

CITY OF OAKLAND

Office of the City Attorney

Legal Opinion

To: President De La Fuente and Members of the City Council

From: John Russo, City Attorney

Date: July 2, 2008

RE: Interpretation of City Charter Section 907. Nepotism.

I. Issue

Does City Charter section 907 prohibit the City Administrator from appointing any relative of his or hers within the third degree as an employee or officer in the administrative service to receive compensation from the City?

II. Summary Conclusion

Yes, City Charter section 907 prohibits the City Administrator from appointing any relative of his or hers within the third degree as an employee or officer to receive compensation from the City. The City Administrator is the ultimate appointing authority for the administrative service. Charter section 907 read with Charter section 503, creates a prohibition whereby no relative of the City Administrator within the third degree may be appointed as an employee for compensation in the administrative service of the City.

III. Background

The City Attorney's Office has been asked by members of the City Council and members of the public whether City Charter section 907 prohibits relatives of the City Administrator from serving as employees of the City.

IV. Analysis

City Charter section 907 prohibits the City Administrator from appointing any relative of his or hers within the third degree as an employee or officer to receive compensation from the City.

Section 907. Nepotism. The Mayor or City Council shall not appoint as an employee or officer, to receive any compensation from the City, any person who is a relative by blood or marriage within the third degree of the Mayor or anyone or more of the members of the Council, nor shall the City Administrator or any other appointing authority appoint to any such position any relative of his or of the Mayor or any member of the Council within such degree of kinship. (Emphasis added.)

Relatives to the third degree include parents, children, siblings, aunts, uncles, nieces, nephews, grandparents and first cousins.

"Appoint" is not specifically defined in the Charter. However, as used in the City Charter, it has a common meaning. "In its ordinary usage, 'appoint' means 'to name officially, in this context to an office, post or service.'" (Gillespie v. San Francisco Public Library Com., 67 Cal.App.4th 1165, 1174 (1998) (defining "appoint" for the purposes of the Brown Act).)

The City Administrator has broad appointment power. Indeed, he or she has the power to appoint each person in the administrative service of the City.

Section 503. Powers of Appointment and Removal. The City Administrator shall be responsible to the Council for the proper and efficient administration of all affairs of the City under his jurisdiction, and shall, subject to the provisions of Article IX of this Charter and except as otherwise provided in this Charter, have the power to appoint, assign, reassign, discipline and remove all directors or heads of departments and all employees under his jurisdiction. He may delegate to directors or other department heads responsible to him/her the authority to appoint, discipline and remove subordinate employees, subject to the provisions of Article IX of this Charter. (Emphasis added.)

This language indicates that the City Administrator is the ultimate appointing authority for all positions in the administrative branch.¹ Thus, Charter section 907 read with Charter section 503, creates a prohibition whereby no relative of the City Administrator within the third degree may be appointed as an employee for compensation in the administrative service of the City.

The City Attorney's Office received advice from outside counsel regarding the interpretation of Section 907. The advice concluded that the City Administrator was not the appointing authority for civil service positions and was therefore insulated from the effect of the anti-nepotism Charter provision for those positions. The City Attorney's Office rejects the advice for the following reasons.

First, the advice read the anti-nepotism section of the Charter too narrowly. Rules relating to conflicts of interest and nepotism should be read broadly, not narrowly, to meet the voters' purpose in deterring corruption and the appearance of corruption. Conflict of interest statutes and anti-nepotism statutes serve similar, if not identical, goals. The laws are "aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised

¹ While the City Administrator may "delegate" the appointment power, the delegation simply gives the department head the right to exercise the appointment authority of the City Administrator; it doesn't divest the City Administrator of such authority.

allegiance,” concerned with “what might have happened rather than merely what actually happened.” (People v. Honig, 48 Cal.App.4th 289, 314 (1996) (applying Government Code section 1090.)

The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. (Thomson v. Call, *supra*, 38 Cal.3d at p. 648; Stigall v. City of Taft (1962) 58 Cal.2d 565, 569 [25 Cal.Rptr. 441, 375 P.2d 289].) Yet it is recognized " 'that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.' " (Stigall v. City of Taft, *supra*, 58 Cal.2d at p. 570, quoting United States v. Mississippi Valley Generating Co. (1961) 364 U.S. 520, 549-550 [5 L.Ed.2d 268, 288, 81 S.Ct. 294].) Consequently, our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. (Ibid.) They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance. (Thomson v. Call, supra, 38 Cal.3d at p. 648.) Their objective "is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision" (Stigall v. City of Taft, *supra*, 58 Cal.2d at p. 569, italics in original; see also People v. Vallergera (1977) 67 Cal.App.3d 847, 865 [136 Cal.Rptr. 429]; People v. Watson (1971) 15 Cal.App.3d 28, 39 [92 Cal.Rptr. 860].)

(Id., emphasis added.)

Such provisions “cannot be given a narrow technical interpretation that would limit their scope and defeat the legislative purpose.” (Id.)

In enacting the conflict-of-interest provisions the Legislature was not concerned with the technical terms and rules applicable to the making

of contracts, but instead sought to establish rules governing the conduct of governmental officials. (Stigall v. City of Taft, supra, 58 Cal.2d at p. 569.) Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (Id. at pp. 569, 571; Millbrae Assn. for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222, 237 [69 Cal.Rptr. 251].)

(Id.)

The interests behind the conflict of interest statutes are the same as that of the City Charter's anti-nepotism section. Both make paramount the maintenance of the public's confidence in the integrity of government, protecting against impropriety and the appearance of impropriety. They both address the "possibility" of personal influence. In the confines of an intricate bureaucracy, it may be impossible to discern whether improper influence has actually been exercised. The anti-nepotism provision seeks to shore up confidence in a government bureaucracy that is not pellucid. The anti-nepotism law must be interpreted consistently with its purpose.

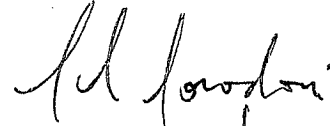
Second, outside counsel reasoned that Oakland's Civil Service rules place most employees outside of the City Administrator's appointment power. The City Charter provision concerning civil service, Section 902, contains no language nullifying the City Administrator's final authority to appoint all employees within her jurisdiction. The Civil Service rules provide the process for appointment and removal, but they do not extinguish this authority.

V. Conclusion

City Charter section 907 prohibits the City Administrator from appointing any relative of his or hers within the third degree as an employee or officer to receive compensation from the City. Because the City Administrator's has ultimate authority over all employees in the administrative service, this prohibition extends to all employees in the administrative service. Any relatives in City employ at the time a new City Administrator takes office are not "appointed" by the new City Administrator and

therefore their hiring is not subject to Section 907. Any subsequent promotion or appointment to a new position, however, would be prohibited by Section 907.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Russo". The signature is written in a cursive style with a large initial "J".

JOHN A. RUSSO
City Attorney

MTM:ww

cc: Mayor, City Auditor