THE COMMONWEALTH OF MASSACHUSETTS

STATE ETHICS COMMISSION

ONE ASHBURTON PLACE

BOSTON, MASSACHUSETTS 02108

727-0060

COMMISSION ADVISORY NO. 11

NEPOTISM

INTRODUCTION

The term "nepotism" originates from the Latin word for nephew. It originally referred to favoritism to a nephew in granting official positions. Nepotism is now commonly understood to include favoritism of any sort afforded any relative.

The term nepotism does not appear in the conflict of interest law, and for years it was unclear whether the conflict law prohibited nepotism. The Special Commission which initially drafted the law in 1962 indicated that the criminal sections of the law were not intended to apply to nepotism. In August 1983, however, the Supreme Judicial Court concluded in Sciuto v. City of Lawrence, 389 Mass. 929 (1983), that the language of the statute clearly prohibited public officials from acting on matters in which an immediate family member had a financial interest. The Sciuto case involved a claim by two city police captains of the Lawrence Police Department that the appointment of Patrick Schiavone to police chief was invalid because two prior promotions approved by his brother, the director of public safety, had violated the conflict of interest law. The Court agreed that these promotions violated G.L. c. 268A, §19 and returned the case to the lower court to decide whether any further action should be taken regarding the promotions. The lower court ordered the promotions rescinded pursuant to §21 of c. 268A, and the brother was demoted three levels, losing his position as chief. Following the Sciuto decision, the State Ethics Commission began to enforce the conflict law in complaints alleging nepotism.

The purposes of this advisory are to outline the prohibitions against nepotism contained in the conflict of interest law and to explain the Commission's enforcement policy regarding nepotism violations.

NEPOTISM IS PROHIBITED

The conflict law prohibits elected and appointed public officials at the state, county, and municipal level from participating[1] in particular matters[2] in which their immediate family members have a financial interest. (See, G.L. c. 268A, §§6, 13 and 19 dealing with state, county, and local officials, respectively.) Immediate family is defined in the statute as "the employee and his spouse, and their parents, children, brothers and sisters." Thus, for example, an official's brother-in-law would be considered "immediate family" if he were the brother of the official's spouse but not if he were married to the official's sister.

In addition to these sections of the law, nepotism raises concerns under G.L. c. 268A, §23, which sets forth standards of conduct regulating all public employees. Essentially, Section 23 prohibits a public official from using his position to secure an unwarranted privilege of substantial value for himself or others, or from acting in a manner which gives the basis for the impression either that he is improperly influenced by another person, or that someone is unduly enjoying his favor because of kinship. Therefore, if a public official wishes to participate in a matter which affects the financial interest of a relative, even if that relative is not a member of his immediate family, (e.g. a cousin or a niece) he may not give preference to the relative because of the relationship, and he must be careful to avoid the appearance of favoritism based on kinship. This is done by publicly disclosing the

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1/G.L. c. 268A, §1(j) defines participate as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."

2/G.L. c. 268A, §1(k) defines particular matter as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property."

relationship and following ordinary and accepted procedures without deviation.

The purpose of these provisions is to prevent potential conflicts or the appearance of impropriety that arise whenever a public official's personal loyalty to a family member competes with the public interest that objective decisions be made regarding public employment.

SPECIFIC ACTS THAT ARE PROHIBITED

A public official may not hire an immediate family member.[3/] As stated above, the conflict law prohibits a public employee from participating in any particular matter in which a family member has a financial interest. The decision to hire is a particular matter in which an official is "personally and substantially" participating, and the family member has an obvious financial interest in the hiring decision.

Personal and substantial participation involves any significant involvement in the hiring process. For example, interviewing or creating a test for applicants, one of whom is a family member, would violate the law.

An official need not be the sole decision-maker to be prohibited from participating in the hiring decision. For example, an official cannot, as one member on a board, vote to hire his family member, regardless of the size of the board. Nor would it matter that there was little, if any, controversy among the board members regarding the decision. A person can no more participate in making a vote of a 15-member board unanimous by casting the 15th vote than one can cast the deciding vote in an eight-to-seven vote.

It also makes no difference whether an official has unilateral authority over personnel decisions or whether he is one link in a bureaucratic chain of approvals. A typical example arises where a sub-committee conducts a search to fill a municipal position. The sub-committee's preferred

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[3/] See, e.g., In the Matter of Rita Walsh-Tomasini, 1984 SEC 207 (school committee woman violated §19 by hiring her son as her staff assistant; resolved with a $1,000 fine and son resigning). In the Matter of George Ripley, 1986 SEC 307 (state Commissioner of Labor and Industries violated §6 by hiring two daughters; resolved by paying $2,000 fine and both daughters resigning).

list of candidates is then narrowed down by the full search committee and the candidate is ultimately chosen by a city council. A public official with a family member in the pool of candidates cannot participate in the sub-committee's search, the full committee's approval of a list of candidates, or the city council's final decision.[4]

In addition to hirings, any significant involvement in the reappointment, promotion, reclassification, demotion, or firing of an immediate family member is prohibited. A public official may not participate in a job performance evaluation of an immediate family member because such evaluations play a critical role in job retention, promotion, and other job-related benefits of financial interest to the employee.

The Commission also views day-to-day active supervision as constituting personal and substantial participation.[5] The process by which employees are retained or fired, promoted or demoted, or granted or refused step increases is not merely a function of a formal personnel evaluation. Realistically, those decisions are based on the supervisor's cumulative impressions derived from his day-to-day supervision of the employee. Therefore, while there may be exceptions, day-to-day supervision of a family member is barred because it is an integral part of the evaluation process.

Determining a family member's salary is barred. The prohibition includes approving or authorizing discretionary salary increases such as annual step increases even though

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[4] See, generally Graham v. McGrail, 370 Mass. 133 (1976). As the Court advised, participation involves more than just voting, but includes any significant involvement in the discussion or other matters leading up to the vote. The Court suggested that generally the best course would be to leave the room when a matter involving a family member's financial interest arises.

[5] Active supervision is distinguished from those situations where the public official has official responsibility for his family member as a public employee, but does not directly participate in dealing with his family member. A typical example would be where the head of a large agency oversees several divisions but delegates the supervision of each to a division chief, and the division chief supervises the family member.

they may be thought of as "automatic".[6]

Finally, a subordinate may not advise or recommend to his employer a personnel decision in which the subordinate's immediate family member has a financial interest.[7]

DELEGATION

A public official is prohibited not only from participating in personnel decisions affecting his family member, but also from delegating the authority to a subordinate. Because the official is in a position to choose and influence the person most likely to favor his family member, the choice of who will make the decision is an important part of the overall hiring decision. [8]

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[6] By law, step increases may be withheld by a department head. See, G.L. c. 30, §46(c)(3), and c. 35, §54 for state and county employees, respectively.

[7] This should be distinguished from the situation where someone in a different division in the same agency or someone outside of an agency gives a recommendation or reference regarding a candidate for a job. For example, a municipal planning board member who called a supervisor in the Department of Public Works to recommend a family member for a DPW job would not be participating personally and substantially in the hiring decision. Similarly, a state official may recommend some one to another state agency for a job if this is done without placing improper pressure on the state agency. Section 23 concerns could arise, however, if pressure is or appears to be exerted. Indeed, an outsider's recommendation can involve such substantial pressure on an agency as to be deemed personal and substantial participation by the outsider, thereby, violating §6. In the Matter of James Craven, 1980 SEC 17.

[8] The Commission recognizes that this is a difficult issue, because a family member's financial interest may or may not be affected by the choice of who will make the decision. Nevertheless, because it is not practical to determine which delegations are proper and which are not, and because such delegations can play a critical role in the hiring process, the Commission has determined that any such delegations constitute personal and substantial participation.

DISCLOSURE AND AUTHORIZATION

Since a public official cannot participate in personnel decisions affecting a relative, what action, if any, should he take when faced with a potential nepotism situation? The answer depends on the position the official holds, because the conflict of interest law treats state and county officials differently depending on whether they are elected or appointed. The law also treats local appointed officials differently from state and county appointed officials.

State and County Appointed Officials

For state and county appointed officials, the rule is quite specific: if their duties would otherwise require them to participate in a particular matter in which a family member has a financial interest, they must disclose all of the relevant facts to their appointing authority and the Commission, and the appointing authority must then decide whether to undertake the function himself, assign it to someone else, or allow the official to participate. If the appointing authority decides to authorize the public official to participate, he must do so explicitly in writing, and a copy of that authorization must be submitted to the Commission.

Municipal Appointed Officials

In contrast, under the conflict law, municipal officials may abstain from participating in the matter and thereby avoid any violation. They do not have to disclose to anyone that they are abstaining. Alternatively, they may seek the authorization from their appointing authority to participate, but the authorization must be granted in writing. Copies of the request and the authorization do not have to be filed with the Commission but they must be available for public inspection.

Elected Officials

Because elected officials do not have an appointing authority, they cannot take advantage of the disclosure and authorization provisions available to appointed officials. There is no statutory mechanism which permits their participation without violating the statute, and, therefore, they must abstain from participation.

ACTION BY SUBORDINATES

The one remaining issue is whether an elected official (or an appointed municipal official who chooses not to seek an authorization to participate) may abstain from the process entirely and have a subordinate handle the hiring (or other personnel) decision. This situation is distinguishable from the delegation of a hiring decision by an elected official. As indicated above, delegation is prohibited. The question is whether the elected official may simply abstain and, without providing any direction, leave to the subordinate the decision to hire (or promote, etc.) the family member.

The question of whether the subordinate has the authority to perform the duty in place of his superior is not addressed by the conflict of interest law. The answer must be determined by interpreting the statute which creates the principal official's position, and, specifically, any language which might provide a mechanism permitting a subordinate to act following the "disability" (whether physical, mental, or otherwise, including a conflict of interest) of the principal official.

A review of many such statutes reveals no consistent rule indicating when such authority may be exercised by a subordinate. Accordingly, any response the Commission will give to a request for an opinion on how the conflict of interest law will apply where an elected official abstains and a subordinate seeks to hire will be conditioned on the official's obtaining an opinion as to the legality of the personnel action by the subordinate. State officials should request such an opinion from the attorney general; municipal employees from the town or corporation counsel; and county employees from the legal counsel for the county.[9]

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[9] Even in those instances where a law authorizes a subordinate to assume the hiring role, two significant issues arise under §23 of the conflict law. First, the subordinate may not use his position to secure an unwarranted privilege for the applicant, i.e. hire the family member because of his relationship rather than his qualifications. If the subordinate so hired an unqualified family member, he would violate §23(b)(2).

Secondly, where the subordinate hires his supervisor's family member and where the subordinate serves at the pleasure of his supervisor, the question inevitably arises whether the subordinate can realistically make an objective decision regarding the family member. It would seem

ENFORCEMENT POLICY

Until the Supreme Judicial Court concluded in August, 1983 that §§6, 13 and 19 prohibited nepotism, there was, in the Commission's view, legitimate uncertainty as to whether those sections did apply to nepotism conflicts.

In exercising its enforcement discretion, the Commission has, as a matter of fairness, given deference to this uncertainty when the primary violation, the hiring, has occurred prior to the 1983 Supreme Judicial Court decision. Thus, the Commission has resolved numerous nepotism violations involving hirings prior to August 1983 with confidential letters apprising the public official of the violation. Similarly, when the hiring has occurred prior to August 1983, but additional violations involving promotions or salary increases involving the same family member have occurred thereafter, the Commission, again as a matter of

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difficult, or nearly impossible, to avoid the appearance of a lack of objectivity. Thus, a problem is created under §23(b)(3), which prohibits an official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can unduly enjoy his favor in the performance of his official duties.

Under a 1986 amendment to §23(b)(3), any such conclusion will be deemed unreasonable if the subordinate discloses in writing to his appointing authority, or if no appointing authority exists (or, of course, if the appointing authority is the same person who was originally disqualified), discloses publicly that he is making a decision affecting his supervisor's immediate family member.

Public disclosure is not defined in the conflict law, although the statute makes it clear that all c. 268A disclosures must be made in writing. In fulfilling its function to interpret the statute, the Commission has determined that for state and county officials, this written public disclosure should be made to the Commission, where such disclosure will be a matter of public record. For municipal officials, the disclosure should be made, again in writing, to the city or town clerk.

fairness,[10] has resolved these cases in the same confidential manner.

When the family member is still in the official's employ, the Commission has explained the conditions which must be met if the person is to remain an employee. If an appointed official is involved, he must inform his appointing authority and the appointing authority must decide how the situation should be resolved. If the official is elected, the Commission has sought to identify an independent "appointing authority" to make the same determination. For example, county commissioners have been designated to perform ongoing supervisory functions or make promotion decisions regarding an elected county official's immediate family member.[11] The Commission will generally follow this approach as to any nepotism violation which took place prior to the date of this advisory if the original hiring was before August 1983. These situations will be resolved with confidential letters.[12]

The fairness considerations which dictate confidential resolutions of nepotism violations occurring prior to August 1983 are not present for violations occurring after that date. These will be handled, as are all other c. 268A violations, on a case-by-case basis within these general guidelines: The more serious nepotism violations e.g. hiring, promotions and substantial salary increases, will be resolved publicly with fines and, where appropriate, action seeking resignation or rescission of the personnel actions involved. Less serious violations may be appropriate for public resolution without a fine, or if sufficiently minor, with a confidential letter.

10/Typically those situations involved a family member who was hired years prior to 1983, who was promoted or received salary increases prior to 1983, and then received a promotion, salary increase, or was being supervised by the public official after 1983 as well.

11/In resolving such violations, the Commission will insist that ongoing personnel decisions be made by an independent appointing authority, if one can be identified, rather than allowing abstention and the assumption of those duties by a subordinate.

12/Especially egregious circumstances may require public resolution and a fine.

CONCLUSION

This advisory highlights the most common nepotism violations. An advisory cannot deal with every possible situation and indeed, may raise as many questions as it answers. The Commission encourages public officials and employees at all levels of government to seek advice from the Commission as to how the law applies to their own situations.

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The Commission issues Commission Advisories periodically to interpret various provisions of the conflict of interest law. Advisories respond to issues which arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. Copies of this Advisory and other Advisories are available from the Commission office.

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Editors note: We have used the generic pronoun "he" throughout the advisory for ease of reading.

THE COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108
727-0060

MEMORANDUM

TO: City Councillors & Selectmen
FROM: Lee Regan, Director of Public Education
RE: Nepotism Advisory
DATE: December 15, 1986

Attached is an Advisory concerning the conflict law's prohibition against nepotism and the Ethics Commission's enforcement policy regarding nepotism violations.

As the advisory points out, historically there has been some confusion concerning nepotism and whether it constitutes a violation of the law. In 1983, the Supreme Judicial Court concluded that the conflict law does indeed prohibit public officials from acting on any matter (hirings, promotions, pay raises, etc.) in which immediate family members have a financial interest.

We trust this advisory will clear up most, if not all, of the remaining questions and ambiguity surrounding this important prohibition in the law.

We urge you to take the time to look over this policy, and call the Commission's Legal Division at 727-0060 with any questions you may have.

Please pass this advisory along to other public officials and departments in your city or town.

4. S-674

Comm. from Lee Regan, Dir. of Education, State Ethics Commission, transmitting an advisory on the conflict of interest law's prohibition of nepotism & enforcement policy of nepotism violations.

In City Council,

December 15, 1986

Placed on File
Copy to all Councillors

Copies sent to all Councillors in their Friday packages 12/19/86 mh