



MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion 23-09-013

September 13, 2023

You have requested that the Ethics Commission review the possible selection of an individual to a senior agency position. The individual's spouse is the supervisor of the person who would be the direct supervisor of the individual and has general responsibilities for the administration of the agency.

The Commission appreciates that you brought this question to the Commission and understands the sensitivities involved and the concerns you have regarding how this appointment would raise ethics issues.

The Commission believes the appointment of the selectee would create ethics issues for the spouse of the individual who would be selected. Though the requirements of the merit system are not within the Commission's jurisdiction, the Commission also understands there are obligations imposed by the merit system. The Commission takes no position on what the agency's obligations are pursuant to that system. The Commission recognizes that the selection of the individual to the position brings with it inherent appearance problems and understands that the agency is asking the ethics question as a result of the operation of the merit selection process.

The Commission sought, on August 23, 2023, a legal opinion from the County Attorney's office on whether the regulatory provision COMCOR 19A.14.02.2.5a could legally be read or interpreted by the Ethics Commission to bar the hiring of the individual where, arguably, the appointed position was under the supervision and control of a relative. On September 8, 2023, the County Attorney opined that COMCOR 19A.14.02.2.5a was invalid and cannot be read by the Ethics Commission to bar the personnel action. The County Attorney's rationale was that the regulatory provision was inconsistent with the ethics law provision at 19A-14(d)(2).

The County's ethics law includes an anti-nepotism provision that states in 19A-14:

- (d) (1) A public employee must not appoint, hire, or advocate the advancement of a relative to a position that is under the jurisdiction or control of the public employee.
- (2) A relative of a public employee must not be employed in a position if the public employee:
 - (A) would exercise jurisdiction or control over the position; and
 - (B) advocates the relative's employment.

MONTGOMERY COUNTY ETHICS COMMISSION

100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850
OFFICE: 240.777.6670 FAX: 240.777.6672

Commission regulations provide:

19A.14.01.02

2.4 Nepotism, Employee Prohibition – A public employee must not appoint, hire, or advocate the advancement of a relative (as that term is defined in the Public Ethics Law) to a County position.

2.5 Nepotism, Employment Prohibition – A relative of a public employee must not be employed in a position if the public employee:

- a. Would exercise jurisdiction or control over the position; or
- b. Advocates the relative's employment.

The regulations track the statutory prohibitions with one exception; the regulatory prohibition on employment uses the word "or" instead of the statutory provision "and" so that under the regulation either exercising jurisdiction or control over the position or advocating a relative's employment creates a disqualifying situation in hiring. The regulation thereby expands the scope of the statutory provision requiring both exercising jurisdiction and control over a position "and" advocacy for the relative's employment. If it were assumed that the spouse in the circumstances presented were viewed as exercising jurisdiction and control over the selectee's position (and arguments on either side of that could be reasonably put forth), a question the Ethics Commission confronted is whether it could rely on the regulation's expansion of the statutory prohibition, especially as that could conflict with merit systems requirements to select the best qualified applicant.

The County Attorney opined that the regulation is broader than the ethics law provision as it substitutes "or" for "and", thereby expanding the scope of the prohibition.

The County Attorney stated:

Although courts generally defer to agency expertise in regulations they promulgate, courts will not "give effect to agency regulations that are inconsistent with or conflict with the statute the regulations are intended to implement." (Citations omitted). In such circumstances the regulations "must yield to the statute." (Citations omitted).

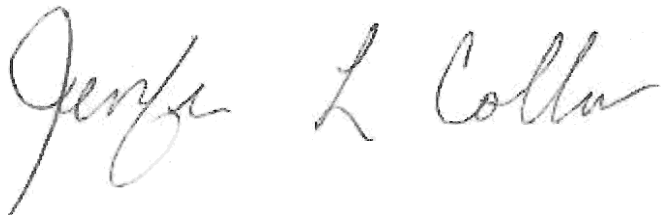
A court would interpret COMCOR § 19A.14.01.02.5 as in conflict with, and therefore yielding to, § 19A-14(d)(2). There is a material difference between prohibiting certain action when two conditions are present and prohibiting that action when only one of those two conditions is present. As noted above, COMCOR § 19A.14.01.02.5 is invalid, and it cannot legally be read or interpreted by the Ethics Commission to effectively bar [the selection of the spouse]."

As the Ethics Commission is not in a position to bar the appointment, and to the extent the proper administration of the merit system requires an offer to be made to the person identified as

the best-qualified candidate, the Commission suggests the agency should inform the selectee in making its offer that in the event the selectee accepts the offer, that the selectee's holding that position would result in consequences for the individual's spouse and activate non-participation requirements. The non-participation limits have not been examined by the Ethics Commission with respect to the prospect of the selectee taking the position that is one level removed from the selectee's spouse, but could be examined pursuant to a request for an advisory opinion from the spouse. If the selectee wants to discuss this with the individual's spouse prior to acceptance of an offer, the individual could do so. This would provide an opportunity for the spouse to request an advisory opinion before the selectee accepts the offer so the consequences of acceptance are known in advance of acceptance.

If the selectee accepts the offer without the Ethics Commission having received a request from the spouse on the scope of the non-participation of the spouse, the Commission will invite the spouse or the spouse's supervisor to submit a request for an advisory opinion on the subject of non-participation requirements applicable to the spouse. In this regard, if the selectee accepts the offer, the Commission would like to be informed.

For the Commission:

A handwritten signature in cursive script that reads "Jennifer L. Collins". The signature is written in black ink on a white background.

Jennifer Collins, Acting Chair