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Edited by Evelyn A. Peyton, Esq.

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WHAT'S NEW AT CUDDY & MCCARTHY

Now that the merger of the two firms is complete, our new website is up and running at www.cuddymccarthy.com. We invite you to visit the site, where you can see the pictures and resumes of all of our attorneys. The site also contains copies of past *ELQ* articles, as well as articles from the current issue. As always, should the *ELQ* articles raise any questions about your specific situations, please call us for further assistance or clarification.

Our partner Andy Sanchez was just elected to, and attended his first meeting of, the Board of Directors of the Council of School Attorneys (COSA), which is the school lawyer adjunct to the National School Boards Association. Andy's election to the prestigious COSA Board is a wonderful recognition of his experience, commitment, and expertise in school law, and of this firm's

nationally recognized reputation in the field. Previously, John Kennedy and Buck Cuddy each served two terms on the COSA Board.

Since the publication of the Winter 2008 issue of *ELQ*, our attorneys have made presentations for the New Mexico School Boards Association (NMSBA) at its annual Board Member Institute and at six of the eight NMSBA Region Meetings. Currently, we are putting the finishing touches on the program for the 30TH annual NMSBA School Law Conference, which will be held in Albuquerque on June 5-6, 2009. We produce that Conference each year in partnership with NMSBA, and we hope you will be able to attend.

NEPOTISM REVISITED AND ENLARGED

by C. Emery Cuddy, Jr.

The 2009 Legislature expanded the school nepotism prohibitions by passing S.B.212, which was sponsored by Senator Vernon Asbill, a former Superintendent of Schools in Carlsbad. Interestingly, the Legislature approved the bill with only one dissenting vote. This article describes the changes to the nepotism statute and reviews the statute's application.

The amended Section 22-5-6(A), NMSA 1978, provides in pertinent part:

22-5-6. Nepotism prohibited.

- A. A local superintendent shall not initially employ or approve the initial employment in any capacity of a person who is the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, *brother, brother-in-law, sister, sister-in-law*, of a member of the local school board, or the local superintendent. The local school board, may waive the nepotism rule for family members of a local superintendent.

(2009 changes in italics.) Similar changes were made to the charter school statute (Section 22-8B-10, NMSA 1978) prohibiting nepotism in charter schools.

The nepotism prohibition statute was first enacted in 1971, but it has been revised several times to provide greater clarity as well as to recognize that, following HB 212, the superintendent now does the hiring in a school district.

The statute's 2009 amendment, which takes effect on June 18, 2009, adds certain relatives to the list of those whom the school district's superintendent shall not employ. The expanded list of prohibited relatives is as follows, with the newly added relatives shown in italics:

- | | |
|-------------------|----------------------------|
| [1] Spouse | [8] Daughter |
| [2] Father | [9] Daughter-in-law |
| [3] Father-in-law | [10] <i>Brother</i> |
| [4] Mother | [11] <i>Brother-in-law</i> |
| [5] Mother-in-law | [12] <i>Sister</i> |
| [6] Son | [13] <i>Sister-in-law</i> |
| [7] Son-in-law | |

If you have a question about the legality of hiring a particular relative, simply go to list above, and if the person is not related to the superintendent or school board member in any capacity shown on that list, there is no prohibition against his or her employment. Please note that grandparents, aunts, uncles and cousins are not included.

Of course, in our evolving culture, you may run into some non-traditional relationships that raise questions as to whether the statutory prohibitions apply. For example, a couple may be living as husband and wife, yet not be married. Since the statute's prohibitions are exclusive, and "spouse" has a clearly defined meaning in New Mexico law, the prohibition against employment of a spouse would not prohibit the employment of an unmarried domestic partner. The same reasoning applies to divorced persons, where the divorce has terminated the relationship (for example, a former son-in-law is no longer a son-in-law if he has been divorced from the board member's or superintendent's daughter).

Another aspect of the nepotism law to remember is that a local school board is allowed to waive the statute's prohibition for family members of the local superintendent. The Legislature, in including this waiver provision, seemed to be aware that such flexibility is important to the ability of some (particularly small) school districts to recruit superintendents. Although the waiver provision is available, the waiver must be properly drafted and adopted publicly by the local school board in order to be legally defensible.

Subsection (B) of the amended nepotism statute now provides:

- B. Nothing in this section shall prohibit the continued employment of a person employed on or before *July 1, 2008*.

(2009 changes in italics). This subsection was enacted to reflect a New Mexico Supreme Court decision from 1981 holding that the nepotism statute's prohibitions did not require the termination of employment of a tenured teacher when her father was subsequently elected to the school board. Therefore, if a person is already employed when a relative is elected to the local school board or a school superintendent is hired by the board, the relative is entitled to continue to be employed even if the person is within one of the prohibited categories listed above.

As far as the July 1, 2008 date is concerned, we are of the opinion that it is irrelevant to the application of the statute; anyone who was employed prior to the election of a related school board member, or prior to the employment of a superintendent, can continue to be employed regardless of the nature of the relationship to the board member or superintendent.

We hope this article will make you aware of the expanded coverage of the nepotism statute and provide helpful guidelines about the limitations on employment the amended nepotism statute requires.

WHEN CAN SCHOOLS DRUG-TEST EMPLOYEES?

by Ramon Vigil, Jr.

Schools may use random drug testing for employees in "safety-sensitive" positions, and they may require drug testing for any employee when there is individualized, reasonable suspicion that the employee is under the influence of alcohol or other drugs while on duty.

The Fourth Amendment of the United States Constitution states in part that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause" Thus, the government is constitutionally prohibited from conducting unreasonable searches and seizures

without a warrant issued by an independent magistrate based on probable cause. Drug testing is considered a “search” of a person.

Because the Fourth Amendment is made applicable to the State and its actors by the Fourteenth Amendment of the United States Constitution, the State and its actors are bound by the same Fourth Amendment prohibitions regarding search and seizure. *Elkins v. United States*, 364 U.S. 206, 213 (1960). As early as 1943, the United States Supreme Court expanded the definition of government action to include public school administration. *West Virginia State Bd. of Ed v. Barnett*, 319 U.S. 624 (1943). Consequently, public school officials, as state actors, are bound by the Fourth Amendment prohibitions regarding search and seizure. As the text of the Fourth Amendment indicates, the ultimate measure of constitutionality of a governmental search is reasonableness.

The Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer. *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987). Therefore, public schools, as employers, have restrictions regarding search and seizure that are not placed on private employers. Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, the individual’s private expectations are balanced against the government’s interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. *Treasury Employees v. Von Raab*, 489 U.S. 656, 666 (1989). Generally, “[t]o be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.” *Chandler v. Miller*, 520 U.S. 305 (1997).

In *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 617 (1989), a case involving drug testing of railroad engineers, the U.S. Supreme Court held that state-compelled collection and testing of urine constitutes a search and therefore is subject to the requirements of the Fourth Amendment. However, in *Skinner*, the Court also held that the government’s interests in ensuring the safety of the traveling public and of railroad employees justified a departure from the usual requirements of search and seizure, thereby allowing drug testing of employees conducting safety-sensitive tasks. *Skinner*, 489 U.S. at 604. Thus, a school district may require mandatory suspicionless drug testing for employees whose jobs involve “safety-sensitive” tasks such as driving

school buses, operating heavy equipment, etc. Under *Skinner*, the test for whether employees hold safety-sensitive positions is whether the employees “discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” *Skinner*, 489 U.S. at 628.

The federal courts in most circuits have determined that teachers and other school employees working directly with students do not hold safety-sensitive positions. Only the Sixth Circuit Court of Appeals has determined that teachers and school administrators hold safety-sensitive positions and that a one-time, suspicionless testing of people hired to serve in teaching and administrative positions is reasonable and not unconstitutional. *Knox County Education Association v. Knox County Board of Education*, 158 F. 3D 361 (6th Cir. 1998). Because New Mexico is in the Tenth Circuit, New Mexico courts are not required to follow Sixth Circuit cases.

In addition to adopting a policy for the mandatory random testing of employees who are involved in safety-sensitive positions, public schools may conduct suspicion-based drug testing. Accordingly, if a school administrator has individualized, reasonable suspicion to believe that an employee is under the influence of drugs or alcohol, the school official may require drug or alcohol test(s) of an employee. *Hern v. Board of Education*, 191 F.3d 1329 (11th Cir. 1999). Moreover, a teacher or school employee who refuses to take a drug test when there is individualized reasonable suspicion of drug or alcohol use may be terminated for insubordination. *Id.*

Some circumstances that may lead a school administrator to reasonably suspect that an employee’s work performance or on-the-job behavior may have been affected by illegal drugs or alcohol may include, but not be limited to, the following:

1. Observed use, possession, or sale of illegal drugs, and/or use, possession, sale, or abuse of alcohol, and/or the illegal use or sale of prescription drugs.
2. Apparent physical state of impairment of motor functions.

3. Marked changes in personal behavior not attributable to other factors.
4. Employee involvement in, or contribution to, an accident where the use of alcohol or drugs is reasonably suspected, or employee involvement in a pattern of repetitive accidents, whether or not they involved actual or potential injury.
5. Violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs, and/or violations of drug statutes.

Therefore, a school district should engage in mandatory random drug testing of school employees only for employees who hold safety-sensitive positions. In all other instances, public schools should drug-test employees only when there is individualized, reasonable suspicion that the employee is under the influence of illegal drugs or alcohol while at work. In cases involving individualized, reasonable suspicion, school administrators are advised to discuss the circumstances with legal counsel before demanding that the employee submit to drug testing.

**PUBLIC SCHOOL PROCUREMENTS: UNLAWFUL PARTICIPATION BY
BOARD MEMBERS OR EMPLOYEES**

by Evelyn A. Peyton

Now that new school board members have been sworn into office, new conflicts of interest can arise to present problems for your school district. For example, suppose your school board has a brand-new member, Mr. ABC, who is a co-owner of a local photography studio, ABC Photos. The school district has done business with ABC Photos for years, using ABC Photos for all of its high school yearbook pictures and other official district photography. Suppose further that the school district would like to continue doing business with ABC Photos. Although that prospect may seem innocent enough, continuing to do business with ABC Photos now that Mr. ABC is on the school board presents a classic conflict of interest and raises significant legal questions.

In addition to the legal issues involved in such situations, there usually will be an adverse community reaction to a school board member profiting or appearing to profit by doing business with the school district – perceptions of favoritism or cronyism. In order to waive the conflict of interest, as well as to reassure concerned community members, the school board must be able to identify specific benefits to the school district from the arrangement that the district would not enjoy with another contractor. Both the school board and the board member with the conflict should consider how the community might perceive the arrangement, even though the arrangement is legal.

The legal issues in such conflict-of-interest situations are governed by the Public School Code and the Procurement Code. Section 22-21-1 of the Public School Code, entitled “**Prohibited Sales by Personnel**,” precludes a member of the local school board or any school instructor or school administrator from directly or indirectly selling or becoming a party to a transaction to sell instructional material, furniture, equipment, insurance, or supplies to his or her school district, or to work directly or indirectly under contract with the school district with which he or she is associated or employed.

Section 13-1-190 of the Procurement Code relates to “**Unlawful Employee Participation**” and provides that it is unlawful for the employee of a local public body to participate directly or indirectly in a procurement when the employee knows that the employee or any member of his or her immediate family has a financial interest in the business seeking or obtaining the contract in question. Section 13-1-193 of the Procurement Code prohibits “**Contemporaneous Employment**” and provides that it is unlawful for the employee of a local public body that is participating directly or indirectly in the procurement process to be employed by any person or business contracting with the local public body that employs him or her.

These statutes mean that board members and district employees are prohibited from being on both sides of procurements of contracts with the district. Even if a competitive bidding or proposal process is undertaken, it may still be unlawful for a school employee to be simultaneously employed by a business seeking to sell goods or services to the district. The Procurement Code defines “employee” to include board members. Section 13-1-54 states that an employee is “[1] an individual receiving a salary, wages or per diem and mileage from a state agency or a local public body whether elected or not, and [2] any non-compensated individual performing personal services as an elected

or appointed official or otherwise for a state agency or a local public body.” Thus, both salaried instructors or administrators and non-salaried school board members fall within this definition.

Returning to the hypothetical scenario that began this article, if the school district wants to continue doing business with ABC Photos, the school board initially will need to pass a resolution granting a formal waiver of Mr. ABC’s conflict of interest. The waiver process is necessary for avoiding the significant civil and criminal penalties that may otherwise be imposed under Section 22-21-1 of the Public School Code (which provides that a violation constitutes a fourth-degree felony), and Section 13-1-196 of the Procurement Code (which allows civil penalties of up to \$1,000.00 and enforcement action by the attorney general or district attorney). Our caution regarding conflicts of interest reflects the severity of the statutory penalties and the risk that an ambitious district attorney might attempt to make an issue of a procurement for such a conflict by a board member. Even if the action did not succeed, such a charge could seriously harm both the board member and the board itself.

The exact language of such a waiver, as well as the mechanics of the waiver process, are beyond the scope of this article. If your school board is facing a situation such as the one involving ABC Photos, we strongly recommend that the school board president and/or the school district’s superintendent contact the school district’s attorneys for legal advice.

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.