DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

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MEMORANDUM

TO: Deputy Ethics Counselors
Ethics Coordinators

FROM: Edgar M. Swindell
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SUBJECT: Nepotism and Related Favoritism Provisions

Introduction

The purpose of this memorandum is to provide guidance on the law governing nepotism and other forms of favoritism on behalf of relatives in the federal workplace. Nepotism refers generally to the granting of favor to a person related by affinity or consanguinity within a specified degree of relationship to the individual who possesses the authority to recommend or confer a workplace benefit or advancement.[1] More particularly, in the government context, nepotism refers to the prohibited personnel actions of certain public officials in appointing, or advocating for the employment or promotion of, immediate blood or marital relatives to a position in the same agency in which the appointing official or advocate serves or over which the official exercises jurisdiction or control.

Participating in government employment decisions that affect the financial interests of certain relatives or that involve relatives as parties, or using public office to provide an advantage to relatives, even where not strictly nepotism, is proscribed under criminal conflict of interest statutes, ethical conduct standards, and merit systems principles. The following discussion will focus on the technical elements of the nepotism statute and conclude with an overview of these additional restrictions.

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[1] Derived from the Latin *nepos* meaning nephew, nepotism refers historically to the appointment of relatives to high clerical office in the Middle Ages. During the Renaissance, the first formal restrictions on nepotism originated as ecclesiastic reforms. *See* Richard D. White, *Consanguinity by Degrees: Inconsistent Efforts to Restrict Nepotism in State Government*, 32 State & Loc. Gov't Rev. 108, 109 (2000); Anna Giattina, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 Wayne L. Rev. 1111 (1987); Joan G. Wexler, *Husbands and Wives: The Uneasy Case for AntiNepotism Rules*, 62 B.U. L. Rev. 75, n. 14 (1982).

Discussion

The statutes and regulations that address nepotism and other forms of favoritism on behalf of relatives are complex, but effectuate the central objective that federal employees must not use their official authority to provide a preference or advantage to their kin. As described more fully below, the applicable provisions vary as to the individuals and positions covered, the actions proscribed, the exceptions allowed, and the penalties prescribed. Conduct that complies with one provision may nevertheless run afoul of another. On the other hand, certain workplace situations involving relatives are not restricted at all. For example, there is no blanket prohibition barring spouses or other close relatives from working for the same agency.[2] Similarly, as a technical matter, an employee can work in an organization managed by a relative, provided that the manager recuses from personnel-related activities,[3] such as performance evaluations or bonus determinations, involving the subordinate relative.[4] In other words, the substantive prohibitions focus on the conduct of supervisors with respect to their relatives rather than the existence on paper of supervisory status within the organizational structure.[5]

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[2] Office of Government Ethics Informal Advisory Opinion 97 x 5 (March 25, 1997).

[3] The resultant disqualification of the supervisor from personnel actions involving the relative often results, as a practical matter, in the transfer of one party or the other. Where it is not feasible to transfer or reassign an employee from the organizational supervision of a relative, organizations often institute policies that require personnel decisions regarding the lower level employee to be made higher in the chain of command above that of the higher level employee involved. *See, e.g.*, National Institutes of Health (NIH) Policy Manual § 2300-310-1, "Nepotism," ¶ F.3. (1998). An alternative is to arrange a reporting relationship outside the affected organizational unit. *Id.* at ¶ G., "Restructuring Reporting Relationships."

[4] *Clement v. Madigan*, 820 F. Supp. 1039 (W.D. Mich. 1992) (federal employee not prohibited from merely supervising a relative who was "appointed" or "employed" by another federal employee).

[5] *Martin v. Department of Commerce*, 106 M.S.P.R. 23 (2007) (absent proof that supervisor was actually involved in the hiring process, supervisor's maintenance of direct authority over subordinates involved in handling personnel action "did not, standing alone, constitute any of the actions ... necessary to violate the statutes which prohibit nepotism with respect to federal employment"). Noting that the Federal Personnel Manual (FPM), which was abolished on December 31, 1993, remained useful guidance in appropriate circumstances, *Drury v. Office of Personnel Management*, 79 M.S.P.R. 493 (1998), the Merit Systems Protection Board (MSPB) observed that the FPM, Chapter 310, Subchapter 1-3(b)(1) (1988), specifically provided that "the relative of a public official may be appointed by a subordinate of the official if the official is in no way involved in the action and if the agency concerned has no regulations prohibiting such employment."

Statutory Prohibition. The anti-nepotism statute, 5 U.S.C. § 3110, prohibits government officers and employees who are vested with or delegated certain personnel authorities from hiring or promoting, or advocating the employment or advancement of, their relatives. The statute was enacted by Congress in 1967 primarily in an attempt to eliminate hiring practices occurring in small post offices that revolved around familial relationships.[6] The statute reads, in relevant part:

> A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

5 U.S.C. § 3110(b).

Statutory Definitions. The statute proscribes conduct by "public officials," defined as follows:

> "public official" means an officer (including the President and a Member of Congress), a member of the uniformed service, an employee and any other individual, in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals, or to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency.

5 U.S.C. § 3110(a)(2).[7]

The term "relative" applies to individuals within the following degrees of familial relationship:

> "relative" means, with respect to a public official, an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first

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[6] Postal Rates and Federal Salaries Act of 1967, Pub. L. No. 90-206, Title II, § 221(a), 81 Stat. 613, 640 (1967); 113 Cong. Rec. 28,658 (1967) (statement of Rep. Neal Smith).

[7] The statute, by its terms, does not apply to a lower level employee who merely recommends a relative to a superior or other decision-maker if that employee does not possess nor has been delegated the authority to recommend individuals for hire or advancement. *See Clement, supra* at 1046 (individual designated to act temporarily in a supervisory capacity over a relative in the absence of the unit supervisor is not a "public official," absent evidence that temporary supervisor was in fact vested with or delegated the authority to "appoint, " "employ," "promote," or "advance" other employees).

> cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

5 U.S.C. § 3110(a)(3).

An "agency" refers to: (1) an Executive agency; (2) an office, agency, or other establishment in the legislative or judicial branches; and (3) the government of the District of Columbia. 5 U.S.C. § 3110(a)(1). An "Executive agency" means an "Executive department, a Government corporation, and an independent establishment."[8] 5 U.S.C. § 105. The Department of Health and Human Services is an "Executive department." 5 U.S.C. § 101.

The verbs "appoint, employ, and promote" and their corresponding noun forms are readily understood within the context of federal personnel law. The statute, however, does not elaborate on the terms "advance" or "advancement;" nor does the law delineate the precise conduct embodied in the verb "advocate."[9] The statute does not define a "civilian position," but would

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[8] *See Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993) (court observes that the President would be barred by section 3110 from appointing a sibling to a Cabinet position at an Executive department, while noting that the statute might not prevent the appointment of presidential relatives to staff positions in the White House or the Executive Office of the President because these entities may not constitute "agencies" within the meaning of the statute).

[9] Prior to changes made in 2005, Office of Personnel Management (OPM) regulations concerning the employment of relatives provided that a public official "advocates" for the employment or advancement of a relative if the public official recommends a relative to, or refers a relative for consideration by, a subordinate public official, i.e., an official with prescribed or delegated authority to effect personnel actions who stands lower in the chain of command. 5 C.F.R. §§ 310.102(b), (c), and 310.103(c) (2004). Relying upon this regulatory "definition" of the term "advocacy," the Merit Systems Protection Board in *Alexander v. Department of the Navy*, 24 M.S.P.R. 621, 624-25 (1984), reversed the suspension and reduction-in-grade taken against a supervisor who had sent his daughter's SF 171 employment application to a colleague in another office of his agency, who was then hiring staff, because the materials had not been forwarded to a *subordinate* for consideration.

In the same opinion, the Board stated that "these regulations [then at 5 C.F.R. §§ 310.101-310.103, *see* 33 Fed. Reg. 12418 (1968)] are promulgated under the general authority of 5 U.S.C. § 1104, which authorizes the Director of OPM to prescribe regulations and ensure compliance with the civil service laws," adding that "[e]xcept for the emergency exceptions contained in §§ 310.201-202, OPM has no authority to interpret or to regulate under 5 U.S.C. § 3110." After observing that the then regulations in 5 C.F.R. § 310.103 did not implement the anti-nepotism statute, the Board did not explain why the conduct would not

appear to apply broadly to any non-military position in an agency of the Federal Government.[10]

Exceptions. The statute authorizes OPM to prescribe regulations authorizing the temporary employment of relatives, in certain conditions, notwithstanding the restrictions. 5 U.S.C. § 3110(d). The OPM regulations allow temporary employment of relatives for not to exceed 30 days "when necessary to meet urgent needs resulting from an emergency posing an immediate threat to life or property, or a national emergency." 5 C.F.R. § 310.102. The appointment may be extended for a second 30-day period if the emergency need continues. *Id.*

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constitute "advocacy" under the statute which makes no distinction with respect to whether the recipient of the advocacy is a superior, subordinate, or colleague of equal rank. As part of its "plain language rewrite" of the regulations governing the employment of relatives, OPM removed all substantive provisions, except the emergency exception. 70 Fed. Reg. 20457 (April 20, 2005). The remaining provision simply states that "section 3110 of title 5, United States Code, sets forth the legal restrictions on the employment of relatives." 5 C.F.R. § 310.101.

[10] The statute, by its terms, does not apply to the appointment of individuals to the uniformed services, although a "member of the uniformed service" is included in the definition of a "public official" who is barred from acting or advocating with respect to the employment or advancement of relatives. The "uniformed services," comprised of the armed forces and the commissioned corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA), are expressly excluded from the definition of "civil service," which otherwise encompasses "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States." 5 U.S.C. § 2101.

Absent a financial conflict of interest within the meaning of 18 U.S.C. § 208, or the application of the Standards of Ethical Conduct regulation at 5 C.F.R. § 2635.502, which precludes participation in specific party matters that affect the financial interests of a household member or that involve certain relatives as a party or representative of a party, the appointment or recommendation of relatives by a public official to a position in the Public Health Service Commissioned Corps would appear to be unregulated. The merit systems principles and prohibited personnel practices enunciated in 5 U.S.C. §§ 2301 and 2302 embody, for the most part, protections for the career civil service. *See* 5 U.S.C. § 2302(a)(2)(B) (definition of "covered position").

Members of the Commissioned Corps are appointed and compensated under 42 U.S.C. § 204 without regard to the civil service and classification laws, but the appointment process is subject to detailed and exacting standards delineated in 42 C.F.R. Part 21, and an officer's commission may issue only upon nomination by the President and confirmation by the Senate. This process presumably would screen for any recommendations predicated on favoritism rather than merit, although the Division of Commissioned Personnel, Program Support Center, reports no specific policies or provisions relating to nepotism.

In addition, the anti-nepotism statute permits the appointment in the competitive service of a relative who is preference eligible[11] if: (1) the individual's name is within reach for selection from an appropriate certificate of eligibles; and (2) an alternative selection cannot be made from the certificate without passing over the preference eligible and selecting an individual who lacks the hiring preference. *See* 5 U.S.C. § 3110(e).

Penalties. Within the executive branch, the anti-nepotism prohibitions are enforced against the "public official" as a "prohibited personnel practice" in violation of merit systems principles that bar, among other actions, exhibiting personal favoritism and granting any preference or advantage not authorized by law. 5 U.S.C. §§ 2301, 2302(b)(6), (7). Disciplinary actions may be initiated by agency management or sought independently by the United States Office of Special Counsel (OSC) in proceedings before the MSPB. 5 U.S.C. §§ 1214(a)(1)(A), 1215(a)(1) and 1216(a)(4).

The full array of disciplinary options is available, and the MSPB has approved penalties for nepotism violations that range from a fine to dismissal. *See Special Counsel v. Hove*, 46 M.S.P.R. 1 (1990) (approved settlement of $750 civil penalty); *Welch v. Department of Agriculture*, 37 M.S.P.R. 18 (1988) (sustained reassignment and 60 day suspension of high level supervisor with many years of government experience who "should have been aware of the seriousness of and prohibition against acts of nepotism"); *Special Counsel v. Ponce*, 29 M.S.P.R. 385 (1985) (approving 14 day suspension); *Rentz v. U.S. Postal Service*, 19 M.S.P.R. 35 (1984) (held penalty of removal is within the limits of reasonableness for sustained charge of nepotism).

The penalty for the individual appointed, employed, promoted, or advanced in violation of the statute is that the individual may not be appointed or promoted and is "not entitled to pay." 5 U.S.C. §§ 3110(b), (c). Hence, removal from federal service or revocation of a promotion or bonus may result. Moreover, no money may be expended from the Treasury to pay such individual.[12] 5 U.S.C. § 3110(c). As a consequence, liability for improper payment may lie for accountable officers responsible for the certification or disbursement of federal funds. *See* U.S.

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[11] The term "preference eligible" refers to certain veterans and their specified relatives who are entitled to additional rating points in connection with an examination for entrance into the competitive service. 5 U.S.C. §§ 2108(3), 3309.

[12] An individual appointed in violation of the anti-nepotism provision is not entitled to unpaid compensation or payment for accrued annual leave and must refund wages already received because the individual cannot be regarded as either a *de facto* or *de jure* employee. General Accounting Office, B-186453, May 2, 1977. However, repayment of the erroneous salary payments may be waived under 5 U.S.C. § 5584 if there is no indication that the individual was at fault in the matter. The individual is entitled to retain payment of travel expenses received and to payment of unpaid travel expenses because § 3110 applies only to pay or compensation. B-204266, April 22, 1982.

General Accounting Office, *Principles of Federal Appropriations Law*, vol. 2, ch. 9 (3d ed. 2006).[13]

Related Criminal, Ethics, and Personnel Provisions. Government officers and employees may be held criminally liable under the conflict of interest statute, 18 U.S.C. § 208, for taking, or participating personally and substantially in, official actions that have a direct and predictable effect on the financial interests of their spouse or minor children (such as hiring decisions, performance evaluations, bonus determinations, or promotion recommendations). *See United States v. Lund*, 853 F.2d 242 (4th Cir. 1988) (court held that government may prosecute a federal employee under 18 U.S.C. § 208(a) for granting his spouse, who was a subordinate, a salary increase, selecting her over another applicant for promotion to a higher-paying position, and recommending her for government-funded graduate school).

Another criminal statute, 18 U.S.C. § 205, bars an employee from acting, other than in the proper discharge of official duties, as an "agent or attorney" for anyone before the government in connection with any covered matter in which the United States is a party or has a direct and substantial interest. This anti-representation statute may be implicated if the employee's conduct with respect to personnel actions involving relatives rises to the level of advocacy that is beyond a statement of personal opinion or recommendation relating to the ability, aptitude, qualifications, and character of the individual.[14] Moreover, practicing nepotism would not be a "proper discharge of official duties."

The Standards of Ethical Conduct regulations issued by the Office of Government Ethics also prohibit a federal employee from participating in any particular matter involving specific parties that directly and predictably affects the financial interests of a household member (irrespective of a familial relationship) or that merely involves a household member or a relative with whom the employee has a close personal relationship as a party or representative of a party (irrespective of

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[13] Although useful sources on appropriations matters, the opinions and legal interpretations of the Comptroller General and the General Accounting Office (now the Government Accountability Office) are not binding upon departments or agencies of the executive branch. *See Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986); *Implementation of the Bid Protest Provisions of the Competition in Contracting Act*, 8 Op. O.L.C. 236, 246 (1984).

[14] The anti-representation statutes, 18 U.S.C. § 203 (compensated) and § 205 (uncompensated), contain parallel exceptions, subject to approval by an employee's appointing official, that permit an employee to act as "an agent or attorney for, or otherwise represent, the employee's parents, spouse, child, or any person for whom, or for any estate for which, [the employee] is serving as a guardian, executor, administrator, trustee, or other personal fiduciary," except in those matters in which the employee has participated personally and substantially or that are the subject of the employee's official responsibility. 5 U.S.C. §§ 203(d), 205(e).

financial impact).[15] 5 C.F.R. § 2635.502. Thus, as practical matter, actively supervising a subordinate household member or close relative would be difficult, if not impossible, given that the quotidian responsibility of making each work assignment may entail official participation in multiple specific party matters that would involve the household member or relative as a party.[16] Moreover, even in a non-supervisory context, the Standards of Ethical Conduct limit the ability of any employee whose official duties would affect the financial interests of a relative from taking actions that would give rise to an appearance of using the employee's public office for the private gain of another or of giving preferential treatment. 5 C.F.R. § 2635.702(d). In such cases, the employee must comply with the applicable requirements for disqualification specified in § 2635.502. These provisions are highly dependent upon the facts in each case and could reach, for example, job recommendations for relatives other than those with whom the employee has a close personal relationship, if the recommending employee occupies a position with personnel-related duties or otherwise invokes his or her official authority.

Another restriction on nepotistic conduct derives from the merit principle embodied in 5 U.S.C. § 2301(b)(1) that selection and advancement for "covered positions" within an executive branch agency "should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."[17] The term "covered position" for these purposes includes "any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service," with the exception of those positions: (1) excepted from the competitive service because of the "confidential, policy-determining, policy-making, or policy-advocating character" of the position (Schedule C appointees); or (2) specifically excluded from coverage based on a presidential determination of necessity. 5 U.S.C. § 2302(a)(2)(B).

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[15] As a technical matter, this provision is not invoked unless a "reasonable person with knowledge of the relevant facts would question the employee's impartiality" in handling a matter affecting a household member's financial interest or involving a person with whom the employee has a "covered relationship." 5 C.F.R. §§ 2635.502(a) and (b)(1)(ii). In most cases involving household members or close relatives, this predicate is assumed to exist and, therefore, would trigger the requisite recusal, absent an authorization.

[16] The severity of these rules may, in certain circumstances, be addressed by consideration of either a waiver under 18 U.S.C. § 208(b) or an authorization under 5 C.F.R. § 2635.502(d). These management determinations must be made, respectively, by an appointing official or an agency designee based on specific legal criteria and a case-by-case evaluation of relevant factors. *See* 5 C.F.R. Part 2640 and 5 C.F.R § 2635.502(d)(1)-(6).

[17] Certain Government corporations and executive branch agenices engaged in foreign intelligence or counterintelligence activities, such as the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and others, are excluded from the definition of "executive agency." 5 U.S.C. § 2302(a)(2)(C).

The fundamental principle that "personnel actions" in the civil service should be based on merit is enforced through several provisions that codify "prohibited personnel practices." The term "personnel action" encompasses:

> (1) an appointment;
> (2) a promotion;
> (3) a disciplinary or corrective action;
> (4) a detail, transfer, or reassignment;
> (5) a reinstatement;
> (6) a restoration;
> (7) a reemployment;
> (8) a performance evaluation;
> (9) a decision concerning pay, benefits, or awards, or concerning certain education or training opportunities;
> (10) a decision to order psychiatric testing or examination; and
> (11) any other significant change in duties, responsibilities, or working conditions.

5 U.S.C. § 2302(a)(2)(A).

Among other prohibited personnel practices, the law specifies that:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority–
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> * * *
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> (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
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> (7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of ... title [5]) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of ... title [5]) or over which such employee exercises jurisdiction or control as such an official; ...

5 U.S.C. § 2302(b).

As a consequence of the foregoing, conduct that favors a relative other than those enumerated in the anti-nepotism statute could come within the ambit of subparagraph (b)(6) as an unauthorized preference or advantage.

Conclusion

In sum, the provisions described in this memorandum attack the problem of nepotism through various legal means—specific statutory and regulatory prohibitions, financial conflicts of interest, anti-representation rules, appearances of impropriety, use of public office for the private gain of others, and prohibited personnel practices. The disparate approaches vary as to coverage and other details. Understanding these distinctions is critically important in determining the means of enforcement and ensuring success on appeal. When an employee is charged with violating a specific statute or regulation and challenges the disciplinary action, the MSPB will hold the agency to proving the precise elements of each violation. Accordingly, due to the complexity of this topic, advice on individual cases should be sought.

Please contact the Ethics Division at (202) 690-7258 if you have questions concerning nepotism and the related ethics provisions. The General Law Division at (202) 619-0150 should be consulted concerning personnel practices and disciplinary actions.

cc: The General Counsel
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