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CITY OF OAKLAND



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Council President Ignacio De La Fuente
City Council Member, District 5

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September 11, 2008

HONORABLE CITY COUNCIL
CITY OF OAKLAND

RE: AN ORDINANCE AMENDING TITLE 9 OF THE CITY OF OAKLAND MUNICIPAL CODE BY ADDING A NEW CHAPTER, 2.38, ENTITLED ANTI-NEPOTISM POLICY; TO PREVENT NEPOTISM IN HIRING AND ADMINISTRATION.

Dear Members of the Council:

This ordinance will significantly curtail impropriety or the appearance of impropriety in the workplace by greatly reducing nepotism, favoritism, and conflicts of interest. It will reinforce fairness in the workplace and preserve the morale of the many dedicated City employees who believe that hiring and promotions should be based on qualifications and performance. It is both legally sound and a necessary source of protection against sexual harassment lawsuits based on sexual favoritism, currently a major source of liability exposure for California employers.

Some revisions were made to the ordinance to address concerns raised at the July 22, 2008 Finance and Management Committee meeting when this ordinance was first proposed, including requiring relationships to only be reported at the time of offer of employment rather than at time of application and eliminating the word "favoritism" from the title.

As discussed below, the ordinance requires the disclosure of relationships; it does not seek to prohibit intimate and familial relationships in the workplace, other than those between supervisors and subordinates. Such disclosures will provide management with an opportunity to consider whether reassignment or other workplace action, such as removal of authority over a subordinate's terms and conditions of employment if the subordinate is a romantic partner, relative or roommate, is appropriate. Discipline, if necessary, would be imposed only for violation of the disclosure requirement rather than

for the existence of the relationship. See Cal. Prac. Guide Employment Litigation Ch. 5-K, § 5:783.1.

BACKGROUND

There are existing laws and regulations that address nepotism in the City of Oakland government – the City Charter and Administrative Instruction 72. However, each of these has significant limitations. The City Charter anti-nepotism provisions are relatively narrow in scope, and do not include any disclosure requirements, implementation procedures, or checks and balances to ensure that nepotism does not occur. Oakland City Charter section 907 stipulates that:

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

Administrative Instruction 72 (Anti- Fraternalization Policy) states that:

“...a supervisor may not date or have a romantic relationship with any employee over whom he or she has supervisory authority, or anyone whose terms and conditions of employment he or she may influence. a supervisor may not supervise a spouse or domestic partner, immediate family member or cohabitant.

The Administrative Instruction has no provision for collection of information to prevent nepotism, and an inadequate enforcement mechanism. The Administrative Instruction is enforced by Agency Directors and the City Administrator, but only when such relationships come to their attention. This may lead to improper supervisory relationships being undetected. The City’s Personnel Department does not currently collect all information from family, consensual romantic, or cohabitant relationships from existing or prospective City employees.

The proposed ordinance would augment the protections of the City Charter and Administrative Instruction 72 and would eliminate the necessity for Administrative Instructions regarding nepotism.

The Need for Checks and Balances

There are no existing checks and balances to ensure that those entrusted with the prevention of nepotism – the Director of Personnel, the City Administrator and Agency Directors -- are actually taking steps to identify illegal and improper relationships and arrange for alternate supervision.

Furthermore, the City Attorney must be able to protect the City from litigation arising out of improper workplace relationships, including those that may lead to costly

claims of sexual favoritism. This proposed ordinance requires that the City Attorney be informed when a prohibited relationship is identified. In recent months the City Attorney's Office has received letters and other complaints regarding nepotism but has lacked the ability to ensure a response. Furthermore, because federal and state law places certain constraints on re-assignments, the City Attorney must be consulted prior to their implementation.

SUMMARY OF PROPOSED LEGISLATION

This ordinance amends Title 9 of the Municipal Code with Chapter 2.38, an anti-nepotism ordinance that would require City employees to disclose all existing relationships, including romantic and cohabitant relationships, before and during employment. The ordinance also requires an initial disclosure of relationships within 60 days of its effective date to ensure that all current employee supervision arrangements are in compliance with the ordinance. If an existing supervisory relationship violates the ordinance, a transfer of authority or actual transfer of an employee to another position that does not violate collective bargaining agreements or Civil Service Rules may be necessary.

The ordinance applies to all City Agencies (Police, Fire, CEDA, Public Works, Dept. Human Services, Library, etc.) and Departments as well as the Mayor's Office, the City Council, the Office of the City Attorney and the City Auditor's office.

The proposed ordinance includes the following key provisions:

- 1) All individuals who apply for employment with the City of Oakland must disclose all known family relationships, consensual romantic and cohabitant relationships with existing City employees, managers and City officials, after receiving an offer of employment. In addition, the City's anti-nepotism policy will be communicated to all applicants for City employment at the time of application.
- 2) All current City officials, managers and employees must disclose all known family relationships, consensual romantic relationships and cohabitant relationships with existing City employees, managers and public officials no later than sixty (60) days from the effective date of this ordinance and thereafter, on an annual basis. Should new family relationships, consensual romantic relationships or cohabitant relationships arise, they must be disclosed within sixty (60) days of their inception to the Director of Personnel.
- 3) City officials and employees may not supervise employees with whom they have a relationship. Following receipt of information establishing that a prohibited family relationship, consensual romantic relationship or cohabitant relationship exists, alternate arrangements will be made by the Director of Personnel in consultation with the Office of the City Attorney, so that no City official, manager, or employee performs supervision for and/or influences in any manner the terms and conditions of employment of any individual with whom that individual has a family relationship, consensual romantic relationship, or cohabitant relationship.

- 4) Failure to report known prohibited relationships shall result in ineligibility for hiring or continued employment by the City.
- 5) All information identifying cohabitants and romantic relationships will be treated as confidential and disclosed only on a need-to-know basis.

It should be noted that “romantic relationship” is a term used in well over 60 cases within the Ninth Circuit and California. See Davis v. Monroe, 526 U.S. 629 (1999). Other cases use a variety of terms, such as Crosier v. United Parcel Serv. (1983)(social relationship, social fraternization), and Merino v. Courtesy Oldsmobile Cadillac, Inc. (2004) 2004 Cal. App. Unpub. 5591 (personal relationship).

FISCAL IMPACT

Management of nepotism is an existing expectation of all City officials and employees and this ordinance does not add significant new responsibilities. Implementation of this ordinance will take minimal staff time at the time of hiring employees to ensure they will not report to relatives. Implementation of this ordinance may result in greater efficiencies and better utilization of City resources due to the use of administrative practices based on merit.

LEGAL CONTEXT

The Ordinance Does Not Violate An Individual’s Right to Privacy

The right to privacy under the California Constitution

Article I § 1 of the California Constitution recognizes certain “inalienable rights,” including the right to privacy. To prevail on an Article I § 1 privacy claim, a plaintiff must show (1) the defendant engaged in conduct that invaded plaintiff’s privacy interests; (2) plaintiff had a reasonable expectation of privacy as to the interests invaded; (3) the invasion was serious; and (4) the invasion caused plaintiff to suffer injury, damage, loss or harm. See id. at § 5:711 (citations omitted).

Preventing the dissemination or misuse of sensitive and confidential information is a privacy interest. Hill v. National Collegiate Athletic Ass’n (1994) 7 Cal.4th 1, 35. A reasonable expectation of privacy is measured objectively, based on widely established community norms. Id. at 37. A serious invasion of privacy is one that constitutes “an egregious breach of the social norms underlying the privacy right.” Id. Protective measures, safeguards and other alternatives may minimize the privacy intrusion. For example, if the intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, there is no violation of the constitutional right to privacy. Pioneer Electronics (USA) Inc. v. Sup. Ct. (Olmstead) (2007) 40 Cal.4th 360, 371.

An employment policy that serves an important interest, such as avoidance of impropriety in the workplace and reduction of risk of sexual harassment, is justified if it minimizes the intrusion on privacy, such as by safeguarding the confidentiality of

information collected. The collection of information on family relationships is unlikely to raise privacy concerns. However, the collection of information on romantic and cohabitant relationships would raise privacy concerns. Courts reviewing employer policies requiring disclosure of such relationships have concluded that the need for such policies trumps employees' interest in not disclosing them.

Disclosure of Romantic or cohabitant relationships

In Barbee v. Household Automotive Finance Corp. (2003) 113 Cal.App.4th 525, the employer had a conflict of interest policy requiring any supervisor who wanted to maintain an intimate relationship with a subordinate to bring the matter to the attention of management, affording it the opportunity to take appropriate action to avoid a potential conflict of interest. Barbee, a supervisor, had an intimate relationship with a subordinate he failed to disclose to the company. When the company learned of the relationship, he was fired.

While the court found that a privacy interest might be implicated, it held that the employee had no reasonable expectation of privacy under the circumstances. The court approved the holdings of other courts that have recognized that employers have a legitimate interest in “avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; [and] preventing family conflicts from affecting the workplace.” Id. at 533. A supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate. In addition, the court recognized that managerial-subordinate relationships present issues of potential sexual harassment, and the employer had a legitimate interest in preventing such situations from developing. Id.

Most importantly, though, the court emphasized that the company's disclosure policy had provided the employee with “advance notice” that the company believed his conducting an intimate relationship with a subordinate would present a potential conflict of interest. In the court's view, this advance notice “further diminished” any expectation of privacy the employee otherwise may have had. Id.

In the event of a privacy challenge to the Oakland ordinance, a court would find that the employee had no expectation of privacy. Therefore, a privacy challenge would fail.¹

Applicants for employment

The ordinance demands more information from applicants than it does from employees. Specifically, it requires applicants to disclose “all relationships [family, romantic, cohabitant] with existing City employees, managers and City officials”—not just those with supervisors. On a practical level, this additional breadth for applicants is justified because at the time of application for employment, the identity or identities of

¹ Additionally, we would argue that because the information would be designated as confidential and would be carefully shielded from disclosure except to those with a legitimate need to know, any privacy intrusion is further minimized.

the applicant's potential future supervisors may be unknown. Moreover, an employer clearly has greater latitude to require disclosures by applicants than current employees. See e.g. Loder v. City of Glendale (1997) 14 Cal.App.4th 846, 897-898 (City's drug testing program violated the federal Constitution insofar as it applied to all current employees who had been offered a promotion to another position but was constitutionally permissible, under both the federal and state Constitutions, insofar as it applied to job applicants).

Anti-Nepotism

It is well settled that anti-nepotism rules do not violate the constitutional right of privacy. The Ninth Circuit has also upheld anti-nepotism policies challenged on the basis of due process and equal protection. See Ortiz v. Los Angeles Police Relief Assoc. (2002) 98 Cal.App.4th 1288, 1312 (discussing Parsons (9th Cir. 1984) 728 F.2d 1234). The court found that the county's justification for the rule--avoiding conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties--was rationally related to a legitimate employer interest. Id. See also Parks v. City of Warner Robins (11th Cir. 1995) 43 F.3d 609 (upholding anti-nepotism policy barring spouses from supervising one another and discharging the spouse with less seniority for violation); Waters v. Gaston County (4th Cir. 1995) 57 F.3d 422 (upholding anti-nepotism policy that barred spouses from working in the same department).

Anti-nepotism policies have been found to be important in avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; and preventing family conflicts from affecting the workplace. Parks, 43 F.3d at 615. Accordingly, the ordinance's requirement to disclose of familial relationships is not legally vulnerable.

Sexual Harassment

The ordinance will protect the City against claims of sexual harassment. In Miller v. Dept. of Corrections (2005) 36 Cal.4th 446, female employees of the California Department of Corrections filed a complaint against the Department and its director, alleging claims of sex discrimination and retaliation under the California Fair Employment and Housing Act (FEHA). In that case the warden was involved in consensual relationships with several female employees. Other female employees—who were not involved with the supervisor—alleged that the employees who were involved received preferential treatment. The California Supreme Court held that this constituted harassment because it communicated a message to other female employees that if they wanted preferential treatment, they, too, would have to acquiesce to sexual demands.

SUSTAINABLE OPPORTUNITIES

Economic: Eliminating nepotism enhances City hiring and employment practices, resulting in a more productive workforce, a concomitant decrease in wasteful spending and an increase in fiscal responsibility.

Environmental: The proposed anti-nepotism ordinance will have no environmental impact.

Social Equity: These improvements to City of Oakland's nepotism policies will improve fairness in hiring and access to employment with the City of Oakland. The ordinance also addresses morale and fairness issues in the workplace.

ACTION REQUESTED OF THE CITY COUNCIL

I ask that you support this important reform without further delay. Management of nepotism is a critical step towards developing the quality of local government that Oakland deserves.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ignacio De La Fuente', with a stylized flourish at the end.

Ignacio De La Fuente
CITY COUNCIL PRESIDENT

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REVISED

Approved as to Form and Legality

V. Lopez 9-11-08
City Attorney

OAKLAND CITY COUNCIL

Ordinance No. _____ C.M.S.

Introduced by Council President Ignacio De La Fuente

AN ORDINANCE AMENDING TITLE 9 OF THE CITY OF OAKLAND MUNICIPAL CODE BY ADDING A NEW CHAPTER, 2.38, ENTITLED ANTI-NEPOTISM POLICY, TO PREVENT NEPOTISM IN HIRING AND ADMINISTRATION.

WHEREAS, in order to maintain confidence in City government, it is imperative that citizens are assured that City employment is free from nepotism, patronage, and favoritism,

WHEREAS, it is imperative that City employment be based on merit, so that citizens are assured that City employees will be providing the highest quality service to those deserving citizens,

WHEREAS, nepotism, patronage and favoritism are demoralizing and dispiriting to the dedicated, hard-working employees of the City,

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Chapter 2.38 is added to the Oakland Municipal Code to read as follows:

2.38. PROHIBITION ON NEPOTISM IN CITY EMPLOYMENT

Section 1. Definitions.

The following definitions apply to this chapter:

“City,” as used in this chapter, means the City of Oakland as a municipal organization, City officers, City managers and City employees, including all individuals who are employees of the City Council, Mayor’s Office, City Administrator’s Office, City Attorney and City Auditor’s Office, as well as all employees of City Agencies and Departments.

“Family Relationship” includes relationship by blood, adoption, marriage, domestic partnership, foster care and cohabitation, and includes parents, grandparents, great-grandparents, grandchildren, great-grandchildren, children, foster children, uncles, aunts, nephews, nieces, first cousins, second cousins, siblings and the spouses or domestic partners of each of these relatives

and cohabitants. This definition includes any relationship that exists by virtue of marriage or domestic partnership, such as in-law and step relationships, which are covered to the same extent as blood relationships.

“Consensual Romantic Relationship” means any consensual sexual or romantic relationship with any City officials, managers and employees who may supervise them, directly or indirectly, or who may influence the terms and conditions of their employment.

“Cohabitant Relationship” means any relationship where an individual shares a residence with a City official, manager or employee.

“Terms and conditions of employment” includes but is not limited to hiring, setting and changing all forms of compensation or remuneration, benefits, payments, hours, shifts, transfers, assignments, working conditions, performance evaluations, promotions, training, retirement, classification, retention, evaluation, demotion, discipline and all other job-related qualifications, opportunities and privileges.

“Supervision” means authority, direction, control or influence, including being in the same chain of command and participation in decisions about Terms and Conditions of Employment.

Section 2. Purpose.

The purpose of this anti-nepotism ordinance is to eliminate actual or perceived conflicts of interest, partiality or favoritism in the City workplace due to nepotism and to maintain public confidence in the fairness of the City’s hiring and employment practices as well as in the competence of City employees. This Ordinance achieves its goals in three ways: (1) by requiring applicants for City employment to disclose all family relationships, consensual romantic and cohabitant relationships with existing City officials, managers and employees, after receiving an offer of employment (2) by requiring disclosure of all existing family and cohabitant relationships, (3) by requiring disclosure of all existing personal romantic relationships between individuals who supervise or may influence the terms and conditions of employment of individuals with whom they have a romantic relationship.

Section 3. Disclosure of Relationships.

A. All individuals who apply for employment with the City of Oakland must disclose all known family relationships, consensual romantic and cohabitant relationships with existing City officials, managers and employees, after receiving an offer of employment. Information concerning cohabitant and consensual romantic relationships will be treated as confidential and disclosed only on a need-to-know basis. The City’s anti-nepotism policy will be communicated to all applicants for City employment at the time of application.

B. All current City officials, managers and employees must disclose all known family relationships, consensual romantic relationships and cohabitant relationships with existing City employees, managers and officials no later than sixty (60) days from the effective date of this

ordinance and thereafter, on an annual basis. Should new family relationships, consensual romantic relationships or cohabitant relationships arise, they must be disclosed within sixty (60) days of their inception to the Director of Personnel. Information concerning cohabitant and romantic relationships will be treated as confidential and disclosed only on a need-to-know basis.

Section 4. Prohibited Supervisory Relationships

A. City officials, managers and employees may not supervise City employees with whom they have a known family relationship, consensual romantic relationship or cohabitant relationship.

B. Following receipt of information establishing that a prohibited family relationship, consensual romantic relationship or cohabitant relationship exists, alternate arrangements will be made by the Director of Personnel in consultation with the Office of the City Attorney, so that no City official, manager, or employee performs supervision for and/or influences in any manner the terms and conditions of employment of any individual with whom that individual has a family relationship, consensual romantic relationship, or cohabitant relationship.

Section 5. Failure to Report Relationships, Including Cohabitant and Romantic Relationships Involving Supervision.

Any individual who fails to disclose her or his known, prohibited family relationship, consensual romantic relationship or cohabitant relationship with City officials, managers or employees, shall be ineligible for hiring or continued employment by the City.

Section 6. Prohibition on Participation or Use of Influence in Hiring and in Setting or Changing Terms and Conditions of Employment

No official, manager or employee may attempt to influence the City or any official, manager or employee, to hire, promote, or change the terms and conditions of employment of any individual with whom that person has a family relationship, consensual romantic relationship or cohabitant relationship. No official, manager or employee may delegate such authority to a subordinate in order to participate in such personnel decisions.

Section 7. Enforcement

A. The Director of Personnel shall be responsible for collection of information concerning family relationships, consensual romantic relationships and cohabitation relationships. Such information shall also be provided to the City Attorney and City Auditor. Such information will be preserved for a minimum of five years.

B. The Director of Personnel, in consultation with the City Attorney, shall be responsible for identifying and implementing alternate arrangements should an official, manager or employee provide supervision to, directly or indirectly, an individual with whom she or he has a family relationship, consensual romantic relationship or cohabitant relationship. In the event that a prohibited relationship exists between the Director of Personnel and any other City official,

manager or employee, the City Administrator, in consultation with the City Attorney, shall make such alternate arrangements.

C. Any City employee who becomes aware that an official, manager or employee has attempted to influence the City, its officials, managers or employees, or change the terms and conditions of employment of any individual with whom that person has a family relationship, consensual romantic relationship or cohabitant relationship, shall report that attempt to the Director of Personnel, the City Attorney or the City Auditor.

Section 8. Severability.

If any part, provision, or clause of this Ordinance or the application thereof to any person or circumstance, is held to be invalid by a court of competent jurisdiction, all other provisions and clauses hereof, including the application of such provisions and clauses to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and
PRESIDENT DE LA FUENTE

NOES –

ABSENT –

ABSTENTION –

ATTEST: _____

LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____