

Matthew Poston
County Attorney

Matthew.Poston@LibertyCounty
CAO.com



1923 SAM HOUSTON ST.
STE. 202, LIBERTY, TX 77575

P: 936.336.4650
F: 936.336.4658

RECEIVED

By Opinion Committee at 7:52 am, Aug 14, 2020

August 13, 2020

The Honorable Ken Paxton
Attorney General of the State of Texas

Attention: Opinion Committee
via email to: opinion.committee@oag.texas.gov

RE: Application of the nepotism prohibition to the employment by one county commissioner of a prohibited relative of another commissioner in an *ex officio* road commissioner county.

Dear Attorney General Paxton,

I am writing this letter to request from your office your opinion about whether the nepotism statute, found in Chapter 573 of the Government Code, would be violated by the employment of a county commissioner's prohibited relative by another county commissioner in a county that administers its roads pursuant to Subchapter A of Chapter 252 of the Transportation Code. This request turns on interpreting two attorney general opinions, JM-801 (1987) and DM-158 (1992). Specifically, because DM-158 overrules to the extent of conflict JM-801, can it be said that JM-801's application of the nepotism statute no longer applies?

The nepotism prohibition relevant here is:

A public official may not appoint, confirm the appointment of, or vote 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 or fees of office if:

- (1) the individual is related to a public official within a degree described by Section 573.002; or
- (2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

Tex. Gov. Code §573.041.

Under the facts presented in this request, subsection (1) would not apply, as the hired individual has no relationship with the hiring commissioner. Subsection (2), on the other hand would appear to apply. The commissioner does not possess any hiring authority but for his status as a commissioner on commissioners court. It is impossible to be an *ex officio* road commissioner but for also being a commissioner sitting on commissioners court. But that explanation seems lacking if

RQ-0372-KP
FILE# ML-48854-20
I.D.# 48854

no other member of the commissioners court or the court itself does not have the authority to make employment decisions for the position in question. How could it be said that a person exercised an authority he has by virtue of his membership on a board if the board itself lacks that authority?

Your office has previously addressed a closely related issue in a situation where a county judge hired a prohibited relative of a county commissioner. County judges are members of the commissioners court and therefore sit on the same “local board”. *See* Tex. Loc. Gov. Code §81.001(a). Your office determined that in hiring a secretary in his office, the county judge was not acting as a *member* of commissioners court. Tex. Att’y Gen. Let. Adv. No. 115 (1975).

In the context of other local governmental entities, prior opinions of your office have looked repeatedly at what entity or person has the hiring authority and whether that authority has been sufficiently delegated. “The right to control, whether exercised or not, was found to be the decisive factor in several instances in which this office found the nepotism statute to be applicable.” Tex. Att’y Gen. Op. JM-801, at 3 (1987). If a home-rule municipality has delegated hiring authority to a city manager through its charter, a relative of a city commissioner may be hired by the city manager without violating the nepotism prohibition so long as that individual isn’t related to the city manager. Tex. Att’y Gen. Op. No. GA-0595 (2008). But where the city council has kept some oversight by way of a revocable ordinance rather than through the city’s charter, or where delegation to a city manager is less-than-complete, the same employment would violate nepotism. Tex. Att’y Gen. Op. No. DM-2, at 2 (1991); Tex. Att’y Gen. Op. No. GA-0226, at 5 (2004) (A delegation of authority to ‘appoint, subject to consultation with’ the city council allows city council to retain some authority and therefore is insufficient.)

School boards, similarly, may delegate “final authority” over “selection of personnel” to superintendents. Tex. Educ. Code §11.163(a)(1). If that authority is delegated by the school board, then nepotism does not prohibit the hiring by the superintendent of relatives of the school board. Tex. Att’y Gen. Op. No. GA-0123 (2003).

The facts presented in this request are virtually identical to those presented in 1987 to your office. Tex. Att’y Gen. Op. No. JM-801 (1987). There, your office concluded that “the commissioners court has authority to approve or disapprove the hiring decisions of an *ex officio* road commissioner”. *Id.* at 5. Nepotism would apply, therefore, if a commissioner hired another’s son. *Id.* In large part this appears to be based on legislative history and this opinion reasoned that while, “The 1981 amendment [to the Road and Bridge Act] was necessary to allow *ex officio* road commissioners to make hiring decisions at all”, “[n]othing in the statutory language or legislative history indicates that the 1981 amendment was intended to prevent the commissioners court from exercising supervision over the hiring decisions of each individual road commissioner.” *Id.* at 4, 5.

A subsequent opinion took the opposite view. Tex. Att’y Gen. Op. No. DM-158 at 4 (1992). (“However, we believe that [JM-801] incorrectly concluded that ‘[n]othing in the statutory language or the legislative history indicates that the 1981 amendment was intended to prevent the commissioners court from exercising supervisions’ over an *ex officio* road commissioners’ individual hiring or firing decisions”. The opinion concluded that, “Rather, we feel that the statutory language and legislative history of the 1981 amendment clearly evidence the legislature’s intent to delegate the authority to hire and fire road and bridge employees to the *ex officio* commissioner, once the commissioners court has authorized the employee positions.” *Id.* Other than this, DM-158 does

not further address the applicability of the nepotism statute in light of that fact, even though it would seem that it renders application of nepotism impossible to these facts.

In summary, it appears that there is a conflict between prior opinions of this office. Opinion DM-158 appears to nullify the foundation reached by the prior opinion, JM-801, but it stops short of nullifying its conclusion. In the context of an *ex officio* road system county, does DM-158 render application of the nepotism statute impossible to a situation where one commissioner hires the prohibited relative of another?

I thank you and your office very much for an opinion on this matter. If you have any questions regarding this, just let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Matthew C. Poston', with a stylized flourish at the end.

Matthew C. Poston
County Attorney