



INSPECTOR GENERAL REPORT

2010-04-0087, 2010-06-0162,
2010-09-0223, 2011-01-0001 et al.

April 7, 2011

NEPOTISM RULE

Inspector General David O. Thomas and State Ethics Director Cynthia Carrasco report as follows:

Summary

It is recommended that subsection (b) of IC 4-15-7-1, the Nepotism Rule, be amended to clarify that at no time may a state employee directly supervise a related employee. Additional language is suggested to address other clarifications of the rule.

This report respectfully recommends statutory clarification of the state nepotism rule in IC 4-15-7-1 (“Nepotism Rule”).

Nepotism is generally defined as favoritism granted to relatives regardless of merit.¹

The purpose of the Nepotism Rule is to impose restrictions on the hiring

¹ The American Heritage New Dictionary of Cultural Literacy, Third Edition. Houghton Mifflin Company, 2005.

and supervision of related employees. A principle advanced for nepotism restrictions is that, in appearance or reality, workers treat related employees differently from nonrelatives.

The Nepotism Rule applies only to state employees in the Executive Branch, and not to those in local government.²

The Nepotism Rule currently states:

(a) No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office, or department or institution, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation provided by law.

(b) This section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department, or institution.

(c) This section does not apply to the authority of the board of trustees of a state educational institution to employ any person the board considers necessary under IC 21-38-3-1.

(d) No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.

IC 4-15-7-1.

The Office of the Inspector General (OIG) is charged by the Indiana Legislature to make recommendations to the Legislature to strengthen public integrity laws, including the Code of Ethics. IC 4-2-7-3(9). The Nepotism Rule is incorporated within the Code of Ethics. *See*: 42 IAC 1-5-15. The OIG is also charged to provide advice to state workers to prevent wrongdoing. IC 4-2-7-3(8).

² The United States Government also imposes restrictions regarding nepotism. *See e.g.* 5 CFR, Part 310.

In our advisory and investigative experiences, we have found the Nepotism Rule to be, at times, ambiguous, and have accordingly encountered challenges in applying the rule.

Based upon these experiences and the authorities cited herein, the OIG makes the following findings and recommendation.³

Findings

The OIG wishes to initially stress that we recognize that it is simplistic to merely be critical of statutory rules. Rules that originated in 1897 and have experienced multiple amendments are often in need of evaluation. Our goal is merely to seek clarity in the Nepotism Rule, especially when we have the duty to enforce it, and with this enforcement, there is the potential for a state worker to be penalized, in extreme violations, with large monetary fines and possible termination or disbarment from state government.⁴ It is with this perspective that

³ OIG advisory and investigatory functions involving the Nepotism Rule appear to be affected by the “rule of lenity”. Assuming the Nepotism Rule is ambiguous (as argued *post*), thereby justifying statutory interpretation, *Sees v. Bank One, Indiana*, 839 N.E.2d 154 (Ind. 2005), the rule of lenity requires that criminal or penal statutes be interpreted strictly against the state and any ambiguities resolved in favor of the accused. *Meredith v. State*, 906 N.E.2d 867 (Ind. 2009). See also: *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020 (2008).

The rule of lenity also extends beyond criminal offenses and to all penal statutes, these being statutes which command or prohibit certain acts and establish penalties. *Lovitt v. State*, 915 N.E.2d 1040 (Ind.Ct.App. 2009); *Storrjohann v. State*, 651 N.E.2d 294 (Ind.Ct.App. 1995).

The Indiana Attorney General in 1948 opined that the nepotism statute in effect in 1948 was “highly penal” and therefore must be “strictly construed.” Ind.Atty.Gen.Op. 1948, at 2.

As the Nepotism Rule is within the Code of Ethics, 42 IAC 1-5-15, and accordingly a violation is subject to the monetary and other penalties for a Code of Ethics violation, IC 4-2-6-12 (see footnote 4, *post*), we believe this inclusion of the Nepotism Rule within the Code of Ethics to be further evidence that the rule of lenity applies. Accordingly, the OIG provides advice and conducts investigations of alleged Nepotism Rule violations within these parameters.

⁴ IC 4-2-6-12 addresses Code of Ethics violations, penalties and sanctions:

If the commission finds a violation of this chapter, IC 4-2-7, or IC 4-2-8, or a rule adopted under this chapter IC 4-2-7, or IC 4-2-8, in a proceeding under section 4 of this chapter, the commission may take any of the following actions:

(1) Impose a civil penalty upon a respondent not to exceed three (3) times the value of any

we respectfully make the following findings and recommendation.

1

We briefly trace below the history of Indiana nepotism statutes to illustrate the many historic and differing opinions addressed legislatively through the decades. Our research reveals that nepotism rules have been statutorily advanced (and repealed) through the years in various forms.

A

Our research shows that nepotism was first statutorily addressed in Indiana in 1879. State “benevolent institutions” were restricted in the following manner:

[State benevolent institutions] shall not appoint, nor allow to be appointed, any relative of their own, or of either of them, either by blood or marriage; and they shall not allow any of the relatives, or members of the family, except the wives and children of such officers whose regular home has been and is with him, of any superintendent or other subordinate or employe [sic], to be kept, maintained, or supported in the institution, without charging to such persons the full value of such maintenance and support, unless such relative or member of the family be regularly employed and paid as one of the subordinates or employes [sic] thereof.

Indiana Acts of 1879, Chapter 3, Section 9.

benefit received from the violation.

- (2) Cancel a contract.
- (3) Bar a person from entering into a contract with an agency or a state officer for a period specified by the commission.
- (4) Order restitution or disgorgement.
- (5) Reprimand, suspend, or terminate an employee or a special state appointee.
- (6) Reprimand or recommend the impeachment of a state officer.
- (7) Bar a person from future state employment as an employee or future appointment as a special state appointee.
- (8) Revoke a license or permit issued by an agency.
- (9) Bar a person from obtaining a license or permit issued by an agency.
- (10) Revoke the registration of a person registered as a lobbyist under IC 4-2-8.
- (11) Bar a person from future lobbying activity with a state officer or agency.

B

The first state-wide application of nepotism restrictions came in 1921:

*Be it enacted by the general assembly of the State of Indiana, That no person being related to any member of any state board or commission, or to the head of any state office or department as a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation now or hereafter provided by law: *Provided*, That nothing contained in this section shall be construed to apply to any of the state institutions.*

Acts of 1921, Chapter 165, Section 1.

As seen below, state “institutions” were later included in the rule’s application.

C

The third version of statutory nepotism restrictions came during the Indiana Special Session of 1932:

It shall be unlawful for any department or institution of the state government to employ any two or more persons who are members of the same family and who are domiciled in the same home.

Acts of 1932, Special Session, Chapter 70, Section 12.

D

The General Assembly reacted the following year and repealed all statutory provisions restricting nepotism:

This act [addressing nepotism] shall expire by limitation on the first day of January, 1936, and upon the expiration of this act, all laws and parts of

laws which may be in any way affected by this act shall be in as full force and effect as they would have been if this act had not been passed.

Acts of 1933, Chapter 122, Section 1.

E

With no further state-wide nepotism restrictions through 1936, the General Assembly imposed on the Indiana Department of Public Welfare in 1936 the following:

Nepotism prohibited. No person who is related to any member of the state board [of public welfare] or to the administrator or to any director of the state department as a husband or wife, father or mother, son or daughter, son-in-law or daughter-in-law, brother or sister, niece or nephew, uncle or aunt, shall be eligible to any position in the state department; and no person who is related to the Judge of the Circuit Court appointing the county board or to any member of a county board or to the director of any county department as a husband or wife, father or mother, son or daughter, son-in-law or daughter-in-law, brother or sister, niece or nephew, uncle or aunt, shall be eligible to any position in such county department; nor shall any such relative be entitled to receive any compensation for his services out of any appropriation made by law by the state or by the county as the case may be.

Acts of 1936, Special Session, Chapter 3, Section 31.

F

The Legislature reinstated state-wide nepotism restrictions in 1941. Our current Nepotism Rule in subsection (a) (IC 4-17-5-1(a)) mirrors this substantive language from 1941.

No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office, or department

or institution, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation now or hereafter provided by law.

Acts of 1941, Chapter 16, Section 1.

G

The Indiana Legislature in 1955 imposed nepotism restrictions on county commissioners in their operation of county homes.

Nepotism shall not be permitted in appointments and employment in the county home so far as prohibited by law.

Acts of 1955, Chapter 119, Section 17.

H

Six years later in 1961, the nepotism statute with regard to state-wide application was amended to add a hiring exemption if an employee was employed for more than one year before a second employee was hired.

(b) [T]his section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department, or institution.

Acts of 1961, Chapter 8, Section 1.

This is the current language in subpart (b) of our Nepotism Rule (IC 4-15-7-1(b)).

I

After two more decades, the rule was amended again in 1982, this time

maintaining the previous language but prohibiting any direct supervision between specified, related employees.

(d) [N]o persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.

Acts of 1982, Public Law 23, Section 35.

This language is currently found in subpart (d) of the Nepotism Rule (IC 4-15-7-1(d)).

J

In 1995, the 1941 version was amended a third time to exclude its application to hiring decisions made by the board of trustees of certain state educational institutions.

(c) [T]his section does not apply to the authority of the board of trustees of a state educational institution to employ any person the board considers necessary under IC 21-38-3-1.

Acts of 1995, Public Law 36, Section 1.

This may have been in response to an earlier 1989 Attorney General Opinion which concluded that the nepotism restrictions applied to universities.

See: 1989 Op.Atty.Gen. No. 89-21.

K

Fourth and fifth amendments for technical corrections were made to the 1941 version in Public Law 2-2007, Section 44, and Public Law 3-2008, Section 8.

In summary, it might be said that through the years, there have been varied views in Indiana on what, if any, nepotism restrictions are appropriate.

2

Several components of the Nepotism Rule make its interpretation challenging in our advisory and investigative functions.

A

First, the scope of the one-year exemption could be considered to be equivocal. The Nepotism Rule currently states in relevant part:

(b) This section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department, or institution (*emphasis supplied*).

IC 4-15-1-7(b).

By using the word “section” in subpart (b), this one-year exemption applies to the entire statute, including subsection (d) which prohibits any direct supervision of related employees. Consequently, it is arguable that direct supervisions of relatives may occur if one of the related employees has been employed for one year.

This interpretation is inconsistent with the direct supervisory restriction language in subpart (d) which states that “no persons” may be in that supervisory position. *See*: IC 4-15-7-1(d).

If the intent of the current language is to permit a direct supervisory relationship between relatives if one has been employed for one year, we pose for consideration whether this position should be re-examined. It is one thing to allow relatives to be within the same agency after one has been employed for one year, but the justification to *ever* allow relatives to *directly supervise* each other seems to more likely invite the circumstances negatively associated with nepotism.

B

The word “appropriation” in subpart (a) of the Nepotism Rule is undefined, also making the application of the Nepotism Rule ambiguous. This portion of the Nepotism Rule restricts “services” to be paid for “any appropriation.”

If strictly applied (under the “rule of lenity” addressed in footnote 3, *supra*), the results could be extreme or absurd. For example, even if the scope of “any appropriation” is interpreted as limited to any state appropriation (rather than a federal or local government appropriation), this could result in the unintended consequence of disqualifying family members from interactions with the entire governmental sovereign. We suspect the intent, instead, was to limit this conduct within the particular state agencies.

The OIG also encounters situations where the appropriation is given to a business organization to which the relative is associated, through a contract for example, when the application of the Nepotism Rule seems to be restricted to the

relative as an individual.

C

The application of the Nepotism Rule to an “institution” without a definition of that term may also result in equivocal applications. As one example, the Attorney General in 1989 (without the benefit of a statutory definition in the Nepotism Rule) issued an opinion that an “institution” in the Nepotism Rule included Purdue University. That interpretation was statutorily reversed with the subsequent amended exemption of “state educational institutions” to the Nepotism Rule in the 1995 legislative session. See Public Law 36-1995, Section 1.

Summary

Although the above challenges might be considered by some to be extreme or overly-technical criticisms of the Nepotism Rule, we posit these circumstances not as academic questions, but circumstances the OIG actually encounters when determining how to advise state workers who seek clarity, or in whether to investigate for violations which could result in monetary fines and termination of individuals’ state employment.

Recommendation

For all of the above reasons, the OIG respectfully recommends a legislative clarification of the Nepotism Rule.

At a minimum, it is recommended that the following language in

subsection (b) of IC 4-15-7-1 be amended as follows:

(b) ~~This section~~ **Subsection (a)** shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department, or institution.

This amendment would clarify that it is intended that at no time may a state employee directly supervise a related employee. IC 4-15-7-1(d).

As another possible solution, we have taken the liberty to draft for consideration the rule in a manner which we believe may encompass what the current rule and interpretations⁵ might seek to address. *See Exhibit A, attached hereto.* This proposed language includes hiring restrictions.

Due to the ambiguities addressed previously, we would further recommend that the application of any amendments be prospective rather than retroactive.

Conclusion

The OIG remains ready to provide further research or information upon request.

Dated this 7th day of April, 2011.

David O. Thomas, Inspector General

⁵ The Indiana Supreme Court has recently reaffirmed that the State Ethics Commission (SEC) has the exclusive authority to interpret the Code of Ethics. *Ghosh v. State Ethics Commission et al.*, 930 N.E.2d 23 (Ind. 2010). The Nepotism Rule is within the Code of Ethics. See 42 IAC 1-5-15. SEC formal advisory opinions addressing the Nepotism Rule may be found on-line at: <http://www.in.gov/ig/2338.htm#nepotism>.

EXHIBIT A

(A proposal for the Nepotism Rule in IC 4-15-7-1)

(a) The following definitions apply to this section:

(1) "Agency" has the meaning set forth in IC 4-2-6-1.

(2) "Direct supervisory relationship" means a related worker who immediately reports to, or is directly supervised by, another related worker.

(3) "Employed" means conduct referring to all employment, including full-time, part-time temporary and contractual employment.

(4) "Related worker" means, within the same agency, a father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece or nephew. It does not include an individual's associated entity unless the individual is a partner to, or an executive officer, or the sole proprietor of the entity.

(b) A related worker may not be employed:

(1) in the same agency with another related worker; or

(2) by a related worker to perform services for a related worker's agency.

Notwithstanding subsection (c)(1), a related worker in this section may never hire another related worker, nor be in a direct supervisory relationship with another related worker.

(c) This section is not violated if:

(1) a related worker is employed in an agency for at least twelve (12) consecutive months immediately preceding the employment of the other related worker;

(2) the employment involves the board of trustees of a state educational institution in IC 21-38-3-1; or

(3) the employment occurred prior to [enter the effective date of this public law].