

Nepotism

By Jessica Hogan

The state conflicts of interest provisions set forth in Article 18 of the General Municipal Law have been described as “disgracefully inadequate” by the former Temporary State Commission on Local Government Ethics because they offer little guidance to public officials or reassurance to citizens that their public servants are serving the public and not themselves. As found by the Commission, Article 18 fails to address many of the most basic conflicts of interest, contains language that is so vague that at least one provision has been struck down as unconstitutional, offers no range of penalties (a violation is either a misdemeanor or a disciplinary infraction), is virtually unintelligible except to an experienced municipal lawyer, violates common sense, and, in the one area that it does regulate (prohibited interests in contracts), overregulates to such a degree that it turns honest public servants into criminals and inflicts substantial and unnecessary financial burdens on municipalities.¹



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Nepotism provides one such instance of Article 18’s weaknesses. Not only does Article 18 fail to address nepotism in any form, but also it in fact expressly authorizes a public official to hire a relative, even a spouse or child.² Clearly, however, a municipality may—and should—adopt a more stringent code of ethics that does address such issues.³ In doing so, a municipality should consider whether an outright prohibition on family members working for the municipality is either workable or desirable. Such a prohibition, particularly in smaller municipalities but even in larger ones, may prevent the municipality from hiring the best people into public service. Often, a commitment to public service runs in families, particularly in the fields of education and public safety. Furthermore, merely allowing family mem-

bers to work for the same municipality presents little harm. Rather, the harm lies in the abuse of office that arises when a public official hires, retains, or promotes family members or supervises them or is supervised by them. In its Conflicts of Interest Law, the City of New York has addressed the nepotism issue by thus restricting abuse of office without attempting to prohibit a City agency from hiring two or more members of the same family. This approach, which this article describes, should prove workable in virtually every municipality, regardless of size.

In contrast to Article 18, New York City’s ethics code, found in Chapter 68 of the New York City Charter, not only prohibits public servants from using their position to obtain a benefit for someone with whom they are associated, including certain family members, it also seeks to ensure that public servants are not even put into a position where their loyalty is questioned. While Chapter 68 does not expressly ban nepotism, it includes several provisions that prevent family members from using their office to obtain a benefit for those related to them or from appearing to be in a position where they could benefit relatives.

First, Charter Section 2604(b)(2) prohibits a public servant from engaging in “any business, transaction or private employment, or hav[ing] any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” Second, Charter Section 2604(b)(3) provides that “no public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.” A person “associated” with the public servant includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.⁴ Finally, Charter Section 2604(b)(14) provides that “[n]o public servant shall enter into any business or financial relationship with another public servant who is a superior or subordinate of such public servant.” Pursuant to Charter Section 2603(e), the New York City Conflicts of Interest Board (“the Board”) is empowered to enforce these provisions, and, as will be discussed below, has had occasion to do so in the past.

“Relatives” for the purpose of this article means those family members who are “associated” with a public servant within the meaning of Charter Section 2601(4), i.e., mother, father, brother, sister, spouse, domestic partner, or child. Since a financial benefit to one spouse ordinarily accrues to the other spouse, “relative” effectively includes the spouse or domestic partner of a parent, child, or sibling as well. As mentioned above, there is no explicit prohibition in Chapter 68 banning relatives from working at the same City agency. However, public servants are prohibited both from actively taking steps to benefit their relatives and, even if they take no action, from merely being involved in any matters concerning these relatives. In other words, not only may a public servant not use his or her position to attempt to obtain a benefit, he or she must make sure there is complete insulation or “recusal” from any decisions involving those relatives.

Use of Position to Obtain a Benefit

Charter Sections 2604(b)(2) and (b)(3) prohibit a public servant from actively using or attempting to use his or her position to benefit a relative. The typical situation faced by the Board involves a public servant attempting to find work for his or her relative, either with the City itself or with a vendor doing business with the City. Interestingly, a violation of the Charter could occur even if there is no monetary benefit attached to this position, in other words, even if the relative receives no compensation. For example, in Advisory Opinion No. 93-21, the Board found that it would be a violation of Charter Section 2604(b)(3) for a member of the City Council to nominate his or her family member for an appointment to a community board, even though this was an unpaid position. Community board members are nominated by the City Council and chosen by the Borough President. In finding that it would be a violation to nominate a relative, the Board noted that “Charter Section 2604(b)(3) is intended, among other things, to prevent City employees from abusing the public trust by exerting official influence to secure financial gain or special treatment for family members. . . . It is also intended to preserve public confidence in government by helping to insure that official actions or decisions are motivated solely by the public interest, rather than private relationships or affiliations.”⁵ In addition, the Board noted that permitting such nominations would allow the Council member to use “the power of public office to secure an advantageous appointment for individuals closely tied to him or her through financial or personal relationships.”⁶ Thus, whether the relative receives a monetary gain is irrelevant; the violation lies in helping the relative

to secure any position in government, paid or unpaid.

A key component of a sound ethics law is the ability to enforce its provisions. Absent this power, an ethics code is merely a guideline that may be obeyed or ignored at the whim of the public servant. In the case of Chapter 68, however, the Board possesses enforcement power. For example, the Board recently entered into a settlement with a former New York City Department of Education (“DOE”) employee who had sent his brother’s resume to all of the principals in a particular DOE region.⁷ The brother received an interview as a result of this mass e-mail, but did not accept a position. Nevertheless, despite the fact that the brother did not actually obtain a position, the DOE employee still violated Charter Section 2604(b)(3) merely by sending the e-mail on behalf of his brother. The Board took into account the fact that the DOE employee attempted to recall his e-mail after realizing the folly of his actions but still fined him \$1000 for misusing his position to obtain a benefit for his brother.

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In another case a New York City School Construction Authority (“SCA”) employee used her position not only to obtain a job for her husband, but to attempt to obtain for him promotions as well.⁸ Here, the public servant approached a fellow SCA employee directly involved in the hiring process and repeatedly requested an interview for her husband until he was interviewed and eventually hired. When her husband submitted his resume for a promotion, she again requested that he receive an interview for the promotion. The Board fined this employee \$5000 for violating Charter Section 2604(b)(3).

These examples are not intended to suggest that violations of Charter Sections 2604(b)(2) and (3) in regard to relatives are limited to helping these relatives obtain work. Anytime a public servant abuses his or her position for the benefit of a relative a potential violation has occurred. For example, the Board fined a former Bronx Assistant District Attorney \$1000 for issuing a grand jury summons to a police officer in a case on which the officer had never worked, for the alleged purpose either of preventing the officer from testifying against the public servant’s

husband on a traffic ticket or of inconveniencing the officer.⁹ In yet another, perhaps even more egregious case, the Board agreed to a 30-day suspension without pay, a demotion, probation, and forfeiture of \$2500 of accrued leave time in lieu of a fine for a New York City Department of Transportation employee who used his position with the City to solicit a subordinate to marry his daughter and bring her from Ecuador to the United States so that she could obtain permanent resident status.¹⁰ In yet another case, the Board fined a former vice president of a community school board \$1500 for testifying at a DOE hearing on behalf of her sister without identifying herself as a relative.¹¹ The sister was appealing an unsatisfactory rating that she had received in her capacity as an acting assistant principal. The community school board member appeared to testify in her official City capacity, praising her sister's work without ever disclosing the familial relationship.

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Chapter 68, far more stringent than Article 18, clearly prohibits public officials from hiring or promoting spouses, children, or siblings. Moreover, the power of the Board to fine public servants for violations of the ethics law, a power not set forth in Article 18, serves as a strong deterrent to nepotism. However, these protections are not enough to prevent nepotism. It is important that public servants not even be placed in a position where they may be tempted to engage in nepotism. Stopping short of prohibiting relatives from working at the same agency or with agency vendors, Chapter 68 instead utilizes recusal, discussed below, to prevent public servants from being placed in a position by which they might benefit their relatives.

Recusal from Matters Involving Relatives

As a basic tenet of public policy, public service should be encouraged. Prohibiting relatives from working together at the same City agency may well offer an unworkable solution to the problem of nepotism. Chapter 68, through Charter Sections 2604(b)(2) and (b)(3), allows for this balance by permitting relatives to work at or with the same City agencies, provided that a sufficient recusal mechanism is in place to ensure that a public servant cannot abuse his or her position in order to obtain a benefit for a relative. But what constitutes sufficient recusal? Is it merely

enough not to be actively involved in any decisions regarding one's relatives? While certainly necessary, lack of active involvement alone does not satisfy the prohibition of Charter Sections 2604(b)(2) and (b)(3). In order to avoid even the appearance that a public servant is in a position to use his or her public authority to affect his or her relatives, the public servant must be completely insulated from any matters involving the relative. This means, among other things, not attending meetings regarding those relatives, not engaging in any conversations regarding those relatives, and not receiving any documents regarding those relatives.

For example, in Advisory Opinion No. 2004-3, the Board addressed the question of whether relatives of community board members may serve as staff to that community board. The Board noted that community board members have the power to determine how the community board budget will be allocated, including allocating money for staff, such as salary increases. Because of this power the Board found "that a member of a community board cannot effectively be recused from all matters affecting community board staff. The power to hire or fire the district manager, and the power to allocate the board's limited budget, are at the core of a board member's function. Thus, if a close relative is on staff, the member will inevitably take action that affects the relative's employment."¹² Moreover, the Board found that it would also violate Charter Section 2604(b)(14), the prohibition on a superior and subordinate having a financial relationship, if a member of the community board staff was a spouse of a community board member since, of necessity, a financial relationship exists between husband and wife.

In another case the Board addressed the question of whether or not the law firm of a public servant's spouse could respond to a Request for a Proposal ("RFP") from the public servant's agency. The public servant in question held a managerial position in the agency and had regular contact with members of the RFP selection committee. The Board found that it would violate Chapter 68 of the Charter for the agency to award the contract to the public servant's spouse since "the public servant is not sufficiently isolated from either the award of the contract or the performance of the contract to avoid the ethical constraints of Chapter 68."¹³ In order to preserve the public trust in government, it is vitally important that an agency completely insulates a public servant from any matters relating to a relative. Lack of this protection may result in an appearance to the public that the public servant is benefiting his or her relative. Therefore, if the agency cannot accomplish this insulation, then the public servant is in potential violation of Charter Sections 2604(b)(2) and (b)(3).

The Board faced a similar issue in Advisory Opinion No. 94-20. Here two public servants sought advice as to whether they might continue serving in their present positions at their City agency, where both had husbands with interests in firms doing business with the agency. Again, the Board found that, while one public servant could avoid all involvement in matters involving her husband's firm, the other could not continue serving in her position because her agency had advised the Board that she could not "effectively recuse" from matters involving her husband's firm.¹⁴ The Board found that the public servant could not continue to serve in her position at the agency since she "would be in a position to obtain a direct or indirect private advantage for her husband."¹⁵

Thus, going far beyond Article 18 of the General Municipal Law, Chapter 68 of the City Charter prohibits public servants from even being in a position to obtain any benefits for their relatives. While some may argue that this "prophylactic" measure is unfair since it arguably presumes that all public servants, given a chance, would abuse their positions, it gives the public confidence that public servants are serving public, not private, interests.

Chapter 68, in contrast to Article 18, provides a practical solution to the problem of nepotism. It balances the need to attract qualified, dedicated employees to the City, and to obtain the best vendors, with the need to assure the taxpaying public that employees and vendors achieve their positions, promotions, and contracts based on merit, not familial relations. It does this first, and perhaps most importantly, through its clearly worded provisions that prohibit a public servant from using his or her position to benefit a relative. These provisions effectively prevent a public servant from seeking a choice position for his or her relative or from interfering in governmental process in order to assist a relation. Second, the Board exercises its power to enforce the Charter provisions that prevent nepotism, namely Charter Section 2604(b)(2), (b)(3), and (b)(14). Thus, the provisions of the Charter that prevent nepotism are not merely guidelines to be considered, but mandates to be obeyed. This approach results in an ethics

code that addresses nepotism in a manner that assures the public that integrity in government is not sacrificed while allowing the municipality to hire the best persons for the job.

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Endnotes

1. See Temporary State Commission on Local Government Ethics, "Final Report," *FORDHAM URBAN L.J.* 1 (1993).
2. See Gen. Mun. Law s 800(3). See also 1967 Op. Atty. Gen. (Inf.) 158 (opining that sheriff may appoint his wife as matron of county jail).
3. See Gen. Mun. Law s 806(1)(a). See also Davies, "Addressing Municipal Ethics: Adopting Local Ethics Laws," in Salkin & Smith, *ETHICS IN GOVERNMENT, THE PUBLIC TRUST: A TWO-WAY STREET* 103 (NYSBA 2002).
4. New York City Charter Section 2601(4).
5. COIB Advisory Opinion No. 93-21 at pp. 3-4.
6. COIB Advisory Opinion No. 93-21 at p. 6.
7. *COIB v. Genao*, COIB Case No. 2004-515 (2005).
8. *COIB v. Vella-Marrone*, COIB Case No. 98-169 (2000).
9. *COIB vs. Campbell Ross*, COIB Case No. 97-76 (1998).
10. *COIB v. Moran*, COIB Case No. 99-501 (2001).
11. *COIB v. Adams*, COIB Case No. 2002-088 (2003).
12. COIB Advisory Opinion No. 2004-3, p. 5.
13. COIB Advisory Opinion No. 91-2, p. 3.
14. COIB Advisory Opinion No. 94-20, p. 6.
15. *Id.*

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The views expressed in this article do not necessarily reflect those of the Board. The New York City Charter provisions and Board opinions and decisions cited in this article may be found on the Board's website, <http://www.nyc.gov/ethics>.