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ANGLETON, TEXAS 775

RD-359

March 27, 1992

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FIRST ASSISTANT

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Opinion Committee

Office of the Attorney General  
Attn: Madeleine B. Johnson  
Chair, Opinion Committee  
P. O. Box 12548 Capitol Station  
Austin, Texas 78711

JERI YENNE  
ADMINISTRATIVE ASSISTANT

**RE: REQUEST FOR ATTORNEY GENERAL OPINION**

**APPLICATION OF SECTION 11.04 OF THE HOME RULE CHARTER OF  
FREEPORT, TEXAS, TO THE EMPLOYMENT AS A POLICE OFFICER OF THE  
SON OF A MEMBER OF THE CITY COUNCIL**

JIMMY R. JONES  
CHIEF INVESTIGATOR

Dear Ms. Johnson:

**I. FACTS**

Councilman John Stanford has served several terms on the City Council of the City of Freeport, Texas. His son is presently completing the police academy at Brazosport College and is interested in employment at the Freeport Police Department. The City of Freeport has a council-manager form of government where the council hires, supervises and may fire the city manager and, subject to the approval of the city council, the city manager hires, supervises and may fire the chief of police. The individual police officers are hired, supervised and may be fired by the chief of police with the consent of the city manager but the individual members of the city council do not participate in the hiring, supervision or firing of the individual police officers.

**II. QUESTIONS**

1. Is Section 11.04 of the Home Rule Charter of the City of Freeport inconsistent with the provision of Subsection (a) of Section 1 of Article 5996a, V.A.T.S., and, therefore, in violation of Article II, Section 5 of the Constitution of Texas?

2. If Section 11.04 of the Home Rule Charter of the City of Freeport is not inconsistent with the provisions of Subsection (a) of Section 1 of Article 5996a, V.A.T.S., is the exception found in Subsection (b) of Section 1 of Article 5996a, V.A.T.S., applicable to Councilman Stanford's son?

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3. If Section 11.04 of the Home Rule Charter of the City of Freeport is inconsistent with the provisions of Subsection (a) of Section 1 of Article 5996a, V.A.T.S., and, therefore, in violation of Article 11, Section 5 of the Constitution of Texas, do the provisions of Subsection (a) of Section 1 of Article 5996a, V.A.T.S., permit the hiring of Councilman Stanford's son and, if so, would the provisions of Subsection (c) of Section 1 of Article 5996a, V.A.T.S., apply to Councilman Stanford?

### III. DISCUSSION

Subsection (a) of Section 1 of Article 5996a, V.A.T.S., provides, in part, as follows:

No officer...or member of any...municipal board...shall appoint, or vote for, or confirm the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity, as determined under Article 5996a...to the person so appointing or so voting, or to any other member of any such board...of which such person so appointing or voting may be a member, when the salary, fees or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatsoever.

Subsection (b) of Section 2 of Article 5996h, V.A.T.S., provides that, "... (a) parent and child are related in the first degree (of consanguinity)."

In Op. Atty. Gen. 1943, No. 0-5274, the employment by the city manager of a relative of a council member was held not to violate the Article 5996a where the city manager alone appoints, hires, employs and removes city employees and the council is expressly prohibited from taking any part in the appointment or removal of such employees.

Subsection (a) of Section 4.02 of the Home Rule Charter of the City of Freeport provides that the Chief of Police, "...shall, with the approval of the City Manager, appoint and remove the employees of (the police) department...". However, Section 11.04 of the Home Rule Charter, contains the following provision:

No person related within the second degree of affinity or within the third degree by consanguinity to any elected officer of the City, or to the City Manager, shall be appointed to any office, position or clerkship or other service of the City.

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Admittedly, Subsection (a) of Section 1 of Article 5996a, V.A.T.S., as interpreted by the Attorney General in Opinion No. 0-5274, would not appear to prevent Councilman Stanford's son from being employed by the Chief of Police, whereas the more stringent standard provided by Section 11.04 of the Home Rule Charter of the City of Freeport would appear to prohibit such employment without regard to the fact that such employment would not be subject to the approval of Councilman Stanford. Thus, the first question posed above would appear to turn on whether or not the nepotism provisions contained in the Home Rule Charter of a city are inconsistent with Subsection (a) of Section 1 of Article 5996a, V.A.T.S., when such charter provisions are more restrictive than the nepotism provisions contained in the state law.

My research has failed to disclose any Attorney General opinions or appellate court cases directly in point. However, Section 5 of Article 11 of the Texas Constitution provides, in part, that "...no (home rule) charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State..." (Emphasis added). In applying this provision, it has been held that, while generally speaking, a municipality may not enter a field of legislation occupied by general legislative enactments, a home rule city may adopt local regulations which are permitted by or in harmony with the state constitution and statutes. See Prescott v. City of Borger, Tex. Civ. App. (Amarillo, 1942), 158 S.W.2d 578, writ ref'd; City of Weslaco v. Melton, Tex. Sp. Ct., 308 S.W.2d 18 (1958); City of Brookside Village v. Comeau, Tex. Sp. Ct., 633 S.W.2d 790 (1982), cert den., 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932; City of Beaumont v. Jones, Tex. Civ. App. (Beaumont, 1977), 560 S.W.2d 710, writ ref'd, NRE.; Gordon v. State, Tex. Ct. App.-Houston [1st Dist.] 1988, 757 S.W.2d 496, PDRR; and City of Richardson v. Responsible Dog Owners of Texas, Tex. Sp. Ct., 749 S.W.2d 17 (1990); where the court upheld the validity of local regulations in areas partially occupied by state statutes. Section 26.041 of the Local Government Code provides that a home rule city may, "...(1) create offices; (2) determine the method of selecting officers; and (3) prescribe the qualifications, duties and tenure of office for officers." In my opinion, Section 26.041 of the Local Government Code "invites" the type of supplemental local regulations contained in Section 11.04 of the Home Rule Charter of the City of Freeport.

If Section 11.04 of the Home Rule Charter of the City of Freeport is not inconsistent with the provisions of Subsection (a) of Section 1 of Article 5996a, V.A.T.S., nevertheless the exception contained in Subsection (b) of Section 1 of Article 5996a, V.A.T.S., which create an exception with respect to, "...any other

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nepotism law contained in any charter or ordinance of any municipal corporation of this State..." would not apply to the initial employment of Councilman Stanford's son because, by its own terms, such exception applies only where the employee has been employed for the requisite period prior to the appointment (now thirty days for municipalities) or election (now six months for municipalities) of the public official or member of the governing body to whom such employee is related. (Incidentally, the fact the the Legislature, in adding the above quoted language to Article 5996a, recognized the existence of municipal nepotism provisions in charters and ordinances would also seem to lend support to the argument that a city can adopt more stringent nepotism regulations than those provided by the state law.)

Subsection (c) of Section 1 of Article 5996a, V.A.T.S., begins with the phrase, "When a person is allowed to continue in an office, etc., because of the operation of Subsection (b)...". (Emphasis added). Therefore, by its own terms it would seem that Subsection (c) would not be applicable to Councilman Stanford if his son can be employed by the Freeport Police Department because the provisions of Subsection (a) of Section 1 of Article 5996a as a result of his father not being allowed to participate in the hiring, supervision or firing of him.

Sincerely,



JIM MAPEL

Prepared by: Wallace Shaw  
Attorney at Law