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OPINION COMMITTEE

January 27, 2017

YVONNE CLARK
ADMINISTRATIVE ASSISTANT

FILE # ML-48121-17
I.D. # 48121

RQ-0147-KP

The Hon. Ken Paxton
Attorney General of Texas
Opinion Committee Division
P.O. Box 12548
Austin, Texas 78711-2548

VIA CMRRR# 7014 2870 0000 2496 2305

Re: Request for Opinion

Dear Sir:

I respectfully request, pursuant to Section 402.043 of the Texas Government Code, your opinion as to the following question:

May a close relative¹ of an public official perform work for that official's office without violating statutory proscriptions against nepotism, if the relative receives no compensation for his services, but does receive either reimbursement of actual expenses or a *per diem* expense payment?

For your convenience, I have included my brief within this letter.

Factual Background

The Hale County Sheriff must, from time to time, transport female prisoners to other facilities away from the Hale County Jail. The Sheriff's brother, a retired Texas Ranger who still holds his peace officer certification, and the brother's wife, have volunteered to transport female prisoners when the need arises. They would receive no compensation for their time and effort transporting the prisoners, but they would use a vehicle owned by Hale County and receive money to defray their expenses (either reimbursement of actual expenses or a *per diem* amount).² A copy of one of the forms used to submit the expense claim to the County Auditor is enclosed herein as Exhibit B.

¹As used herein, "close relative" means a person related to a public official within the third degree of consanguinity or affinity.

²Please see the letter dated December 2, 2016, from David B. Mull, Hale County Sheriff, to myself, requesting a written opinion in this matter. I have attached a copy of the letter hereto as Exhibit A. I have previously informed the Sheriff in writing that I would seek an opinion from your office.

Legal Authorities and Argument

Generally, a public official may not appoint anyone related to that official within the third degree of consanguinity or affinity “to a position that is to be directly or indirectly compensated by public funds or fees from office.” TEX. GOV’T CODE §573.041(1). An official’s sibling is related by the second degree of consanguinity. *Id.*, §573.023(a)(2). The spouse of a sibling is related by the second degree of affinity. *Id.*, §573.025(a). A public official (including an auditor or treasurer) may not approve the payment of public funds for the compensation of a person made ineligible for employment because of nepotism. *Id.*, §573.083. Violations of the nepotism statute can lead to removal from office or a misdemeanor conviction. *Id.*, §§573.081; 573.082; 573.084.

Even though the Legislature first enacted the nepotism statute in 1907,³ very little interpretive caselaw exists. Attorney General opinions, however, abound; however, these opinions are very fact-specific. Your office has previously opined that the predecessor to our current nepotism statute did not cover the appointment of members to the newly-formed State Board of Education, who received no salary for their service, but did receive reimbursement of expenses that they incurred in attending board meetings. *Op. Tex. Att’y Gen.* No. JM-195 (1984). Your office reached this conclusion by noting that the majority of foreign jurisdictions, as well as some analogous Texas cases, did not consider payment of expenses to constitute “compensation.” *Id.*, at 2-3.

Texas cases regarding other statutes and constitutional provisions besides nepotism have uniformly held that the payment or reimbursement of expenses does not constitute compensation for a position. *Whitehead v. Julian*, 476 S.W.2d 844, 845 (Tex. 1972) (receipt of \$50.00 monthly expense allowance did not make mayor the holder of a “lucrative” office); *Terrel v. King*, 14 S.W.2d 786 (Tex. 1929) (payment of reasonable amounts to reimburse public servant’s expenses did not constitute compensation for services rendered); *State ex rel. Beiker v. Mycue*, 481 S.W.2d 476, 477 (Tex.Civ.App.—San Antonio 1972, no writ) (receipt of \$50.00 monthly car allowance did not constitute an “emolument” so as to trigger dual office-holding provisions of Texas Constitution); *cf.*, *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex.Crim.App. 1994); *Irwin v. State*, 177 S.W.2d 970, 973 (Tex.Crim.App. 1944), *overruled on other grounds*, 740 S.W.2d 727 (Tex.Crim.App. 1987). As alluded above, none of these cases directly addresses the nepotism statute. The Opinion cited above, JM-195, also relied somewhat on an express statutory provision that stated that the board members received no compensation for their service.

The cases cited and Opinion No. JM-195 lead one to the conclusion that a sheriff’s close relative could transport prisoners and receive only reimbursement of actual expenses or a *per diem* expense payment⁴ without implicating or violating the nepotism statute. We would, however, appreciate your office’s opinion in the matter.

Thank you for your attention to this matter. Please let me know if you require any more information or further briefing of the issue. With best regards, I am,

³35 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW §7.23 (Thomson/West 2d ed., 2002).

⁴This conclusion assumes that the Hale County Commissioners Court will have set any per diem amount in advance of its payment, and that the amount will be reasonable in light of the likely amount of actual expense. In other words, the per diem payment will not serve as *de facto* compensation for services rendered.

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Sincerely yours,

JAMES M. TIREY


Hale County Attorney

Enclosure

cc: Mr. David B. Mull (via hand delivery)
Ms. Maretta Smithson, Hale County Auditor (via hand delivery)
Ms. Ida Tyler, Hale County Treasurer (via hand delivery)
Office File