S T A T E O F T E N N E S S E E
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Opinion No. 12-61

Application of the Tennessee State Employees Uniform Nepotism Policy Act

QUESTION

Whether the internal management structure at a district public defender's office would remove the district public defender's brother-in-law from the "direct line of supervision" such that his employment at the public defender's office would not violate the Tennessee State Employees Uniform Nepotism Policy Act of 1980, codified at Tenn. Code Ann. §§ 8-31-101 to -107 (hereinafter "the Nepotism Act").

OPINION

No. In the fact situation presented, the Nepotism Act precludes a district public defender from employing his or her brother-in-law as an investigator for the district public defender's office.

ANALYSIS

This opinion request addresses the application of Tennessee's Nepotism Act, codified at Tenn. Code Ann. §§ 8-31-101 to -107, to public defender's offices created under Tenn. Code Ann. §§ 8-14-201 to -212.[1] These public defender's offices are governmental entities as defined by Tenn. Code Ann. § 8-31-102(1), and their employees are state employees under Tenn. Code Ann. § 8-31-102(3).[2] As state employees these employees are covered by Tennessee's Nepotism Act, which states in pertinent part:

[1] This opinion does not include the public defender's offices of Shelby County and the Metropolitan Government of Nashville and Davidson County, given these offices are created by local governments and thus their employees are not state employees covered by the Nepotism Act. *See* Tenn. Code Ann. §§ 8-14-202(a) & 8-14-201; Tenn. Code Ann. § 8-31-202. *See also* Tenn. Att'y Gen. Op. 05-104, at 1 n.1 (July 7, 2005).

[2] These statutes specifically provide as follows:

> (1) "Governmental entity" means any state agency, authority, board, commission, department, or office within the executive or judicial branch of state government or any autonomous state agency, authority, board, commission, department, office, or institution of higher education; provided, that "governmental entity" does not include any agency or office of the legislative branch;
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> . . . .

> (w)ithin each governmental entity, no state employees who are relatives shall be placed within the same direct line of supervision whereby one (1) relative is responsible for supervising the job performance or work activities of another relative; provided, that to the extent possible, the provisions of this chapter shall not be construed to prohibit two (2) or more such relatives from working within the same governmental entity.

Tenn. Code Ann. § 8-31-103.

Each public defender appointed under Tenn. Code Ann. § 8-14-202 is accountable for the office in his or her district and is charged with the responsibility of representing indigent persons for whom the public defender has been appointed as counsel by the court. Tenn. Code Ann. §§ 8-14-202, 8-14-203 and 8-14-204. Each public defender is given full authority to appoint assistant district public defenders and district investigators who "serve at the pleasure of the district public defender and shall perform such duties as the district public defender may require." Tenn. Code Ann. § 8-14-202(b)(2) & (3).

Nepotism statutes or policies are generally designed to avoid conflicts of interest between work-related and family-related obligations and to reduce favoritism or even the appearance of favoritism. *See Wright v. Metro Health Medical Center*, 58 F.3d 1130, 1136-37 (6th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996). The legislative history of Tennessee's Nepotism Act, adopted in 1980, reveals the Act is intended to serve this same purpose. In discussion on the floor of the Tennessee Senate, the Senate sponser of the bill creating the Nepotism Act responded as follows to a question about a husband and wife working together in a State office:

> Senator Hicks: I still say that if they are [working together] it is the wrong thing to do if they're in the direct line of supervision. Now, if they are in the same department, that doesn't make any difference. *But if one of them is the other's boss then I think it's a bad situation.*

Discussion of Senate Bill 2217 on Senate Floor, 91st Tenn. Gen. Assembly, 2nd Sess., Tape #S-86 (March 24, 1980) (emphasis added).

The specific question posed is whether Tennessee's Nepotism Act would apply in the following factual situation. A district public defender employs his brother-in-law as an investigator with his office. The definition of relative under the Nepotism Act includes the public defender's brother-in-law. Tenn. Code Ann. § 8-31-102(2). The brother-in-law is assigned to the DUI Vertical Team and obtains work/cases through an internal investigative request process embedded in the office case management system. In other words, the office's attorneys request investigative assistance and an investigator is assigned based on the attorney's Team assignment. The brother-in-law only works on DUI cases, and only DUI cases handled by three lawyers on the DUI Vertical Team. His immediate supervisor is the attorney DUI Vertical

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(3) "State employee" means any person who is employed by a governmental entity.

Team Leader. That attorney team leader supervises and evaluates the brother-in-law's work and is the person responsible for conducting his annual performance reviews. The Vertical DUI Team Leader's immediate supervisor is the deputy public defender. The deputy public defender supervises each of the seven team leaders in the office. The district public defender has no direct supervisory control over the brother-in-law or any of the other investigators in the office. The district public defender does not evaluate the brother-in-law's job performance nor review his annual performance evaluation. These responsibilities are performed by the DUI Vertical Team Leader. The DUI Vertical Team Leader's performance evaluations, and all team leader evaluations, are the responsibility of the deputy public defender.

This Office has previously addressed the application of the Nepotism Act in factually distinct employment scenarios. Op. Tenn. Att'y Gen. 06-101 (June 14, 2006) reviewed whether the Nepotism Act was applicable where a husband and wife were both employed in the same office of the Tennessee Board of Probation and Parole. The husband was the district director while the wife was a probation parole officer who reported to a probation parole manager who, in turn, was then supervised by the husband, the district director. *Id.* The probation parole manager signed off on the wife's performance evaluations which then normally would have gone to the district director, the husband, for review. However, in an effort to comply with the statute, the assistant director for field services signed the wife's performance evaluations as reviewer, rather than the husband, who was neither a rater nor reviewer in any phase of the wife's performance evaluations. *Id.* This Office concluded there was a violation of the Nepotism Act because the supervisory connection between the spouses was direct. Despite delegating his supervisory duties over the wife's position, the husband, as director of the regional office, remained responsible for supervising his wife's job performance. *Id.* at 2.

Op. Tenn. Att'y Gen. 04-113 (July 12, 2004) addressed related state park employees employed at a park inn and restaurant. A hospitality manager 3, which is the top-level manager at the park inn and restaurant, had been reassigned from one park to another. The hospitality manager 3 had a sister-in-law who was employed as a servitor at his new assignment. The hospitality manager was not the direct supervisor of his sister-in-law or any of the servitors. The servitors were supervised by a hospitality assistant who in turn was supervised by a hospitality manager 2. The hospitality manager 3 neither evaluated nor reviewed the evaluations of the servitors. *Id.* This Office opined in this particular scenario there no violation of the Nepotism Act would exist if "the hospitality manager 3 directs the activities of all the Inn and Restaurant employees and those directions are not applicable individually and solely to his sister-in-law." *Id.* at 3.

However, this same opinion also examined the hypothetical scenario in which the hospitality manager 3 supervised the person responsible for doing evaluations of the related servitor. In that hypothetical situation this Office determined there would be a violation of the statute because the hospitality manager 3 would be in the direct line of supervising the job performance of his sister-in-law and thus "would be the reviewer of the servitor's evaluations." *Id.* at 3. Indeed, Op. Tenn. Att'y Gen. 06-101 subsequently summarized this conclusion by succinctly stating "that if one relative supervised the person responsible for doing evaluations of the other relative, the Act would be violated." Op. Tenn. Att'y Gen. 06-101, at 2.

By statute, the district public defender in the factual scenario presented is granted the authority, at his or her pleasure, to hire and fire all district investigators – which would include the brother-in-law employed as an investigator. Tenn. Code Ann. § 8-14-202(b)(3). The district public defender also is granted the authority to hire and fire, again at his or her pleasure, the assistant public defender who supervises the brother-in-law of the district public defender. Tenn. Code Ann. § 8-14-202(b)(2). Thus by statute the investigator in this scenario stands in the "direct line of supervision" of the district public defender, and thereby the hiring and retention of the brother-in-law as an investigator violates the Nepotism Act. The district public defender cannot avoid this conflict by shifting supervision of the investigator to an assistant public defender. The conflict would still exist because the investigator remains in the "direct line of supervision" of the district public defender, since the district public defender supervises the assistant public defender. *See* Op. Tenn. Att'y Gen. 06-101, at 2; Op. Tenn. Att'y Gen. 04-113, at 3. As Senator Hicks aptly explained in discussing the reach of this Act on the floor of the Tennessee Senate, it is "wrong" for relatives to work together if they are "in the direct line of supervision" and "if one of them is the other's boss" that is "a bad situation." Discussion of Senate Bill 2217 on Senate Floor, 91st Tenn. Gen. Assembly, 2nd Sess., Tape #S-86 (March 24, 1980).

In this scenario the district public defender is ultimately responsible for and in control of his or her office, and the employees in that office cannot be the district public defender's relatives as defined by the Nepotism Act. To construe this statute otherwise would unduly restrict the scope of the Nepotism Act and inappropriately circumvent the legislative purpose of preventing favoritism or the appearance of favoritism in State offices.

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