

# Texas Education Agency

11/14/91  
mjt

1701 NORTH CONGRESS AVENUE

AUSTIN, TEXAS 78701-1494

(512) 463-9734

November 1, 1991

RD - 268

The Honorable Dan Morales  
Texas Attorney General  
Supreme Court Building  
P. O. Box 12548  
Austin, TX 78711-2548

DEC 03 91

Re: Request for Opinion  
Proper Application of the Texas Nepotism Laws,  
Art. 5996a thru Art. 5996h, V.A.T.C.S.

Dear General Morales:

I have received several requests from the public schools to ask for an official opinion regarding the proper application of the Texas nepotism laws, art. 5996a thru art. 5996h, V.A.T.C.S., to the fact situations which are outlined in this letter. Following each statement of facts is the position of the Texas Education Agency. This opinion is requested to assist the public schools which are, from my information, applying the statutes differently across our state.

In this request the term "meeting statutory longevity requirements" is used to describe an employee who has been continuously employed for either 30 days before his/her relative is appointed to the governing board or for six months before his/her relative is elected to the governing board. When an employee meets either of these requirements, the employee is entitled to "continue in an office, position, clerkship, employment or duty" as provided in art. 5996a, sec. 1, (c).

The specific questions asked are:

1. If an employee who meets the statutory longevity requirements is promoted to a position longer than 30 days or longer than six months before the employee's prohibited relative becomes a member of the governing board, may that employee retain that position?

The Agency's position is that this question should be answered in the affirmative, the school districts have

**ACCOMPANIED BY ENCLOSURES —  
FILED SEPARATELY**

requested specific confirmation from your office.

2. If an employee who meets the statutory longevity requirements by holding more than one office, position, clerkship, employment or duty is promoted to a new position less than 30 days or less than six months before a prohibited relative is elected to the governing board, is the employee entitled to remain in that position?

The Agency's position, relying upon Tex. Atty. Gen. Op. JM-371 (1985) and the 1985 amendment to art. 5996a, is that this employee is entitled to retain the position held when the board member is elected or appointed. The Agency's position is more thoroughly discussed in a letter to Mr. Earl Ayers dated June 20, 1990 and enclosed for your information and review.

Also enclosed is a contrary position stated by the Grambling & Mounce law firm, El Paso, which firm provides legal services to several school districts in this state.

3. After the election or appointment of a member of the governing board, may an employee who meets statutory longevity requirements be promoted to another position?

The Agency's position is that the governing board has authority to promote employees provided the trustee to whom the employee is related does ". . . not participate in the deliberation or voting upon . . ." the promotion. The Agency's position is based upon a view that Tex. Atty. Gen. Op. JM-385 is applicable only to the specific facts stated therein and not to the correct construction and application of the 1985 amendment to other and more general facts.

Again, the Agency's position is not universally accepted as indicated in the enclosed letter from the Grambling & Mounce firm.

4. May a Texas school district's governing body adopt a nepotism policy concerning promotions that is more restrictive than the statutory requirements found in art. 5996a thru art. 5996h?

The specific question asked by school districts is whether a district may adopt a more restrictive policy concerning promotions. This request is to answer that specific question as part of a larger question asked: Can a Texas school district adopt nepotism policies concerning hiring, promotion, and placement that are more restrictive than the statutory requirements?

The Agency's position is that a governing board may adopt

a nepotism policy concerning promotion that is more restrictive than the Texas nepotism laws. This position is based on Tex. Atty. Gen. Op. MW-540 (1982).

The Agency does, as a matter of policy, question the wisdom of more restrictive policies concerning hiring, promotion, and placement because the laws requiring equal employment opportunities for protected classes of individuals have been broadened since 1982 as have the affirmative action hiring requirements. It is the Agency's view that more restrictive policies in this area invite complaints and litigation.

5. May a Texas school district compromise and settle a grievance, a complaint, or a lawsuit by hiring or promoting, or placing an employee in a position otherwise prohibited by the Texas nepotism statutes? In that regard, can the employee be awarded back pay or compensation as a part of a compromise and settlement when such pay or compensation is prohibited by the Texas nepotism statutes?

A question based on specific facts is one where an employee filed an EEOC charge in 1990 and subsequently filed an internal grievance. To resolve both the complaint and the grievance the governing board proposed awarding a promotion and back pay in 1991, after relatives within the prohibited degree were elected to the board of trustees. The school has questioned whether the trustee who is related to the employee can participate in the settlement negotiations and vote. The school has also pointed out the settlement is voluntary by the trustees and not a court ordered settlement.

6. When a member of the governing board marries an employee of the school district who meets the statutory longevity requirements at the time of the marriage and at the first time the board of trustees votes to "appoint, vote for, or confirm" the appointment of the employee to any position, is the governing board precluded from voting to continue the employment relationship?

The Agency's understanding is that the Texas Attorney General's Office has maintained that either the employee or the trustee must resign at the time of the marriage. The Agency has followed this informal advice. Because the question is being asked much more frequently, we are requesting written confirmation from your office.

Those proponents of a position to impose no sanctions when a governing board member and an employee marry cite in support of their position the operative words of the

Honorable Dan Morales

November 1, 1991

Page 4

statute. The statute prevents the governing board from appointing, voting for, or confirming the employment of a relative. The statute contains no language to prevent a marriage by a member of the governing board. Marriage relationships are subjected to the statutory restrictions when a marriage relationship exists. The question posed is whether the existence of the nepotism statutes imposes sanctions upon a created marriage. The proponents of no sanctions also refer to decisions of the Texas courts that recite the public policy of this state to look with favor upon marriage and to seek in all lawful ways to uphold marriage as the most important of social institutions. Kissick v. Garland ISD, 330 S.W.2d 708, 711 (Tex. Civ. App. - Dallas - 1959).

7. The authority of a campus principal to exercise his discretion over all teacher and staff appointments selected to fill all positions on a public school campus is established in §13.352(d) Texas Education Code and supported by Tex. Atty. Gen. Op. DM-27 (1991).

The question asked is do the nepotism laws apply to the campus principal and to any applicant for employment who may be related to the campus principal within the prohibited degree? Because the governing board retains its authority to contract with the school district's employees, including campus staff (§23.28 Texas Education Code), do the nepotism laws continue to prohibit employment of an applicant selected by a campus principal when the applicant is related to a school board member within a prohibited degree?

The Agency's position is that §13.352(d) Texas Education Code has vested a campus principal with powers of a public officer and the nepotism laws apply to the principal and those same laws continue to apply to the board members. It is also our view that the governing board of a school district can hire a person related to a campus principal within a prohibited degree, but the person may not be hired to serve on the campus of the principal who is related to the applicant within the prohibited degree.

8. It is a prevalent current practice for the governing body of a public school district to delegate to the superintendent the authority to hire and dismiss employees without obtaining approval or review of the governing board. Can the superintendent hire a person related to a board member within a prohibited degree? Can the superintendent retain in employed status an employee who has not met the statutory longevity requirements before the employee's prohibited relative becomes a board member? Is there any difference, other than the right of a contracted employee to serve for the stated term of an

employment contract, between an employee at will and a contracted employee? Under delegated authority, can the superintendent promote an employee who is related to a board member within a prohibited degree without board action?

The Agency's position, based upon Pena v. Rio Grande City ISD, 616 S.W.2d 659 (Tex. Civ. App., Eastland - 1981), is that the nepotism laws apply equally to at will or contracted employees, except for a contracted employee's right to serve out a stated contract term. Further, that employment duties assumed by a delegation of authority from the governing board of a school district does not operate the exempt employees, or applicants, or members of the governing body from the Texas nepotism statutes. We believe this is the correct reading of Pena which is modified only for campus principals who have become "officers." They assume officer status because campus principals are vested with employment powers largely independent of the control of others.

Some school districts believe that the nepotism laws do not apply in cases where the school district's board of trustees has delegated authority to a superintendent. The Schulman law firm of San Antonio has concluded that the Attorney General should re-examine and overrule it's prior position regarding retention and termination of at will employees. A copy of the position paper filed by the Schulman firm is attached to this request.

9. Can a Texas public school district hire an attorney to represent the district when the attorney is related to a school board member within a prohibited degree?

The Agency's position is that employment of an attorney is subject to the Texas nepotism statutes. In support of this position the Agency cites Bean v. State, 691 S. W. 2d 773, ( Tex. Civ. App. - El Paso, 1985, pet. ref'd), and Tex. Atty. Gen. Op. JM 581 which cites this case with approval.

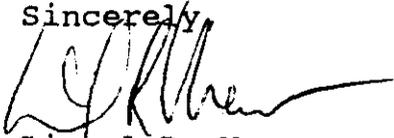
School district's taking an opposite view cite Tex. Atty. Gen. Op. JM 492 and additional opinions which hold that the nepotism laws no longer control contracts between a public governing body and independent contractors. Under these authorities such contracts are governed by §171.001 et seq Tex. Loc. Gov't. Code, (fmlly art. 988b V.A.T.C.S.) which is a conflict of interest statute. The argument made is that an attorney is an independent contractor and does not hold an office, position, clerkship, employment or duty and is therefor exempt from the application of art. 5996a.

Honorable Dan Morales  
November 1, 1991  
Page 6

Your opinion concerning each of the questions asked in this letter is necessary and will be helpful to the Texas public schools. Copies of their requests and Agency position papers are enclosed.

This is a lengthy request and if any part can be adequately addressed with an informal opinion or Letter Advisory, please be assured I will be appreciative of your judgment and discretion.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Meno", with a long horizontal flourish extending to the right.

Lionel R. Meno  
Commissioner of Education

Enclosures