



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 14, 1996

The Honorable William R. Ratliff
Chair
Education Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 96-052

Re: Whether the husband of the curriculum coordinator of the Upper Northeast Texas Tech Prep Consortium may serve on the governing board of the Northeast Texas Community College District and related questions (ID# 38812)

Dear Senator Ratliff:

You ask several questions on behalf of the Northeast Texas Community College District (the "college district").¹ A letter attached to your request explains that the curriculum coordinator of the Upper Northeast Texas Tech Prep Consortium ("Tech Prep" or the "consortium"), of which the college district is a member, and her husband both filed as candidates to run for place six on the college district's governing board. A third person conducted a write-in campaign for place six. In the election, no candidate won a majority of the votes. The Tech Prep curriculum coordinator's husband garnered the most votes, followed by the Tech Prep curriculum coordinator in second place, and the write-in candidate in third place.² The second-place candidate withdrew her candidacy in the runoff election.³ As a result, the first-place candidate must be considered the winner of the election and there will be no runoff election.⁴

You ask whether the husband of the Tech Prep curriculum coordinator is eligible to serve on the college district's governing board. The general counsel of the college district suggests that the Tech Prep curriculum coordinator is an employee of the college district and is particularly interested in the application of nepotism and conflict of interest

¹See Educ. Code § 130.192 (defining college's service area).

²We have been informed that the second-place candidate garnered just one vote more than the third-place candidate, but that the third-place candidate did not request a recount.

³See Elec. Code §§ 145.001, .092, .093 (requisites of withdrawal request).

⁴Election Code section 145.095 provides as follows: "If a runoff candidate withdraws, the remaining candidate is considered to be elected and the runoff election for that office is not held."

prohibitions.⁵ Chapter 573 of the Government Code prohibits a public official from appointing, confirming the appointment of, or voting 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 if the individual is related to the public official within a prohibited degree. *See* Gov't Code § 573.041. A husband and wife are related within a prohibited degree. *See id.* §§ 573.002, .024(a)(1), .025(a). Chapter 573 would prohibit the governing board as a whole from voting on the appointment of a member's spouse. *See id.* § 573.044. The general counsel for the college district informs us that the Tech Prep curriculum coordinator was not employed by Tech Prep or the college district for a period from summer 1995 to March 18, 1996. Therefore, assuming for the moment that she is an employee of the college district, she has not been continuously employed by the college district for six months prior to the election of her husband, and would not fit within the exception to the nepotism prohibitions set forth in section 573.062. *See id.* § 573.062(a)(2)(B).

The crucial question is whether the Tech Prep curriculum coordinator is an employee of the college district. If she is, then the governing board is prohibited from voting on her appointment. If she has a contract, she would be able to work for the remainder of the contract term. If she has no contract for a term, she would not be able to work beyond the end of the pay period after her husband assumes office. Letter Advisory No. 70 (1973) at 2 (where nepotism prohibitions apply, relative of public official may complete contractual term; if he is an at-will employee, he may not be retained). If, on the other hand, she is not an employee of the college district, the nepotism prohibitions would not apply.

The general counsel for the college district informs us that the Texas Higher Education Coordinating Board has determined that the Tech Prep curriculum coordinator is legally an employee of the college district. We have received another opinion request⁶ regarding the same situation, however, that describes the consortium as follows: "Consortium members include three colleges, twenty-five public schools, and business and industry representatives in a nine-county region." The other opinion request contends that while the college district is the fiscal agent for the consortium and processes the curriculum coordinator's pay check, the executive committee of the consortium has the

⁵The constitutional dual-office holding provisions and the common-law doctrine of incompatibility apply when one person holds two offices; they do not apply here because the Tech Prep curriculum coordinator's husband would not hold two offices. *See* Tex. Const. art. XVI, § 40.

⁶An opinion request from the Titus County Attorney, ID# 38718, asked whether the curriculum coordinator of the consortium was eligible to serve on the governing board of the college district. The crucial legal issue in that request was whether the curriculum coordinator is an employee of the college district for purposes of the common-law doctrine of incompatibility. Given that the curriculum coordinator has withdrawn from the race, that opinion request is now moot.

authority to hire her. It suggests that the governing board of the college district does not have this authority.

In addition, we have reviewed the coordinating board's determination, in a letter from the general counsel of the coordinating board, which states that consortium staff "are considered employees of the fiscal agent for purposes of payroll, benefits, leave administration and other matters." The draft policy of the coordinating board states that the

[consortium] staff are chosen by the [consortium] following the legally-required hiring procedures of the fiscal agent. [Consortium] staff work under the general or policy direction of the [consortium], but day-to-day supervision may be delegated to the fiscal agent. The fiscal agent is the employer of record responsible for payroll, benefits, leave administration, and other matters, but the [consortium] may negotiate policy exceptions for the staff.

For purposes of the application of the nepotism prohibitions in chapter 573, the crucial question is whether the governing board of the college district has the authority to hire the Tech Prep curriculum coordinator. *See, e.g.*, Attorney General Opinions DM-208 (1993) at 2 (statutory nepotism prohibitions apply only to officers who have actual, statutory authority to hire personnel), H-697 (1975) at 1 (statutory nepotism prohibitions do not apply if relative of member of governing board is hired for position authorized by that body when governing body does not exercise control over person to be selected). If the governing board has this authority, then the curriculum coordinator will not be able to continue to serve beyond the expiration of any contractual term after her husband assumes office. If the governing board does not have this authority, then the nepotism prohibitions do not apply. The facts regarding the governing board's hiring authority with respect to the Tech Prep curriculum coordinator appear to be in dispute. We are unable to make factual determinations in an attorney general opinion. *See, e.g.*, Attorney General Opinions DM-98 (1992) at 3, H-56 (1973) at 3, M-187 (1968) at 3, O-2911 (1940) at 2. Therefore, we cannot definitively resolve this issue.

You also ask about conflict of interests. Chapter 171 of the Local Government Code, which preempts the common law of conflict of interests as applied to local public officials, *see* Local Government Code § 171.007, might come into play if the nepotism prohibitions do not apply. Assuming that Tech Prep is a "business entity"⁷ for purposes of chapter 171, the chapter would not prevent the Tech Prep curriculum coordinator's husband from serving on the governing board. Rather, it would require him to disclose

⁷We have not received any information about Tech Prep as a legal entity. We assume for purposes of this opinion only that Tech Prep is a business entity for purposes of chapter 171. *See* Local Gov't Code § 171.001(2) (defining "business entity"); *see also* Attorney General Opinions DM-267 (1993) at 2 (city is not a business entity), JM-852 (1988) at 4 (state university is not a business entity).

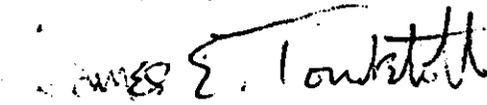
any particular economic interest in a governing board action and would forestall him from participating in actions from which he or his wife may directly or indirectly benefit.

Specifically, chapter 171 requires a local public official to disclose a substantial interest in a business entity.⁸ Prior to any governing board action that will have a "special economic effect" on the business entity, the local public official must file an affidavit disclosing the interest and may not participate in such a decision. *Id.* § 171.004. A person has a "substantial interest" in a business entity if he or his wife has received funds from the business entity that "exceed 10 percent of the person's gross income for the previous year." *Id.* § 171.002. In sum, chapter 171 of the Local Government Code, if applicable, would require the Tech Prep curriculum coordinator's husband to disclose a substantial interest in the consortium if it provides more than ten percent of his wife's gross income and would forbid him to take part in any action of the governing board that will have a special economic effect on the consortium.

S U M M A R Y

Chapter 573 of the Government Code does not apply to a member of the governing board the Northeast Texas Community College District whose wife is the curriculum coordinator of the Upper Northeast Texas Tech Prep Consortium, of which the college district is a member, unless the governing board of the college district has the authority to hire the curriculum coordinator. Chapter 171 of the Local Government Code does not prevent the Tech Prep curriculum coordinator's husband from serving on the governing board of the college district.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee

⁸See Local Gov't Code § 171.001(2) (defining "business entity").