Superintendent for Human Resources at that time, it was not an uncommon practice for the District to work around college students' schedules and have them return and continue their work during the summers. When this would occur, the students, including the grandson in question, were considered standing employees with the District – there was no new paperwork

upon their return, they were not required to reapply for the position, and they were not removed from the payroll system.

Based on this oral agreement and understanding, the grandson returned to work with the District in June 2009. In September 2009, the grandson was promoted to a full-time position with the District and has continued to serve in that position ever since.

QUESTION PRESENTED

Does an at-will employee with consistent but periodic delivery of employment services qualify for the continuous employment exception under Texas Government Code § 573.062?

ARGUMENT AND AUTHORITIES

Because a blood grandson of a board member is related within the second degree of consanguinity, the nepotism prohibitions of Chapter 573 apply. The key question, however, in this context, is whether the continuous service exception appropriately applies. As outlined above, if the grandson maintained continuous employment with the school district for a requisite amount of time prior to the board member assuming office, then the grandson's employment is "grand-fathered" or excepted from the nepotism requirements. Elections for Alvin ISD Board of Trustee members are held on the uniform election date established by the Election Code in May of each respective year. Thus, a relative of a school board member must serve at least six (6) months continuously before the board member assumes office following the election. *See* Tex. Gov't Code § 573.062(a).

Payroll and other employment information indicates that the grandson was consistently employed on a part-time, at-will basis for more than six consecutive months prior to the board member's election in May/June 2008. Previous Texas Attorney General Opinions have stated that a continuous employment exception can apply to part-time, at-will employees and even to independent contractors that provide services on a periodic basis. *See* Tex. Att'y. Gen. Ops. LO-95-015 (1995), JC-0185 (2000), JM-45 (1983). Therefore, the grandson's continued employment with the District following the election and assumption of office by the board member in

May/June 2008 appears to fall under the continuous employment exception under the nepotism rules, and as such, would be lawful and appropriate.

Following the board member's election in May 2008, the grandson continued to provide part-time services throughout the entire summer of 2008. In August/September 2008, the grandson left to attend college. However, pursuant to an oral agreement and understanding by both parties that the grandson would return, the grandson returned to work for the full summer of 2009 and continued his employment with the District until he became a full-time employee in September 2009. So the question becomes whether the grandson still qualified for the continuous employment exception upon his return to the District during the summer of 2009.

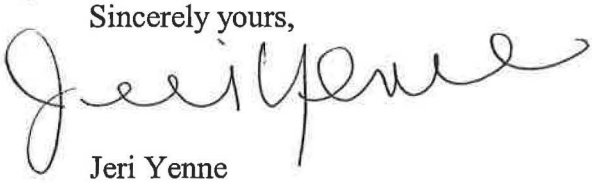
In some situations, the Attorney General has opined that intermittent, interrupted periods of employment may not constitute continuous employment especially when an employee serves simply as a substitute with no expectation or obligation or agreement for on-going employment. *Seee.q.,* Tex. Att'y. Gen. Op. JM-861 (1988) (substitute teacher on a substitute list not enough); Tex. Att'y. Gen. Op. LO-92-75 (1992) (cafeteria worker on list of substitutes not enough); *Bean v. State*, 692 S.W.2d 773, 775 (Tex. App.—El Paso 1985, pet. ref'd) (periodic court appointments by judge in different cases not enough). In contrast, continuous employment has been found by the Attorney General in other situations involving periodic employment during a period. *See e.q.,*Tex. Att'y. Gen. Op. JM-45 (1983) (an auditor retained by the school district on a yearly basis for periodic auditing services could qualify for continuous-employment exception); Tex. Att'y. Gen. Op. LO-95-015 (1995) (at-will employee provided periodic part-time janitorial services under an oral agreement was sufficient for the continuous employment exception).

The current situation appears to most closely resemble those cases where the continuous employment exception has been found to be applicable, especially in light of the oral agreement between the grandson and the District that he would be providing periodic services. As explained above, this practice was not an uncommon one for college-aged students and the District still considered them standing employees. With the grandson in particular, he never

resigned or was terminated, his employment information and status was consistently maintained in the District's system, he remained on the payroll, he was not required to fill out new paperwork upon his return, and he was not required to reapply for the position. Under the facts in this case, the grandson appears to have maintained continuous employment with the District upon his return in the summer 2009; therefore the continuous employment exception under the nepotism rules would be applicable and the grandson's employment with the District would be lawful and appropriate at all times. Due to the uniqueness of the issue; however, our office seeks you opinion on the matter.

This office looks forward to your response to this request for your opinion on the foregoing question. Please let me know if you would like any further briefing.

Sincerely yours,



Jeri Yenne