

MEMORANDUM

TO: Mark Rose, Bluebonnet Electric Cooperative

FROM: JC Brown, Bastrop City Attorney

DATE: August 6, 2015

RE: Requested Written Statement on Basis for Opinion that City's Ethics Ordinance Would Likely Prevent Appointment of the 'Wife of the Mayor's Employer' to a City Board/Commission; Issue Raised by Citizen.

CC: Mayor Kesselus and City Council Members
Michael H. Talbot, City Manager

SUMMARY BACKGROUND

On April 28, 2015, at the request of the City Council, the Ethics Commission was asked to opine on whether the Mayor would be acting in accord with the City's Code of Ethics (the 'Code') if he appointed his current employer (Mark Rose) to a City Board or Commission. Several 'blind scenarios' were prepared for discussion with the Commissioners at their meeting, to provide alternative examples of potential circumstances, including those that were similar to the one in question. However, even before the details of those hypotheticals could be reviewed one-by-one, and essentially immediately after the City Attorney introduced the general question to the Commissioners, they all promptly responded that such an appointment would present a 'clear-cut' conflict of interest that would violate the Bastrop Code of Ethics (Section 1.15.031 and/or Section 1.15.033). Accordingly, the Ethics Commission opined that the appointment on an employer was prohibited by the Code. The City Manager distributed this Ethics Commission Opinion to the various City Board and Commission staff liaisons and asked that they communicate this information to those on their Boards, Commissions and task forces, so that all were up to date on the Commission's ruling related to this specific issue.

Subsequently, at the City Council meeting held on June 23, 2015, the Mayor was anticipating appointing the wife of the Mayor's employer (Dianna Rose) to a City Board, when Council Member Gilleland stated that she had been asked by a citizen if this proposed appointment by the Mayor would also violate the City's Code of Ethics. The question was directed to the City Attorney, who stated that in her experience, under both the City's Code of Ethics and the State Government Code (which also applies to potential conflict of interests involving local officials) a "spouse" is a person related to an individual within the "first degree of affinity." Brown stated, further, that persons with such 'close relationships' are often deemed to be conflicted out of opportunities, in the same way that their spouses are and, consequently, it was her view that Dianna Rose's appointment would be blocked by the Ethics Code and/or State law, in cases where her husband's appointment was prohibited due to a conflict of interest. After the meeting, in an abundance of caution, Brown suggested to the Mayor, the City Manager and other Council members that it would be beneficial to have the Ethics Commission consider this question, as well, indicating that the Commission's decision would be definitive, in the

event that Brown had misinterpreted or misapplied the Code. (The City Attorney also opined that this prohibition would not affect any appointment of Dianna Rose to other Boards, so long as those appointments had been made by prior Mayors.) The Interim City Secretary began to attempt to schedule a Special Meeting of the Ethics Commission, to consider this question and provide a formal opinion, which was challenging due to the various Commission members' schedules, travel and work plans, etc. Nevertheless, the Interim City Secretary set the meeting as quickly as a quorum of the Commissioners could convene, which was **July 28, 2015** at 4:30 pm.

Late Friday afternoon, on **July 24th**, only two work-days before that Commission meeting, the City Manager received the following text message from Mark Rose, the Mayor's employer:

Good Afternoon

I would like to have in writing the City Attorney's opinion on why Ken cannot appoint Dianna to any Board Commission or Task Force.

It is my understanding she informed the Council it is against the law. I would like to know what law and the specific basis for her opinion.

I am not disputing her knowledge or perhaps even her opinion but in fairness to us, I think that should be in writing so we have the ability to ask for a second opinion, if warranted.

I hope you are doing well.

***My best
Mark***

Mr. Talbot forwarded that message to JC Brown, City Attorney. Subsequently, Talbot and Brown agreed that Brown would prepare a written reply to Mark Rose, as per Rose's request to Talbot. Brown reminded Talbot that she, too, desired an opinion from the Commission, to ensure that the interpretation provided was correct and that the Ethics Commission would take that up on Tuesday, July 28th. Thus, a definite answer would be promptly forthcoming to address Rose's question and put the question to rest.

DISCUSSION

A. JC BROWN'S OPINION STATED AT COUNCIL MEETING ON JUNE 23, 2015.

As is frequently the case when questions are raised during a meeting from the dais, exacting and in-depth legal research on this issue could not be performed prior to responding to the Council's inquiry posed that evening. Nevertheless, an opinion was requested from the dais. In light of her many years of expertise in municipal law, and with the recent decision on a similar question addressed by the City's Ethics

Commissioners in mind, Brown was comfortable stating her opinion that she believed the appointment would run afoul of the Code, because the wife of the Mayor's employer would likely be inferred to have an interest that was substantially similar to the Mayor's employer, Mark Rose.

Accordingly, in response to the citizen's question/concern, noted by Gilleland, Brown stated that it was her view that the appointment would be a violation because: (1) the City's Ethics Commission had issued an opinion that it would be a violation of the Ethics Code for the Mayor to appoint his current employer (Mark Rose) to a City Board and Commission, and (2) the State's Conflict of Interest Statutes generally indicate that "substantial interests" are *inferred* from an individual *to those who are within a first degree of affinity* (and consanguinity), as was the case with Dianna Rose.¹ [Brown had also worked with the Ethics Commission, as it drafted the City's Code of Ethics, and had heard many hours of discussion by that group related to its thoughts and views concerning the standard of ethics it proposed for the City. Accordingly, in reflecting on that, she believed it was more likely than not, that the Commissioners would infer a conflict from such a close family relationship, inasmuch as it had been a stated objective of the Commission to conservatively protect Bastrop's officials from '*even the appearance of wrongdoing and/or self-serving*' actions.]

State law dictates that the relatives of a public official who are within the 'first degree by consanguinity' are his or her parents and children, while *his or her spouse* is a *relative within the 'first degree by affinity'*. Tex. Gov't Code Ann. §§ 573.023(c)(1), .024(a), .025(a) (Vernon 1994). (Emphasis added) A relationship 'in the first degree by affinity' also exists when the spouse of one of the individuals is related in the first degree by consanguinity to the other, that is, between a person and his or her parents-in-law, son- or daughter-in-law, and the children of his spouse. See *id.* §573.024(a)(2). Moreover, the Texas Attorney General has stated, in numerous written opinions, that Chapter 171 of the Local Government Code, (one of the State's Conflict of Interest Statutes), imputes any "substantial interest" of a public official's spouse, parents, children, step-children, father- and mother-in-law, or son- and daughter-in-law to the officer, inasmuch as they are within the first degree of affinity and/or consanguinity. See *by way of example*, Tex. Att'y Gen. Op. No. [DM-267](#) (1993) at 2; Tex. Att'y Gen. LO-95-080, at 3.

Additionally, the City Attorney stated that in her view the appointment would be in violation of the Code because she believed that the appointment could *arguably* be viewed as bestowing/invoking benefits and privileges unique to the employer's 'family unit', that are not otherwise afforded to the public in general, which is another trigger for determining conflicts of interest, in general terms. See, Code, Section 1.15.003.

Brown indicated to the Mayor and Council that additional research could be done and/or that the question could be posed to the Ethics Commission, so that if she had erred in her interpretation and application, a correction could be made. Subsequently, the question was posted for the Ethics Commission's consideration at a specially scheduled meeting set for July 28, 2015.

¹ See, for example, *Local Government Code, Chapter 171* which, in defining the term "substantial interest" states the following: "A local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or interest under this section."

B. ETHICS COMMISSION'S OPINION; JULY 28, 2015; CONFIRMING JC BROWN'S STATED OPINION TO COUNCIL.

At its July 28, 2015, meeting, Brown asked the Ethics Commissioners present to opine as to whether a City Official would be in violation of the City's Code of Ethics if he were to appoint the 'spouse of his current employer' to a City Board or Commission. The immediate reaction and statement from the Commissioners was that "Yes.... *That simply doesn't pass the smell test.*" They also stated that that would have been their intention when they drafted the Code.

Brown indicated that two (2) provisions of the Code were potentially 'on point' and referenced both to the Commissioners. Brown pointed out that the verbiage in one provision (i.e., Sec. 1.15.031) was ambiguous and could arguably be interpreted to mean several things, including a reading to 'state the prohibition' in question.

The Commissioners reviewed the text and agreed that it was their intent to apply Sec. 1.15.031 to prevent the appointment of individuals within certain close relationship (affinity and consanguinity) to the City Officials and the employers of City Officials, as defined by the Code. They asked Brown to prepare a memo for distribution to those 'with interest and a need to know' their opinion on this specific question and, also, to undertake the work needed to prepare a clarifying amendment to the Code, for their recommendation and Council's consideration.

Mr. Talbot agreed to facilitate this work by Brown, which is underway.