

**STATE OF NEW HAMPSHIRE  
EXECUTIVE BRANCH ETHICS COMMITTEE**



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**Advisory Opinion**

**2008-001**

**Question Presented**

May a department head or other supervisor within a prospective employee's chain of command participate, directly or indirectly, in the hiring of a family member?

If it is determined that such employment is permissible, what, if any, limitations or obligations do the ethics statutes place on the department head or supervisor participating in the hiring process or supervision of their family member as an employee? If it is determined that such employment is not permissible, what effects, if any, would such a determination have on the department head, supervisor, or family member so hired?

**Summary Answer**

An executive branch official who serves as a department head or supervisor must recuse himself or herself from a hiring process when either a spouse or a dependent family member is a candidate for employment within the official's department.

Likewise, an executive branch official should not directly participate in any supervisory decisions regarding an employee who is a spouse or a dependent family member.

A department head or supervisor who violates the ethics statutes may be charged with a misdemeanor or may face disciplinary action. RSA 21-G:34. In the event that an individual who is a spouse or a dependent family member of a department head or supervisor is employed by the State in a process where the department head or supervisor

was improperly involved in the hiring decision, the ethics statutes do not impose a consequence on the person hired.

The ethics statute does not currently define other family relationships that may give rise to a conflict of interest under these circumstances.

### **Facts**

An individual who is a spouse or family member of an executive branch department head or supervisor seeks employment with the State in the department where the family member serves. Individuals who are members of the same family, some of whom are dependents, are employed by the same department of State government. Over time one family member may be promoted or transferred into a supervisory role over the other.

### **Legal Authority**

RSA 21-G:21, II; RSA 21-G:22; RSA 21-G:23; RSA 21-I:52

### **Analysis**

RSA 21-G:22 prohibits executive branch officials from participating “in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties.” This section therefore precludes hiring, promotion and supervisory decisions from being made with regard to a spouse or dependent.

The conflict of interest statute, RSA 21-G:22, requires executive branch officials to avoid conflicts of interest. A conflict of interest is a “situation, circumstance or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty.” RSA 21-G:21, II. Although the Legislature has not defined this further as it relates to non-dependent family members or spouses, the Committee recognizes there may be private interests other than pecuniary ones that could well come into consideration and violate the Ethics Code. For instance, if the family member hires their, brother or aunt out of loyalty or affection, they are allowing their private interest, their relationship with that individual, to interfere with their proper exercise of a public duty, in this case, of conducting a fair and impartial hiring process.

In describing the common law on conflict of interest, the New Hampshire Supreme Court has described the restriction as follows:

In New Hampshire the requisite personal interest has been defined as a pecuniary interest which is immediate, definite, and capable of demonstration; not remote, uncertain, contingent and speculative, that is, such ‘that men of ordinary capacity and intelligence would not be influenced by it.

*Marsh v. Town of Hanover*, 113 N.H. 667, 673 (1973)(internal citations and quotations omitted).

A spouse or dependent family member has a personal financial interest in employment. Therefore, a decision to fill a vacancy where the decision maker's spouse or dependent family member is a candidate for the position is a situation which has the potential to cause the private interest to interfere with the proper exercise of the public duty to select the most suitable candidate.

Once employed by the State, the spouse or dependent family member has a personal financial interest in retaining that job, obtaining pay increases, and promotions. Therefore, a supervisory decision to discharge or retain, to change compensation for, or to promote a spouse or dependent family member has the potential to cause the private interest to interfere with the proper exercise of the public duty to make supervisory decisions in the best interest of the people of the State.

A department head or supervisor is required by RSA21-G:22 not to participate in such hiring or supervisory decisions, therefore, recusal is required. Recusal means not participating in deliberations, making recommendations, giving advice, considering resumes or evaluations, or in any other way assuming responsibility for or participating in any aspect of the work or decision-making relating to filling the vacancy or supervising the spouse or dependent family member. Recusal from supervision will typically require establishing an alternative supervisor for the spouse or dependent family member. Likewise, because there may be a non-pecuniary conflict with other family members, the same process as discussed above should be utilized.

The ban on a department head or supervisor participating in the decision to hire or supervise a spouse or dependent family member does not bar that person from seeking or obtaining employment with the department. The Human Rights law, RSA chapter 354-A, prevents discrimination in employment based on marital status and discrimination generally based on familial status. While New Hampshire courts have not addressed the question, the Minnesota Supreme Court has found that an anti-discrimination statute very similar to RSA chapter 354-A prohibits enforcement of an employer's anti-nepotism rule. *Kraft v. State*, 284 N.W. 2d 386, 387 (Minn. 1979).

New Hampshire's legislature has not established an explicit anti-nepotism law. The United States and several states have adopted explicit anti-nepotism laws. 5 U.S.C. § 3110; Missouri Constitution Article VII §6; Louisiana LSA-R.S. 42:1119. These and other anti-nepotism statutes reflect significant policy choices with some limited to immediate family and others extending out to four degrees of consanguinity. Some prohibit only immediate supervisory relationships while others bar any form of employment within the same department.

RSA 21-I:52 prohibits the consideration of political considerations or the receipt of any other consideration in hiring, compensation, and promotion decisions to positions in the classified service. It does not apply to positions outside the classified service and it does not include familial relations as a prohibited consideration.

In light of the presence of the Human Rights statute and the absence of an explicit anti-nepotism statute, extending the prohibition on conflict of interest beyond a requirement of recusal for the department head or supervisory family member is a policy decision properly made by the legislature.

The misuse of position statute, RSA 21-G:23, prevents an executive branch official from using "his or her position with the state to . . . secure governmental privileges or advantages for others." Each time anyone is employed by the State some executive branch official has used his or her position to secure a governmental privilege, employment, for another. Until the legislature clarifies what improper conduct is necessary to make the securing of a governmental privilege for others unethical, it would be an unjustifiable conclusion that this statute prevents a department head or supervisor from participating in decisions regarding the employment or supervision of a family member.

A department head or supervisor who violates the ethics statutes may be charged with a misdemeanor or may face disciplinary action. RSA 21-G:34. Furthermore, departments are authorized by RSA 21-G:27 to establish supplemental ethical codes. Executive branch officials should review their department ethics code to determine if a more restrictive departmental anti-nepotism code applies.

### **Conclusion**

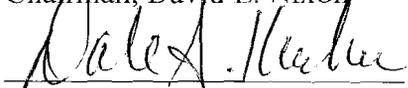
An executive branch official has a duty to recuse himself or herself from the selection of a candidate to fill a vacancy when his or her spouse or dependent family member is a candidate for the position. An executive branch official also has a duty to recuse himself or herself from supervising a spouse or dependent family member.

Although RSA 21-G:30, I (c) only addresses spouse and dependents, the Committee recognizes that other family relationships could present conflicts as well with respect to non-pecuniary interests. The Committee does urge those individuals with hiring and supervisory authority to be mindful of the possible appearance of impropriety or a conflict of interest when dealing with hiring and supervision involving family members.

This Advisory Opinion is issued by the Executive Branch Ethics Committee on April 2, 2008, pursuant to RSA 21-G:30, I (c).



Chairman, David L. Nixon



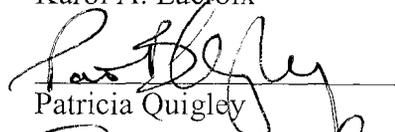
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