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OPINION COMMITTEE

FILE # ML-42559-02
I.D. # 42559

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Cornyn:

Please accept this letter as one of formal request for an Attorney General's Opinion on the following questions:

- (1) **Is it a violation of Section 573.062(b), Government Code, for a city commissioner to deliberate, participate, and display a preference regarding the consideration of a merit salary increase for a sibling in a closed session of a city's Board of Commissioners?**
- (2) **Are individual members of a city's Board of Commissioners in violation of any criminal statutes if such a member votes to approve a merit salary increase for a commissioner's sibling after being involved in a deliberation regarding the nepotistic character of the salary increase?**

FACTS

On September 25, 2001, a city commission, presiding over a Home Rule City, met in a specially called meeting to discuss items which included the merit salary increases of selected city employees. The city commission had met on a previous date and approved an across the board raise for all employees. During the September 25th meeting, the Board of Commissioners convened into a closed session with the city manager to deliberate and discuss the merit salary increases. Under the city's charter, the city manager is charged with evaluating employee performance and making recommendations regarding same.

One of the department heads who was up for merit raise consideration, but who did *not* receive a recommendation for same from the city manager, was an individual who had been employed by the city since 1979 and was a sibling of one of the city commissioners. During the closed session, this commissioner took part in the deliberations related to the other employees under consideration for merit raises. When the discussion began on the sibling of the commissioner, he remained in the room and began to take an active part in deliberating and recommending a merit raise for his sibling. Many times, the commissioner displayed anger towards the other members, as well as the city manager, when they discussed not giving his sibling a raise. The commissioner repeatedly told the city manager that he, the city manager, could "break the tie" if need be. The commissioner also mentioned that his sibling had received other raises and that the commission should vote the same on this occasion.



After reconvening into open session, the city commission voted not to give the commissioner's sibling a merit salary increase. The commissioner did not vote on the denial of the salary increase for his sibling after the Commission reconvened for the public hearing.

Government Code Section 573.062(b) of the nepotism statute states the following:

- (b) If, under Subsection (a), an individual continues in a position, the public official to whom the individual is related in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, re-employment, change in status, compensation, or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees.

The actions of the commissioner warrant an analysis of the statute and its underlying purposes.

While the city manager can evaluate the performance of department heads, such as the commissioner's sibling, and make recommendations regarding their employment status and compensation, only the city commission can vote on any changes to that employment status and compensation. In **Tex. Atty. Gen. Op. No. J-0193 (2000)**, it was decided that the legislature intended to preclude a public official from *participating in all employment actions* that affect the official's relatives, with the exception of those affecting a bona fide class. The opinion also states that "when a person falls within an exception to the nepotism rule and is allowed to continue in employment, the person related to him within the prohibited degree may not *participate* in any deliberation or decision that pertains specifically to the relative exempted by this law." *Id.*

In *Cain v. State*, 855 S.W.2d 714, 718 (Tex. CIM. App. 1993) (en banc), the court described the statute as preventing a sole office holder from "*taking any action with regard to the employment of a relative.*"

In **Tex. Atty. Gen. Op. No. DM-46 (1991)**, the statute was described as applying to any action of a public officeholder concerning the employment of a relative within the prohibited degree that allows for the "*preference or discretion of the officeholder.*"

The public policy and legislative intent of the Texas nepotism statute, (Section 573.062, Government Code), seems to clearly proscribe any deliberation or action on the part of an elected official regarding employment decisions which may solely affect certain close relatives. Elected officials often face pressures of a political and personal nature. The pressures can increase when a decision is local and involves a fellow official. The statute seems to go a step beyond just voting, but also includes participating, displaying preference, and participating to protect the decision makers, such as the Board of Commissioners, from undue pressures, collusion and illegalities. The Texas Penal Code Section 7.02 states the following:

- (a) A person is criminally responsible for an offense committed by the conduct of another if:

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1. acting with the kind of culpability required for the offense, he causes or aids an innocent or non-responsible person to engage in conduct prohibited by the definition of the offense;
2. acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
3. having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make reasonable effort to prevent commission of the offense.

Had the members of the city commission voted to aid the commissioner's sibling after participating in a deliberation with the commissioners in violation of the nepotism statute, the criminal liability of the individual members could have become an issue. This also warrants analysis and interpretation.

Question #1:

Did the commissioner violate Section 573.062(b) of the nepotism statute by deliberating, participating, and displaying his preference regarding the consideration of a merit salary increase for a sibling in a closed session meeting?

Question #2:

Would the individual members of the Board of Commissioners have been in violation of any criminal statutes had they voted to approve a merit salary increase for the commissioner's sibling being involved in a deliberation regarding the nepotistic character of the salary increase?

Your consideration of this matter is greatly appreciated. Please don't hesitate to contact me or Lori Flores with the Senate Intergovernmental Affairs Committee if you have any questions or require further information.

Yours truly,



Frank Madla

FM/lyf/sm

cc: Senator Eddie Lucio