



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

October 28, 2021

Jeffrey J. Turnage, Esq.
Attorney for the City of Columbus
Post Office Box 1366
Columbus, Mississippi 39703-1366

Re: Nepotism

Dear Mr. Turnage:

The Office of the Attorney General has received your request for an official opinion.

Background

Your request states that you are asking this office to reconsider a line of opinions stating that an individual may not be promoted or transferred to another position enumerated in Section 25-1-53 after his or her kinsman, within the third degree, becomes the hiring authority.

The situation about which you ask involves an employee working as a clerk whose brother was subsequently elected to the Columbus City Council (the "Council"). You originally sought an opinion from this office regarding whether a nepotism violation would occur if the employee continued in her current position while her brother assumed his role on the City Council. In our response, we opined:

We are of the opinion that the employment described in your letter falls under the exception set out in Mississippi Code Annotated Section 25-1-53, the nepotism statute, that the prohibition prescribed therein does not apply to any employee who shall have been employed at the time his or her kinsman became a member of the governing board.

MS AG Op., *Turnage* at *1 (July 21, 2017). In line with previous opinions, we explained that an employee who currently holds one of the five positions enumerated in the nepotism statute may continue in that position when a relative within the third degree becomes the hiring authority. Additionally, we directed you to the Mississippi Ethics Commission for assistance with potential conflicts of interest.

According to your request, since the issuance of that opinion, the employee has been promoted to another clerk position within her same department, with her brother recusing himself when her employment was discussed and voted on by the Council. You state that it has been brought to your attention that this may be a nepotism violation.

Questions Presented

In asking for reconsideration of the above-referenced line of opinions, you present four (4) specific questions.

1. Does your office still contend that promotion or transfer voids the exception to the nepotism prohibition, and if so, what is the basis for this opinion, other than your own past opinions?
2. Assuming the answer to Question 1 is in the affirmative, does the fact that your office did not advise us how to avoid violations of the nepotism law after request, create any protections or insulation as to the action taken with regard to the Council's approval of a change in the employee's job duties?
3. If your answer to Question 2 was in the negative, please advise us on whether a *nunc pro tunc* minute entry rescinding the "promotion" language and describing it as an assignment of new duties within the department "cures" any nepotism violation.
4. If your answer to Question 1 is in the affirmative and your answer to Questions 2 and 3 are in the negative, may the City return the employee to the position she held before the change of her job duties or is termination the only option for this employee?

Brief Response

1. Yes. As previous opinions have opined, an individual may not be promoted or transferred into one of the five prohibited positions enumerated in Section 25-1-53 when a relative is part of the hiring authority.
2. No. Your 2017 question about future nepotism violations was conditioned upon an affirmative response to another question, which we answered in the negative, making your future violations question moot.
3. The purpose of a *nunc pro tunc* order is to correctly evidence a previous action which was not accurately recorded. Whether a *nunc pro tunc* order is appropriate is a determination that must be made by the Council.
4. Please see our response to Question 3.

Applicable Law and Discussion

As a threshold matter, official opinions of this office are issued on prospective questions of state law pursuant to Mississippi Code Annotated Section 7-5-25. It is well-established that an Attorney

General's opinion can neither validate nor invalidate past action. MS AG Op., *Magee* at *1 (Aug. 29, 2008); MS AG Op., *Brock* at *1 (Nov. 8, 2019) (citing Miss. Code Ann. § 7-5-25). Accordingly, this office provides the following guidance for future application only, and we are unable to opine on the legality of any promotion, appointment, or transfer already made by the Council.

Section 25-1-53 governs nepotism for public employees, providing as follows:

It shall be unlawful for any person elected, appointed or selected in any manner whatsoever to any state, county, district or municipal office, or for any board of trustees of any state institution, to appoint or employ, as an officer, clerk, stenographer, deputy or assistant who is to be paid out of the public funds, any person related by blood or marriage within the third degree, computed by the rule of the civil law, to the person or any member of the board of trustees having the authority to make such appointment or contract such employment as employer. This section shall not apply to any employee who shall have been in said department or institution prior to the time his or her kinsman, within the third degree, became the head of said department or institution or member of said board of trustees

Miss. Code Ann. § 25-1-53 (emphasis added). The final sentence in this quoted language provides a limited exception to the nepotism restriction.

In describing the analysis required to determine whether a violation of Mississippi's nepotism statute has occurred, this office has opined in the following manner:

In determining whether the nepotism statute applies, it is necessary to apply a three-part analysis. One, are the parties related within the third degree? Two, is the relative who is a public official the appointing authority? Three, is the position one of the five enunciated positions in the statute? If the answer to any one of these questions is no, the nepotism statute does not prohibit the appointment or employment of the individual in question.

MS AG Op., *Scanlon* at *2 (May 3, 2021) (citing MS AG Op., *Gilfoy* at *1 (Aug. 26, 1993)). Section 25-1-53 is somewhat narrow in that it only prohibits the hiring of a person who is related by blood or marriage within the third degree to the appointing authority, and this prohibition only applies to five specific positions: officer, clerk, stenographer, deputy or assistant.

This office has consistently maintained that an individual serving in one of the five positions enumerated in Section 25-1-53, whose family member subsequently becomes the appointing authority, is prohibited from being appointed, promoted, or transferred to any of the five enumerated positions. *See, e.g.*, MS AG Op., *Blackmon* at *3 (Aug. 30, 2019) ("An individual may not be subsequently promoted to another prohibited position after his relative becomes the hiring authority."); MS AG Op., *Williams* at 1 (Dec. 21, 1989) ("The statute allows someone already employed or appointed to an otherwise prohibited position to continue in that position when their relative subsequently becomes a member of the appointing or employing authority. However that employed or appointed person may not be transferred or promoted to another

prohibited position after the relative has become a member of the appointing or employing authority.”); MS AG Op., *Andrzejewski* at *1 (May 3, 2002).

Applying this principle—under facts similar to those presented in your request—this office has found that a violation of the nepotism statute would occur if a clerk, employed prior to his or her kinsman within the third degree becoming the appointing authority, was appointed or promoted to another clerk position. MS AG Op., *Hathorn* at *1 (Mar. 9, 2007) (citing MS AG Op., *Ausbern* (Oct. 10, 2014) (“We have previously opined that a violation of the nepotism statute (25-1-53) would occur if a deputy clerk were promoted to the position of city clerk while her sister is a member of the Board of Aldermen and that this would be true regardless of whether the sister recuses herself from any votes on the matter.”); MS AG Op., *Moore* at *1 (Aug. 29, 2003); MS AG Op., *Harness* at *1 (Sept. 16, 2016); MS AG Op., *Floyd* at *1 (Sept. 8, 1989).

Notably, recusal by the kinsman does not alleviate a nepotism violation. MS AG Op., *Turnage* at *1 (Apr. 25, 2014) (citing MS AG Op., *Gibson* (Feb. 1, 2013) (“[O]ur office has repeatedly opined that a violation of the anti-nepotism statute will occur regardless of whether a board member recuses himself.”); MS AG Op., *Turnage* at *1 (Apr. 25, 2014) (“With regard to your questions regarding recusal by the Mayor, a person's recusal from an employment decision by a board on which that person sits is not relevant, in any way, to whether the Nepotism Law is violated.”).

Your second question—referencing an opinion issued by this office in 2017—asks whether the City is protected or insulated from liability resulting from its promotion of the above-referenced employee, in light of “the fact that your office did not advise us how to avoid violations of the nepotism law after request.” Your request also notes that in seeking the 2016 opinion, you “specifically asked what must be done to avoid a future violation of Section 25-1-53.” As an initial matter, in your 2017 opinion request, you asked two questions, with the second of such questions being: “*Assuming the answer to the above question is in the affirmative*, what must Council Member Jones do in order to avoid a future violation of Section 25-1-53 with regard to [the employee]” (emphasis added)? Your second question was premised on an affirmative response to your first question, and this office responded to your first question in the negative. MS AG Op., *Turnage* at *1 (July 21, 2017). Accordingly, your second question was moot. However, as noted in your request for the instant opinion, our 2017 opinion did refer you to the Mississippi Ethics Commission regarding potential conflicts of interest. *Id.*

While Section 7-5-25 provides both civil and criminal immunity, under certain circumstances, to the recipient of an official Attorney General’s opinion, we are not aware of any such treatment for matters upon which this office has not opined.

Your third question asks whether a *nunc pro tunc* entry in the council minutes rescinding the promotion language is sufficient to cure a nepotism violation. This office has stated that “[t]he purpose of a *nunc pro tunc* order is to correctly evidence a previous action which was not accurately recorded.” MS AG Op., *Miller* at *1 (Nov. 16, 2012) (citing MS AG Op., *Chamberlin* at *2 (Jan. 23, 2004); *see also* MS AG Op., *Blackwell* at *1 (Mar. 2, 1995) (finding a board may not use a *nunc pro tunc* order to retroactively approve actions). Whether an entry in the minutes regarding an employee’s promotion is not an accurate reflection of the official action taken requires a factual determination that can only be determined by the Council. MS AG Op., *Baum* at *1 (June

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7, 2019) (“Therefore, to the extent that your inquiries involve questions of fact . . . we are unable to respond by way of an Official Opinion”).

If the Council determines, consistent with the facts, that a *nunc pro tunc* order is appropriate, and the order accurately evidences that the employee—related to the appointing authority within the third degree—was not appointed, promoted, or transferred, no violation of the nepotism statute will have occurred.

Because we did not answer your third question in the negative, your fourth question is moot.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Phil Carter*

Phil Carter
Special Assistant Attorney General

OFFICIAL OPINION