



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

DAN MORALES
ATTORNEY GENERAL

December 13, 1995

The Honorable Tracey Bright
Ector County Attorney
Ector County Courthouse, Room 201
Odessa, Texas 79761

Letter Opinion No. 95-080

Re: Whether the spouse of a school district trustee may work at the district as a speech pathologist as an employee of a private corporation that has a contract with the district (ID# 25669)

Dear Ms. Bright:

On behalf of the Ector County Independent School District (the "district"), you have requested an opinion from this office concerning whether the spouse of a school district trustee may be employed by a private corporation that contracts with the district to perform speech pathology services on an as-needed basis. You have informed us that the district is governed by a seven-member elected board of trustees. The spouse of one of the trustees is contemplating employment as a speech pathologist with the corporation. You further state that neither the trustee nor his spouse has an ownership interest in the corporation. The corporation is completely responsible for all negotiations, payments, and other business related to the contract. The pathologists are placed at the sole discretion of the corporation. All payments for services rendered are paid directly to the corporation.

We begin our analysis by considering the application of section 21.916 of the Education Code which provides the following:

A private employment agency may not place an employee in a school district if an owner or operator of the agency is related within the third degree by consanguinity or within the second degree by affinity, as determined under Chapter 573, Government Code,¹ to a member of the board of trustees of the school district or to an administrator who has authority to make decisions relating to employment practices in the district.

¹We note that V.T.C.S. articles 5996a through 5997 were repealed by the Seventy-third Legislature. Act of April 30, 1993, 73d Leg., R.S., ch. 268, § 46, 1993 Tex. Gen. Laws 583, 986. The provisions concerning nepotism are now codified at title 5, chapter 573 of the Government Code. *Id.* § 1, at 587. Although this codification is a nonsubstantive revision, the text of the provisions was reorganized to some extent. *Id.* § 47, at 988. The Seventy-fourth Legislature generally amended the statutes to reflect that codification. Act of April 25, 1995, 74th Leg., R.S., ch. 76, § 5.95(27), 1995 Tex. Sess. Law Serv. 458, 545.

Educ. Code § 21.916(a) (footnote added). A private employment agency has been defined as "an agency for the brokerage of labor for a fee paid by an applicant for employment or by a prospective employer or as any person or corporation engaged in the business of finding positions or employment." *Florida Indus. Comm'n v. Manpower, Inc.*, 91 So. 2d 197, 198 (Fla. 1956). As you state in your request letter:

The corporation contracts on an as-needed basis with various entities for the supplying of Speech Pathologists. Under any such contract, the corporation and entity basically agree as to the number of Pathologists, placement and hours that any such Pathologists will work. . . . All payments of any entity are then made directly to the private corporation.

The private corporation, in turn, hires various individuals with the appropriate credentials and then places those individuals at various entities. . . . The Pathologists so placed are subject to the sole direction and control of the private corporation which is also solely responsible for the payment of all compensation to the Pathologists.

Based upon the information that you have provided us we conclude that the corporation at issue is not a private employment agency, thus section 21.916 of the Education Code is inapplicable to the situation about which you ask.

We next consider the prohibition against nepotism which is governed by chapter 573 of the Government Code. The operative provision is section 573.041, which provides the following:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation 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 the public official within [the third degree by consanguinity or the second degree by affinity]²; 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 [the third degree by consanguinity and the second degree by affinity].

²Consanguinity has been defined as relationship by a common ancestor. BLACK'S LAW DICTIONARY 275 (5th ed. 1979). Affinity is relationship established by marriage. *Id.* at 54.

In the situation about which you ask, the spouse of the trustee, being within the first degree by affinity, is clearly within the prohibited degree of relation. However, the board of trustees of the district does not vote for the appointment or employment of any particular individual with regard to this contract. Instead, the board votes on whether or not to enter into a contract with the private corporation to provide speech pathologists on an as-needed basis. Hence, it is the corporation that is responsible for the appointment, supervision, and payment of the individual pathologists. We therefore conclude that section 573.041 is inapplicable to this particular situation.

We now consider chapter 171 of the Local Government Code which contains the general conflict of interest rules applicable to local public officials.³ Section 171.003 sets forth the prohibited acts and the requisite penalties for the commission of such acts. It provides the following, in pertinent part:

(a) A local public official commits an offense if the official knowingly:

(1) violates Section 171.004

(2) acts as surety for a business entity that has work, business or a contract with the governmental entity; or

(3) acts as surety on any official bond required of an officer of the governmental entity.

(b) An offense under this Section is a class A misdemeanor

A local public official possesses a substantial interest in a business entity if:

(1) the person owns 10 percent or more of the voting stock shares of the of the business entity or owns either 10 percent or more or \$5,000 or more of the fair market value of the business entity; or

(2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

Local Gov't Code § 171.002(a)(1), (2). Further, a local public official is deemed to possess a substantial interest pursuant to section 171.002 if an individual related within the prohibited degree by consanguinity or affinity possesses a substantial interest under the section. *Id.* § 171.002(c). You have stated that neither the trustee nor his wife possesses

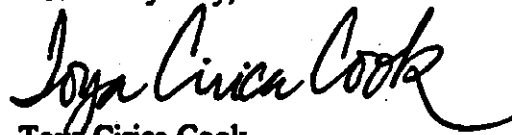
³Chapter 171 pre-empt's the common law of conflict of interests as applied to local public officials. Local Gov't Code § 171.007(a); Attorney General Opinions JM-1187 (1990) at 2 n.2, JM-424 (1986).

a pecuniary interest in the corporation at issue. You further state that it is not known whether any funds received by the spouse from the corporation would exceed ten percent of the spouse's gross income from the previous year. In the absence of any additional information, we conclude that the general conflict of interest rules do not prohibit the trustee's spouse from seeking employment with a corporation doing business with the district.⁴

S U M M A R Y

In certain circumstances, the provisions of section 21.916 of the Education Code and section 171.003 of the Local Government Code and section 573.041 of the Government Code do not prohibit the spouse of an independent school district trustee from seeking employment with a corporation doing business with the district.

Yours very truly,



Toya Cirica Cook
Assistant Attorney General
Opinion Committee

⁴However, if some interest in the corporation should come into being, chapter 171 provides for disclosure of the interest and abstention from discussions and votes concerning the corporation. See Local Gov't Code § 171.004; see generally *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271 (Tex. App.—Dallas 1991, writ denied).