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SENATOR GLENN HEGAR
DISTRICT 18

August 1, 2011

RQ-0991-GA

The Honorable Greg Abbott
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Dear General Abbott:

I am writing to request your opinion on the applicability of the prohibitions against nepotism, as contained in Texas Government Code, Section 573, to a public school district superintendent who makes the decision to reassign his spouse to a different location and position within the district. This question involves the interaction of the Texas Government Code, Section 573.062 (b), Texas Education Code, Section 11.1513(f), Texas Education Code, Section 11.201 (a), (d), and various district Board Policies, and seeks to determine under what circumstances a school district superintendent is considered a public official for purposes of nepotism statutes.

The underlying facts are as follows:

1. The Board of Trustees (Board) hired both the superintendent (Superintendent) and his spouse. The spouse was employed as a part-time counselor in the district. The initial hiring of both individuals occurred prior to the district Board delegating to the Superintendent final authority to select district personnel. More than 30 days following the appointment of the Superintendent and the hiring of his spouse, the school district (District) delegated to the Superintendent "final authority for employment of all contract personnel." Pursuant to the "Continuous Employment" exception, Texas Government Code, Section 573.062, the Superintendent's spouse was allowed to remain in her position.

2. Subsequent to the delegation of final authority to select district personnel, the Superintendent made the decision, pursuant to his statutory authority under the Texas Education Code, Section 11.201 (d) (2), and reassignment authority under Board Policy, to reassign his spouse to a different campus within the district.

3. The reassignment involved moving his spouse, who is a certified academic counselor, to the District's alternative high school because the alternative high school required a certified academic counselor to sign transcripts, and moving the counselor who was in that position, but who was not a certified counselor, to the District's other alternative school campus. This other campus does not have graduating students, and consequently, does not require a certified counselor to sign transcripts.

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4. While the two employees changed workplaces, there was no change in benefits, pay, or hours worked. The Superintendent's spouse has continued as a part-time counselor at her new location at the alternative high school, and the other counselor has continued to work full-time at her new location.

5. The parties differ on their understanding of whether there has been a "change in duties" as a result of the change in workplace location. The District claims that a "change in duties" has indeed occurred with the transfer of location because the Superintendent's spouse is now responsible for signing transcripts where she previously was not, while the duty regarding transcripts is no longer required of the counselor reassigned from the alternative high school.

   The Superintendent of the school district contends, however, that no "change in duty" occurred because the Superintendent's spouse has been qualified and able to carry out the duty of signing transcripts since the day she was hired by the Board. The change that occurred was a necessary change in location because the District's other counselor was not appropriately qualified to carry out the duty of signing transcripts at the alternative high school.

   The Superintendent argues that a "change in duty" would signify a change in the duties for which an employee is qualified and able to provide under the job description of the position. In this instance, the Superintendent maintains that the job description of the positions held by each of the individual district employees did not change, just the location of where they provided their services. Accordingly, the official "duties" of both counselors never changed. The location of their campus assignments within the District did, however, change so that the duties of each counselor were carried out commensurate with their actual position and in compliance with applicable law. *See* Tex. Educ. Code Ann., Section 21.003 (a) (Vernon Supp 2009).

6. The parties also differ on their understanding of whether a "change in status" resulted from the Superintendent's reassignment of his spouse to the alternative high school and whether the Superintendent acted in his capacity as a public official when he made that reassignment.

   The District claims that since the District's Board delegated final authority to the Superintendent to select district personnel, the Superintendent is a public official with regard to his hiring or initial assignment authority pursuant to Texas Education Code, Section 11.1513 (f). Thus, the District argues that while the Superintendent's spouse may be allowed to remain in her position under the "Continuous Employment" provision of the Texas Government Code, Section 573.062 (a), Subsection (b) of that same statutory provision holds that if "an individual continues in a position [under the continuous employment exception], 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." Further, the District claims that, under Board policy DBE (Legal) and Tex. Att'y Gen. Op. No. JC-193 (2000) ("JC-193"), "a 'change in status' includes a reassignment within an organization, whether or not a change in salary level accompanies the reassignment." Accordingly, the District maintains that the reassignment of the Superintendent's spouse to the alternative high school constitutes a clear "change in status."

The Superintendent, in contrast, argues that a "change in status," as described in Texas Government Code, Section 573.062 (b), and as discussed in JC-193, as well as Board Policy DBE (Legal), did not occur in this instance. The Superintendent supports his argument by asserting that the circumstances in this case are significantly different than those set forth in JC-193.

The Superintendent agrees with the District that a "change in status," as described in JC-193 and in Board Policy DBE (Legal), includes a reassignment within an organization, whether or not a change in salary level accompanies the reassignment. The Superintendent takes issue, however, with the District's understanding of what a reassignment, which may be classified as a "change in status," entails. The Superintendent contends that, as described in JC-193, the "reassignment within an organization" in question involved the transfer of the son and the nephew of the Chief of Police from the uniform division of the department to the organized crime unit and criminal investigation unit (respectively) of the department. Both transfers "significantly altered" the regular duties of the individuals and therefore constituted a "substantial change in duties" for the son and nephew of the Chief. See JC-193, page 2.

The Superintendent, therefore, maintains that the transfers described in JC-193 are significantly different in nature than the campus assignments related to the Superintendent's spouse and the other counselor because, in this instance, the "duties" of the Superintendent's spouse and the other counselor were never officially changed in relation to the positions they held at the school district. Only the location of where they provided those services changed with the reassignment.

The Superintendent also argues that the discussion of "change in status" set forth in JC-193 states, "[t]he word 'status' is not limited to an individual's salary level; rather it refers broadly to an individual's 'position or standing in...a profession.'" JC-193, page 3. Accordingly, the Superintendent's position is that the analysis in JC-193 found a reassignment within an organization to constitute a "change in status" if the reassignment requires that the employee's position or standing within a profession is changed as a result.

Thus, the Superintendent opines that a change in campus assignment to meet the requirements of applicable law does not constitute a "change in status" because neither the Superintendent's spouse nor the other counselor experienced a change in their standing within their profession. Rather, their location of service was changed to appropriately comport with their actual standing within their profession. As a result, the Superintendent argues that the reassignment did not constitute a "change in status." Since a "change in status" never occurred, the Superintendent further contends that the District's request for an Attorney General (AG) opinion on the matter is unwarranted. In the alternative, the

Superintendent contends that he was not acting as a "public official" for purposes of the reassignment of his spouse.

7. The District and the Superintendent also differ on this issue of whether the Superintendent was acting as a "public official" for purposes of the reassignment of his spouse. The District asserts that confusion exists regarding the categorization of a person as a "public official." This confusion, the District contends, stems from the fact that while several elected and appointed positions have been deemed public officials for all purposes, public school superintendents have not. Under Texas Government Code, Section 573.001 (3) (A), a public official is defined to include "an officer...of a...school district." Pursuant to Texas Education Code, Section 11.201(a), "the superintendent is the...chief executive officer of the school district." Superintendents, however, have not been consistently deemed public officials in any regard prior to the passage of House Bill 2563 and the related amendments to the Texas Education Code creating Section 11.1513(f). Presumably that was because prior thereto, superintendents had no final unchecked authority to make hiring decisions. *See Pena* v. *Rio Grande City Conso. Indep. Sch. Dist.*, 616 S.W.2d 658 (Tex.Civ.App. - Eastland 1981, no writ).

   The District asserts that the language of Section 11.1513 (f) , which definitively states superintendents are public officials, but only with respect to the delegation of hiring authority, does not appear to answer the underlying question. Specifically, even considering the language of Section 11.1513 (f) (1), it is not clear whether a superintendent, who is a public official for hiring purposes, and therefore prohibited under Government Code, Section 573, from hiring his or her spouse, is specifically exempted from the prohibitions described in Section 573.062 (b) that would preclude an "ordinary" public official from reassigning his or her spouse.

   The District also notes that superintendents who are public officials for hiring purposes may make employment decisions that directly affect their prohibited relatives, while other public officials may not, and therefore, the District believes this discrepancy does not further the intent of the nepotism laws and is not wholly consistent with previous opinions of the AG's office. *See* Att'y Gen. Op. No. JC-193 (2000) (holding the "legislature intended to preclude a public official from participating in *all* employment actions that affect the official's relative"). It is in this interaction of the statues and opinions that the District believes a potential ambiguity exists.

   The District believes that the *Pena* decision, as well as earlier decisions from your office and other opinions of the Texas courts, suggest that the issue of whether an individual is a public official for purposes of nepotism laws may turn on whether the office they hold possesses ultimate authority for making employment decisions. *See Pena* at 658-660; Att'y Gen. Op. No. GA-0415 (2006) (holding it has been "established generally that the nepotism statute applies to officials with final statutory authority over employment decisions"); Att'y Gen. Op. No. GA-0123 (2003) (stating the designation of "public official" has been interpreted to apply to those "who may exercise authority over a governmental entity's appointment or employment decisions"); Att'y Gen. Op. No. GA-0123 (2003) (noting Texas Government Code, Section 573 defines a "public official" to include "an officer ...of

a...school district" and an "officer" has been defined "as a person upon whom a 'sovereign function of the government [has been] conferred...to be exercised by him for the benefit of the public largely independent of' others control" (quoting *Aldine Indep. Sch. Dist.* v. *Standly*, 280 S.W.2d 578, 583 (Tex. 1955)). As to the issue of final authority to reassign personnel, the District asserts that the Superintendent is granted such authority both by statute, Texas Education Code, Section 11.201 (d) (2), and Board Policy.

The Superintendent, in contrast, argues that he was clearly not acting as a "public official" in relation to his decision related to the campus assignments of his spouse and the other counselor. And, as a result, the Anti-Nepotism Statute cannot apply to his actions. In support of his position, the Superintendent states that public school superintendents in Texas are deemed to act as public officials only in keeping with the provisions of the Texas Education Code, Section 11.1513 (f) (1). That means that a Texas public school superintendent may only be considered a public official for the purposes of the Anti-Nepotism Statute if he has been delegated final hiring authority to select school district personnel. Specifically, the statute provides as follows:

> (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*; (emphasis added).

Therefore, the Superintendent contends that the acts of a superintendent can only be subject to the Anti-Nepotism Statute if those acts were made under the Board's delegation of final hiring authority to select school district personnel. In contrast to the District's position, the Superintendent asserts that there is no ambiguity of the language in Texas Education Code, Section 11.1513 (f) (1), and that the Texas Legislature clearly decided after due and diligent consideration that the Anti-Nepotism Statute can apply to a public school superintendent's acts only when he has been delegated final hiring authority and only to those decisions made under that delegation of authority.

Under the Superintendent's position, it stands to reason that if the Board does not possess the authority to assign and reassign personnel within the district, then the Board could not delegate that authority to the Superintendent, and any decisions made by the Superintendent with respect to the assignment of personnel within the district are not subject to the Anti-Nepotism statue. The Superintendent believes that the Texas Legislature made clear in Section 11.201 (d) (2) of the Texas Education Code that the authority to assign the personnel of a school district is an express authority of the superintendents.

To support his assertion, the Superintendent cites a recent AG opinion, Texas Attorney General Opinion No. GA-0123 (2003) ("GA-0123"), which he contends is more instructive than JC-193 and makes it abundantly clear that the board of trustees of a public school district do not have the authority to assign personnel within a public school district. GA-0123 discusses the application of the Anti-Nepotism Statue to an independent school district in Texas. The discussion in GA-0123 focuses on the respective statutory duties of the board

of trustees and the superintendent of schools in Texas. In GA-0123, the AG is asked whether a public school superintendent may reassign a teacher who is related to a school trustee without action by the board. The AG responds that "[t]his issue involves the reassignment of an employee, not a selection covered by Section 11.163 (a) (1)." Tex. Att'y Gen. Op. No. GA-0123 (2003), page 4. GA-0123 goes on to provide the following:

> The superintendent may reassign a trustee's relative to fill a department chair position, and the board is not authorized to act in the matter. Section 11.201 (d) of the Education Code expressly reposes in the superintendent the duty to "assum[e] administrative authority and responsibility" for assigning and evaluating district personnel. Tex. Educ. Code Ann., Section 11.201 (d) (2) (Vernon Supp. 2004). The superintendent's duties listed in Section 11.201 (d) were adopted in 1995 by the same bill that authorized a school board to delegate final hiring authority to select personnel to the superintendent. *See* Act of May 27, 1995, 74th Leg. R.S., ch. 260, Sections 11.163 (a) (1), 11.201 (d), 1995 Tex. Gen. Laws 2007, 2230-31. *Because the District's school board has no authority to assign personnel,* board members are not public officials for purposes of Chapter 573, Government Code. (emphasis added)

Subsequent to GA-0123, the Superintendent adds, the Texas Legislature saw fit to enact the provisions of Texas Education Code, Section 11.1513, specifically subsection (f) (2), to deal with the issue of school boards delegating hiring authority to the superintendent so that their relatives may be hired and the provision was enacted to prevent such a practice. It provides that "each member of the board of trustees remains subject to Chapter 573, Government Code, with respect to all district employees." Tex. Educ. Code Ann., Section 11.1513 (f) (2) (Vernon Supp. 2009).

The Superintendent contends, however, that this does not change the validity of the analysis found in GA-0123 related to whether the board of trustees holds the authority to assign district personnel. Insofar as his analysis stands, the AG's opinion on the matter of whether an assignment of personnel can be delegated to the superintendent by a board of trustees has been given. Therefore, according to the Superintendent, it is clear that a board of trustees cannot delegate the assignment of school district personnel to the superintendent because a party cannot delegate an authority it does not possess. Moreover, in this case, the superintendent already had that authority under Section 11.201 (d) (2).

The Superintendent also cites a recent decision by the Texas Commissioner of Education in which the Commissioner ruled that the assignment of personnel is the duty of the superintendent, as addressed in Texas Education Code, Section 11.201, to support his argument. The Commissioner's decision, issued on November 5, 2010, dealt with a challenge to the transfer of a principal to another school to serve as assistant principal. The community filed a petition for review complaining that the superintendent lacked the authority to transfer the principal. The community argued that the Texas Education Code, Section 11.1513, which gives the school board authority to accept or reject the superintendent's recommendations concerning the selection of personnel, also applies to personnel transfers. Accordingly, the community argued that the transfer should have been approved by the school board. The Commissioner held, however, that Texas Education Code, Section 11.1513 only applies to the hiring of personnel, not the assignment of

personnel. The Commissioner also specifically found that the assignment of personnel is the duty of a superintendent, not the duty of a school board, as set forth in Texas Education Code, Section 11.201. *See The Burbank Cmty. v. San Antonio Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 018-R10-1109 (Nov. 5, 2010).

Therefore, the Superintendent asserts that the Anti-Nepotism Statute does not apply to him in the case at hand and the existing structure of statutes and the current legal interpretation of those statutes support this opinion. The relevant provision of the Texas Education Code clearly provides that the Anti-Nepotism Statute can only be applied to the acts of a public school superintendent to the extent that the board of trustees delegates to the superintendent the final authority to select district personnel and only with respect to a decision made under that delegation of authority. The Superintendent never made a decision under a delegation of authority by the Board in the instance at hand, and accordingly, the Superintendent made a campus assignment (not a personnel selection) to ensure that the District was in compliance with applicable law. In conclusion, the Superintendent claims that under existing laws and their interpretation, it is clear that he was not acting as a "public official" in relation to his decision on the campus assignments and therefore, the Anti-Nepotism Statues cannot apply to his actions on the matter.

8. On a related issue, if the Superintendent is prohibited from making a decision to reassign his spouse, the District questions whether any other person or entity can make such a reassignment consistent with nepotism laws. Previous opinions of the courts and your office, the District asserts, seem to conclude that certain grants of authority to public officials cannot be delegated for purposes of avoiding the nepotism prohibitions because the ultimate authority to make the final decision always remains with the public official. *See Cain v. The State of Texas*, 855 S.W.2d 714 (Tex.Crim.App. 1993) (en banc); Att'y Gen. Op. No. DM-46 (1991).

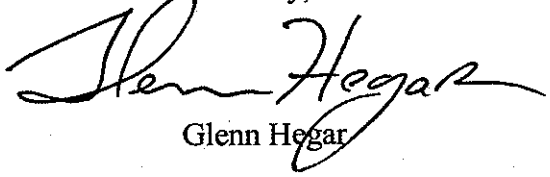
9. As a result of the discrepancy of opinion between the Superintendent and the District, as well as, perceived ambiguity in existing law, I present the following questions for your consideration:

    1. Do the prohibitions on nepotism found in Texas Government Code, Section 573, prohibit a superintendent with (1) delegated final authority to hire or appoint personnel pursuant to Board Policy and Texas Education Code, Section 11.1513; and (2) final authority to assign or reassign district personnel pursuant to Texas Education Code, Section 11.201 (d) and/or Board Policy, from reassigning his spouse to another campus within the school district when there is no change in pay or benefits for his spouse? And, if so;

    2. If the superintendent is prohibited by statute from making a decision concerning the reassignment of his spouse, may the superintendent delegate to another individual or the Board of Trustees the power to make such decision?

Thank you for your consideration of this request. Should you need any additional information, please contact my staff counsel, Melissa Hamilton, at 512-463-0118.

Sincerely,



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