General Commission Advisory No. 2009-1: Nepotism

I. Nepotism Generally

Nepotism, that is, the taking of official actions that have an impact upon family/household members, is prohibited by the Code of Ethics ("Code"). The Code contains both general prohibitions against nepotism and various specific rules, primarily in regards to employment, budgets, and collective bargaining. These prohibitions apply regardless of whether a family or household member is objectively the most qualified candidate for a job, or is deserving of promotion.

While some personally may believe that they can fairly assess their family members or take actions involving their family members without in any way favoring them, the Code strictly prohibits such activities. The policy underlying this approach recognizes that it is difficult for any person to be truly objective when considering matters impacting family/household members and, additionally, furthers the constitutionally founded goal of avoiding the appearance of impropriety. See R.I. Const. art. III, § 7.

While there are a number of different provisions within the Code of Ethics that address persons subject to the Code and their official activities involving family/household members (see, *e.g.*, R.I. Gen. Laws §§ 36-14-5(a), (d), (g), (h), (i), 7(a) and Commission Regulations 36-14-5005 and 5009), the specific prohibitions targeting nepotism are primarily embodied in the more recently enacted Commission Regulation 36-14-5004. This regulation addresses the prohibitions on nepotism generally, as well as providing specific guidelines on issues such as involvement in the supervision and promotion of family/household members in the workplace, participation in budgets that have the potential to financially impact a family/household member, and participation in collective bargaining negotiations and contract ratification in situations where a family/household member is a union member.

II. Relationships Covered

Prior to determining exactly what prohibitions Regulation 5004 places on a public official or employee, the person subject to the Code must determine whether the family/household member in question falls within the pre-defined list of persons enumerated in section (a) of the regulation. It should be noted that section (a)(1) incorporates household members[1] into the prohibitions of the regulation. Section (a)(2) provides a detailed list of family members that fall within the parameters of the regulation.[2] Of note is the fact that the definition provided by section (a)(2) includes "in-laws."

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[1] Commission Regulation 36-14-5004(a)(1) defines "household member" as "a person having legal residence or living in a public official's or public employee's place of residence." Id.

[2] Commission Regulation 36-14-5004(a)(2) states that:

If the family member in question is not one included in subsection (a)(2), the prohibitions articulated in the regulation do not apply, and the official need go no further. See, *e.g.*, A.O. 2008-42 (opining that the child of the Petitioner's step-first cousin was not included within the definition of persons within his family as enumerated in Regulation 5004); A.O. 2007-49 (opining that the term "first-cousin-in-law," as used in Regulation 5004(a)(1), does not include the spouse of one's spouse's first cousin); A.O. 2007-47 (opining that the term "sister-in-law," as used in Regulation 5004(a)(1), does not include the female spouse of one's spouse's sibling); A.O. 2007-36 (opining that the Petitioner's live-in companion's daughter is not a person within his family for purposes of Regulation 5004).

If a person subject to the Code is uncertain whether the relationship in question is captured by the list provided, they can either call the Commission offices or request an advisory opinion, or both.

III. Prohibited Activities

A. General Prohibition

Regulation 5004 (along with other provisions within the Code) prohibits nepotism generally, including those actions which result in a direct monetary gain or loss to a family or household member of a person subject to the Code. Typical examples of such activities would be an official or employee's participation in any of the following: the hiring of a family/household member; the awarding of a contract for services or goods to a family/household member; any decision regarding a family/household member's property; the appointment of a family/household member to a financially remunerated position; the participation in a disciplinary matter in which a family/household member's employment is at risk. Of note is the fact that the prohibitions apply regardless of whether the family/household member experiences a financial gain or loss.

EXAMPLE:

A is a member of the Anytown Town Council. The Town has just released a Request for Proposals (RFP) for the construction of a municipal

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"**Any person within his or her family**" means, in addition to any other definition, any person who is related to any public official or public employee, whether by blood, marriage or adoption, as any of the following: spouse, father, step-father, father-in-law, mother, step-mother, mother-in-law, son, step-son, son-in-law, daughter, step-daughter, daughter-in-law, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, grandfather, step-grandfather, grandfather-in-law, grandmother, step-grandmother, grandmother-in-law, grandson, step-grandson, grandson-in-law, granddaughter, step-granddaughter, granddaughter-in-law, uncle, step-uncle, uncle-in-law, aunt, step-aunt, aunt-in-law, niece, step-niece, niece-in-law, nephew, step-nephew, nephew-in-law, first cousin, step-first cousin and first-cousin-in-law.

playground. B is A's nephew. B's construction company submits a bid in response to the RFP. A must recuse from all aspects of the bid selection process.

A is the Mayor of Anytown. B is A's step-niece. B applies to work as a summer office assistant in the Mayor's office. A may not select or hire B for the position.

A is a member of the Anytown Zoning Board. B is A's estranged parent. B has purchased property in Anytown with the intention of relocating his business there, but requires numerous variances prior to construction. A may neither vote to approve the variances nor deny them, as the prohibition applies regardless of whether the family/household member experiences a financial gain or loss.

While many provisions in the Code of Ethics focus on the financial impact of actions taken by public officials and employees, Regulation 5004 does not require a financial impact in order for actions involving a family/household member to be prohibited. Under subsection (b)(1) of the regulation, participation in any matter which involves a household member or family member as a party or participant is prohibited, regardless of whether or not there will be a resulting financial impact to the family/household member.

EXAMPLE:

A is a member of the Town Council in Anytown. B is A's son. Currently, Anytown prohibits the housing of pit-bulls within areas zoned residential. B seeks a hearing before the Anytown Town Council on an application for an ordinance amendment to allow for the housing of pit-bulls within residential zones. A must recuse when B's application is heard, because B will be a "party or participant" to his own application.

Similarly, subsection (b)(1) prohibits public officials from participating in matters that may bestow an employment advantage upon a family/household member. Such an advantage might not appear to be a direct financial gain for the official's family/household member but, rather, could be manifested as some type of opportunity (such as an educational or travel experience) or resource (such as access to enhanced technology) that the family/household member would not otherwise have had.

EXAMPLE:

A is on the Anytown School Committee. B is A's spouse. B is a teacher in the Anytown school district. Each school district in the state may send two teacher representatives to a state sponsored technology training that will teach Web page design, Power Point, database creation, etc. Each school principal in Anytown has forwarded to the School Committee the names of a pool of five teachers they recommend to be selected to go to the training

for final selection. B is one of the candidates who's name has been forwarded. A must recuse from the School Committee's selection process, because receipt of career training amounts to an employment advantage.

B. Supervision and Evaluation in Employment

Subsection (b)(2) of Regulation 5004 addresses the ongoing interactions of public officials and employees with family/household members in the workplace. Specifically, this subsection prohibits a person subject to the Code from supervising, appointing, evaluating, promoting, or disciplining a family/household member. This provision speaks to the heart of the historical abuses that nepotism has traditionally spawned, that is, the unfair bestowal of favorable treatment (such as promotions, raises, positive evaluations) on family/household members in the workplace.

***EXAMPLE*:**

A and B are married. A and B are both teachers at Anytown Elementary School. Neither A or B supervise each other, thus there is no violation of Regulation 5004 for them to both work as teachers in the same school. C is the daughter of A and B and has just been hired as a teacher's aide at Anytown Elementary. Neither A nor B may supervise or evaluate C.

A and B are both professors in the math department at Anytown University. As part of its promotion and tenure procedure, Anytown University has all faculty in each department conduct peer evaluations of one another as part of the annual departmental review process. Neither A nor B may complete peer evaluations of one another.

A is a member of the Anytown Town Council. B is A's cousin-in-law. The Town Council appoints members to the Anytown Zoning and Planning Boards. A may not participate in the nomination or appointment of B to the Zoning Board or Planning Board.

In addition to the prohibition against direct supervisory action that involves family/household members in the workplace, persons subject to the Code may not delegate their supervisory responsibilities over a family/household member to a subordinate. The prohibition against delegating supervisory duties over a family/household member to a subordinate stems from the notion that a subordinate will potentially feel pressured to treat their supervisor's family/household member differently than other employees for fear of employment retribution down the road.

***EXAMPLE*:**

A is the Police Chief in Anytown. B is A's granddaughter. B applies to enter the police force in Anytown. Ordinarily, as part of the application process, A, in her capacity as Police Chief, interviews the final candidates

and forwards her final recommendation for hiring to the Mayor, for the Mayor's approval. A is prohibited from interviewing B, nor may A delegate the responsibility to do so to any of her subordinates (a lieutenant, for example).

This subsection does allow the Commission to provide for exceptions in a written advisory opinion, but such exceptions are allowed only when authorized in advance by the Commission in circumstances in which all conflicts and appearances of impropriety have been properly minimized. For example, the Commission has allowed for "alternate chains of command" in the advisory opinion context, but such arrangements must be authorized in advance by the Commission and may not be presumed acceptable prior to the issuance of a duly-authorized advisory opinion.

C. Budgets

Subsection (b)(3) of Regulation 5004 outlines the nepotism prohibitions placed on public employees and officials in regard to budgets. Subsection (b)(3)(A) prohibits persons subject to the Code from participating in discussion or decision-making regarding budgetary line-items that impact the employment, compensation or benefits of family/ household members.

EXAMPLE:

A is on the School Committee in Anytown. B is A's daughter-in-law. B owns a private bus company that transports children to school sponsored sporting events, field trips, and academic competitions. A is prohibited from discussing or voting on any school budget line items regarding bussing.

Subsection (b)(3)(B) provides for an exception to subsection (b)(3)(A) in instances when, if approved in an advisory opinion from the Commission, the family or household member who may be impacted by a budgetary line-item is a member of a significant and definable class of persons and will not be impacted to any greater extent than any other similarly situated member of the class.

EXAMPLE:

A is on the City Council in Anycity. B is A's spouse. B is also one of three-hundred citywide non-unionized parks employees. A proposal has been made to provide life insurance to all parks employees. A wants to participate in discussion and voting on this line item, as she believes it is an unnecessary expense. A must request an advisory opinion, pursuant to subsection (b)(3)(B), in order to do so. If all parks employees would be similarly impacted by this line-item, the Ethics Commission could issue an advisory opinion allowing A's participation in discussion and voting regarding it.

Subsection (b)(3)(C) allows a public official, notwithstanding the prohibition in subsection (b)(3)(A), to vote on the approval or rejection of an entire budget. What this means practically is that, even if an official must recuse from the discussion of specific line items that may impact a family or household member, they will likely be able to vote to approve or reject the budge as a whole.

EXAMPLE:

> *A is a member of the Anytown Town Council. B is A's spouse. B is also a lieutenant in the Anytown Police Department. The Town Council approves the police department budget. A is prohibited from participating in the discussion or voting regarding specific line items in the police department budget that address or affect the employment of her spouse, but may participate in the overall vote to approve or reject the entire police department budget.*
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> *A is a member of the Anytown Town Council. B is A's step-granddaughter. B is also an employee of the Department of Public Works (DPW) in Anytown. The DPW has requested funding for new snow removal equipment. A may vote on the funding for new snow removal equipment, as it will not address or affect the employment compensation or benefits of B.*

D. Collective Bargaining and Contracts

Subsection (b)(4) of Regulation 5004 outlines the prohibition on public official's participation in collective bargaining negotiations and contract ratification in situations where the official's family/household member is also a member of the pertinent union's local bargaining unit.

Subsection (b)(4)(A) provides an absolute prohibition against a public official participating in contract negotiations which address the employment, compensation or benefits of a family/household member. What this means is that an official may not negotiate with a union local that represents his family/household member.

EXAMPLE:

> *A is on the Anycity School Committee. B is A's step-brother. B is also one of 150 maintenance workers in the Anycity school district and a member of Local 101 of the XYZ union. A is prohibited from participating in contract negotiations between the school district and Local 101.*

Notwithstanding the prohibition on an official's participation in contract *negotiations* with a bargaining unit that represents a family/household member, subsection (b)(4)(B) allows an official to vote on a finally negotiated employee contract or collective bargaining agreement if the family/household member is a member of a significant and

definable class and will be impacted to no greater extent than any other similarly situated member of the class.

EXAMPLE:

> *A is on the Anycity City Council. B is A's live-in domestic partner. B is also one of 300 administrative personnel in Anycity, who are represented by Local 101 of the ABC union. The City Council is about to enter into contract negotiations with Local 101. All members of Local 101 stand to be similarly impacted by the new contract. A is prohibited from participating in the contract negotiations, but may vote to approve or reject the already negotiated final contract as a whole.*

IV. Recusal

In most instances, when a public official or employee is faced with one of the nepotism related conflicts raised by Regulation 5004 or other pertinent provisions within the Code, recusal in accordance with R.I. Gen. Laws § 36-14-6 will prevent a person subject to the Code from violating its provisions. Accordingly, if an item is scheduled on the agenda of the agency of which the official is a member that involves or will somehow impact a family/household member, the official must recuse as soon as the agenda item is called, prior to the commencement of discussion or voting on the item. Furthermore, if an agenda item presents a conflict for an individual and is scheduled as part of an executive session, the person subject to the Code who has the conflict must recuse and leave the executive session until that agenda item has been completed.

Similarly, if a public employee finds him or herself in a position in which one of the prohibitions regarding family/household members is implicated, the employee must remove him or herself from the process immediately. Employees must not themselves unilaterally delegate a conflicted matter to a subordinate but, rather, must report the perceived conflict to an immediate supervisor, for that person to handle.

If uncertain whether any given situation presents a conflict, or whether a specific person falls within the definition of family/household member, a person subject to the Code may submit a written request for an advisory opinion, which outlines the particular facts of their circumstance in compliance with Regulation 36-14-1024. Persons subject to the Code who have questions regarding nepotism or any other potential conflicts of interest are encouraged to call the Commission offices with any questions at (401) 222-3790.

V. Topical Advisory Opinion Abstracts:

The following citations are to advisory opinions interpreting Regulation 5004 and are included to provide general information and guidance as to some of the types of issues previously raised in the advisory opinion context regarding nepotism. Be advised, however, that pursuant to Commission Regulation 36-14-1024, persons subject to the Code may not rely on advisory opinions issued to others. Additionally, individuals may

not request advisory opinions regarding other peoples' conduct; accordingly, persons subject to the Code may only request an advisory relative to the provisions of the Code which may affect themselves, and they may not ask for one on behalf of anyone else.

Alternate Chains of Command:
2008-54 (opining that the son of the Saylesville Fire District Fire Chief is prohibited from being employed as a firefighter in the Fire District, notwithstanding that the Fire Chief will not take part in the selection process, since no alternate chain of command exists to insulate the Fire Chief from apparent conflicts of interest)

2007-29 (opining that the son of the Chief of Police for the Town of East Greenwich is not prohibited from being employed as a community service officer, as specifically authorized by the Ethics Commission, provided that certain procedures are followed so that the Petitioner is removed from personnel decisions or matters that particularly affect his son financially)

Budgets:
2007-30 (opining that a member of the East Providence School Committee is prohibited by the Code of Ethics from participating in any budgetary line item relative to bus monitors, given that members of his family are employed by the School Department as bus monitors, but he may vote on the budget as a whole)

First Cousin-in-law:
2007-49 (opining that the wife of the Petitioner's wife's cousin is not the Petitioner's "first-cousin-in-law" as that term is used in Regulation 5004)

Participant or Party:
2009-2 (opining that the Petitioner, a member of the North Kingstown Planning Commission, need not recuse in matters in which the Planning Commission makes recommendations to the Town Council, notwithstanding the fact that her daughter is a new Town Council member, because, while Regulation 5004, subsection (b)(1) would require the Petitioner to recuse if her daughter appeared before the Planning Commission, it does not require her to recuse from voting to make a recommendation that will come before the Town Council. At the point in which the Planning Commission is voting to make a recommendation to the Town Council, no family member of the Petitioner is "a party or participant" in the matter)

Peer Evaluation:
2008-55 (opining that URI faculty members may not participate in the peer evaluation process as outlined in the Agreement Between the Rhode Island Board of Governors and the URI Chapter of the American Association of University Professors when the person under review is a family member or household member pursuant to Commission Regulation 5004)

School Committee and Teachers' Union:

2009-3 (opining that a member of the Chariho School Committee is not prohibited from participating in the School Committee's review of the current teachers' contract, notwithstanding the fact that her sister-in-law is a substitute teacher in the Chariho School system, given that substitute teachers would not be financially impacted because they are not included in the Chariho teachers' bargaining unit)

2008-44 (opining that a member of the Chariho Regional School Committee may not participate in contract negotiations between the School Committee and the Chariho teachers' union, given that her husband's first cousin is a member of the union)

Sister-in-law:
2007-47 (opining that the wife of the Petitioner's husband's brother is not the Petitioner's "sister-in-law" as that term is used in Regulation 5004)

Spouse Contracting with Municipality:
2008-71 (opining that a Warren Planning Board member, who is also the owner and operator of a trucking and excavating company, may submit a bid to perform services for the Town of Warren, notwithstanding the fact that his wife is a member of the Warren Town Council, provided that the contracts for such services are awarded through an open and public process, but noting that his spouse would be prohibited from voting on matters related to the Petitioner's company)

Spouse's Stipend:
2009-20 (opining that a member of the Tiverton Budget Committee may participate in Budget Committee matters regarding the School Committee budget generally, but must recuse from discussion and voting regarding School Committee members' stipends, given that his wife is a School Committee member who receives a stipend for her service)