Oregon
Kate Brown, Governor

Government Ethics Commission
3218 Pringle Rd SE Ste 220
Salem, OR 97302-1680
Telephone: 503-378-5105
Fax: 503-373-1456
E-mail: mail@ogec.oregon.gov
Web Site: www.oregon.gov/ogec

December 16, 2022

Dexter A. Johnson
Legislative Counsel
900 Court St. NE S101
Salem, Oregon 97301

Re: Commission Advisory Opinion 22-248A

Dear Mr. Johnson:

At its December 16, 2022 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion in response to the request set forth in your letter to the Commission dated October 7, 2022. The Commission extended the 60-day period for this commission advisory opinion, as authorized by ORS 244.280(2).

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 22-248A

SYNOPSIS OF FACTS AS PRESENTED TO THE COMMISSION

The following factual information is derived from your request letter and additional background information provided by you.

The Legislative Assembly employs hundreds of individuals to support the 90 elected officials (members) of the Legislative Assembly. While the Legislative Assembly employs mostly nonpartisan staff, the members of the Legislative Assembly also employ partisan staff to serve as legislative staff for an individual member (Member Office Staff). Employees in these offices are hired, supervised, and fired by the legislator who appointed them, and these employees are paid with public moneys allocated to each legislator by the Legislative Assembly.

Within each chamber of the Legislative Assembly, the legislators of each major political party elect a legislator to serve as the head of the party's caucus. Each elected caucus leader also serves as the appointing authority responsible for hiring, supervising, and firing the partisan staff of the caucus office (Caucus Office Staff).

Each chamber of the Legislative Assembly also elects a legislator as leader for that chamber, i.e., the Speaker of the House of Representatives and the President of the Senate. In addition to serving as the appointing authority for Member Office Staff, the Speaker and the President each also serve as the appointing authority responsible for hiring, supervising, and firing employees in their respective leadership offices (Leadership Office Staff). Thus, under current legislative rules, each member of the Legislative Assembly is the appointing authority for Member Office Staff, while a legislator who is serving as a Caucus Leader or Presiding Officer has the additional responsibility of supervising Caucus Office Staff or Leadership Office Staff.

Prior to 2007, there were no express nepotism restrictions in ORS Chapter 244. In 2007, the Legislative Assembly enacted House Bill 2595 (2007), which included new provisions of law that are now codified as ORS 244.177 and ORS 244.179. These laws generally prohibit all public officials from being involved in the hiring or supervision of a relative or member of the household. Both statutes provide exceptions for members of the Legislative Assembly. These exceptions provide that a member of the Legislative Assembly may be involved in the hiring or direct supervision of a relative or member of the household who serves on the member's personal legislative staff. [ORS 244.177(2) and ORS 244.179(2)].

The phrase "personal legislative staff" is not defined in statute or in any Administrative Rules adopted by the Commission. The request for an opinion explains that, ever since the passage of House Bill 2595 (2007), the Legislative Assembly has interpreted the phrase "personal legislative staff" to include all partisan legislative staff for whom the legislator serves as the sole appointing authority pursuant to legislative rule. For most members of the Legislative Assembly, this would be limited to their Member Office Staff. For the caucus leaders and presiding officers, it would also include Caucus Office Staff and Leadership Office Staff. As the request for an opinion explains, the Legislative Assembly's interpretation of the exceptions set forth in ORS 244.177 and ORS 244.179, including the term "personal legislative staff of the member of the Legislative Assembly", is reflected in the Legislative Branch Personnel Rule (LBPR) 24, which states that the legislatively created, nepotism-related limitations in the rule "[do] not apply to members of the Legislative Assembly, personal staff, leadership office staff or caucus office staff."

Thus, according to the request for an opinion, after the nepotism provisions were passed in 2007, caucus leaders and presiding officers continued to hire and supervise family members who were employed as Caucus Office Staff or Leadership Office

Staff. More recently, questions have arisen regarding the scope of the nepotism exceptions for legislators -- specifically, whether "personal legislative staff of the member of the Legislative Assembly," as that phrase is used in ORS 244.177 and ORS 244.179, extends to Caucus Office Staff or Leadership Office Staff.

LEGAL BACKGROUND

Members of the Legislative Assembly are public officials, as defined in ORS 244.020(15), and are subject to the Government Ethics law in ORS Chapter 244.

ORS 244.020(11) defines "member of the household" to mean any person who resides with the public official or candidate.

ORS 244.020(16) defines "relative" to mean the spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of a public official or candidate; the parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official or candidate; any individual for whom the public official or candidate has a legal support obligation; any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or any individual from whom the candidate receives benefits arising from that individual's employment. [ORS 244.020(16)(a) to (e)]

ORS 244.177(1)(a) provides that a public official may not appoint, employ or promote a relative or member of the household to, or discharge, fire or demote a relative or member of the household from, a position with the public body that the public official serves or over which the public official exercises jurisdiction or control, unless the public official complies with the conflict of interest requirements of this chapter.

ORS 244.120(1)(a) provides that, when met with a conflict of interest, a member of the Legislative Assembly must publicly announce, pursuant to rules of the house of which the public official is a member, the nature of the conflict before taking any action thereon in the capacity of a public official.

ORS 244.177(1)(b) provides that a public official may not participate as a public official in any interview, discussion or debate regarding the appointment, employment or promotion of a relative or member of the household to, or the discharge, firing or demotion of a relative or member of the household from, a position with the public

body that the public official serves or over which the public official exercises jurisdiction or control.

ORS 244.177(2) states that a member of the Legislative Assembly may appoint, employ, promote, discharge, fire or demote, or advocate for the appointment, employment, promotion, discharge, firing or demotion of, a relative or member of the household to or from a position on the personal legislative staff of the member of the Legislative Assembly.

ORS 244.179(1) states except as provided in subsections (2) to (4) of this section, a public official acting in an official capacity may not directly supervise a person who is a relative or member of the household.

ORS 244.179(2) states that a member of the Legislative Assembly may directly supervise a person who is a relative or member of the household, and who serves as a public official in a position on the personal legislative staff of the member of the Legislative Assembly.

QUESTION PRESENTED

Question: If a member of the Legislative Assembly serves as a Caucus Leader or Presiding Officer, do the nepotism exceptions for "the personal staff of the member of the Legislative Assembly" set forth in ORS 244.177(2) and 244.179(2) permit the legislator to hire and supervise a family member or member of the legislator's household on the relevant Caucus Office Staff or Leadership Office Staff?

Short Answer: No, the exception for "the personal staff of the member of the Legislative Assembly" does not apply to Caucus Office Staff or Leadership Office Staff.

ANSWER AND ANALYSIS

Initially, we wish to clarify that the Oregon Government Ethics Commission cannot opine on events or actions that have already occurred; thus, this Opinion will not address any prior actions, but will instead focus on how ORS 244.177 and 244.179 would apply prospectively to the circumstances presented.

Ordinarily, public officials are prohibited from participating in the hiring or direct supervision of their relatives or household members as paid employees of their public body. [ORS 244.177(1) and ORS 244.179(1)]. As you noted, these statutes include express exceptions for members of the Legislative Assembly. ORS 244.177(2) and ORS 244.179(2) allow a member of the Legislative Assembly to hire and supervise a member of the household or relative on that legislator's personal legislative staff.

The question raised here is whether the term "personal legislative staff" means only the legislators' Member Office Staff, or whether it also includes Caucus Office Staff and Leadership Office Staff. That determination is necessary to know whether the nepotism exceptions in ORS 244.177(2) and ORS 244.179(2) would also apply to members of the Legislative Assembly hiring or supervising relatives or household members for the Caucus Office Staff and Leadership Office Staff. As the Oregon Supreme Court has explained, the primary goal in interpreting statutes is to determine the intent of the legislature at the time it enacted the statute. *Matter of Compensation of Ward,* 369 Or 384 (2022), citing *State v. Gaines,* 346 Or 160, 171 (2009). To determine that intent, a court will look to the text, context and any helpful legislative history, while recognizing that there is no more persuasive evidence of legislative intent than the statutory language employed. *Id.*

When the Legislative Assembly does not specifically define a term of common usage, a court will "generally assume that the legislature intended to use the term in a manner consistent with its 'plain, natural, and ordinary meaning,' and [will] often consult dictionaries for guidance in determining what the legislature would have understood a term to mean." *Kinzuna Resources, LLC v. DEQ*, 366 Or 674, 681(2020), citing *Coos Waterkeeper v. Port of Coos Bay Oregon*, 363 Or 354, 363 (2018). Here the use of the term "personal" preceding "legislative staff" has a plain, unambiguous meaning that connotes belonging to a particular legislator. Webster's Third New International Dictionary defines the term "personal," in part, as "1 : of or relating to a particular person : affecting one individual or each of many individuals * * * 6 : exclusively for a given individual...." This suggests that the term "personal legislative staff" refers to the legislative staff relating to, or working exclusively for, each of the 90 individual legislators, i.e., Member Office Staff.

Your request indicates that the Legislative Assembly has interpreted the term "personal legislative staff" to apply to all partisan legislative staff for whom the legislator serves as the sole appointing authority, responsible for the employees' hiring, supervising, and firing. This reasoning suggests that because the Caucus

leaders, the Speaker of the House, and the President of the Senate all serve as the appointing authority responsible for hiring, supervising, and firing employees in their respective Caucus and Leadership Offices, the Caucus Office Staff and Leadership Office Staff would qualify as "personal legislative staff" of those legislators serving as their respective appointing authority.

The challenge with that argument is that it appears to stretch the meaning of "personal" beyond its plain, natural, and ordinary meaning. Caucus Leaders and Presiding Officers can change and when they do, the authority over staff changes along with the holder of the leadership office. As a consequence, the argument would have to be that the staff of those offices is "personal" to whichever member of the Legislative Assembly holds the office of Caucus Leader or Presiding Officer. The statute, however, describes the "personal legislative staff of the member of the Legislative Assembly," suggesting that the staff must be "personal" to the legislator *in their capacity as* a member of the Legislative Assembly and not, for example, in their capacity as a holder of a leadership position. Put differently, Caucus Office Staff and Leadership Office Staff do not appear to be personal staff to the member of the Legislative Assembly, as a "member of the Legislative Assembly."

Although the current interpretation of Legislative Branch Personnel Rules (LBPR) may not be directly relevant to understanding the intent of the 2007 Legislative Assembly that adopted ORS 244.177 and ORS 244.179, we note the rules would appear to support the conclusion that "personal legislative staff" is limited to Member Officer Staff. That is, while LBPR 24 "does not apply to members of the Legislative Assembly, personal staff, leadership office staff or caucus office staff" – in creating this exception, the rule expressly describes "personal staff" as a class of staff that is different than "leadership office staff or caucus office staff." *See also* LBPR 5 (same); LBPR 32 (same). This differentiation is consistent with the applicable definition of "personal staff" in LBPR 2: "'Personal staff' means an employee working directly for a legislative member and paid from the member's services and supply budget." While legislative rules do exclude Caucus Office Staff and Leadership Office Staff from the scope of the legislatively created nepotism-related provisions of LBPR 24, the rules also very clearly distinguish Caucus Office Staff and Leadership Office Staff from "personal staff." Thus, the current rules indicate that Member Office Staff are different from Caucus Office Staff and Leadership Office Staff, and that only Member Office Staff are paid from the individual member's budget. Thus, on balance, the current rules support the conclusion that only Member Office Staff constitute the "personal legislative staff" of the legislator.

Were the intent to apply the term "personal legislative staff" beyond Member Office Staff, the legislature could have chosen different language to effectuate that intent. The Legislative Assembly has, on several occasions, adopted statutes that apply broadly to "legislative staff" or to "partisan legislative staff." *See, e.g.*, ORS 40.274(1)(b); ORS 173.915; ORS 173.921; ORS 173.927(1). Thus, although the Legislative Assembly knows how to adopt statutes applicable to "legislative staff" and "partisan legislative staff," it chose the phrase "personal legislative staff of the member of the Legislative Assembly" in ORS 244.177(2) and ORS 244.179(2). Similarly, although the Legislative Assembly knows how to specifically describe Caucus and Leadership Office Staff – and exempt them nepotism-related rules of law based on that status – it did not do so in ORS 244.177 or ORS 244.179. *See also* ORS 243.696(3)(statutory provision applicable to "presiding officers" and "the majority and minority party caucus leaders of the Senate and House of Representatives.") Ultimately, then, the text and context of ORS 244.177 and ORS 244.179 suggest that the "personal legislative staff of the member of the Legislative Assembly" does not include Caucus Office Staff or Leadership Office Staff.

ORS 174.010 explains that the goal of statutory construction is to "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." Here, the exceptions in ORS 244.177(2) and ORS 244.179(2) expressly permit legislators to hire or directly supervise their relatives or household members in positions on their "personal legislative staff." The statutes say nothing about hiring or supervising relatives or household members in positions outside their personal legislative staff, such as Caucus Office Staff or Leadership Office Staff.

Your request addresses the legislative history of the term "personal legislative staff" in Footnote 2. You point out that the contents of House Bill 2595 (2007) were based on draft legislation and a report provided by the Oregon Law Commission (OLC). The OLC report noted "the high level of personal trust, confidence, and confidentiality expected of personal legislative staff" as "persuasive as to the practical necessity, if not the desirability, of continuing to allow members of the Legislative Assembly to hire relatives to serve on their personal staffs."

You assert that the OLC report "does not appear to suggest that the OLC's recommendations were intended to limit or in any way alter the historic practice of allowing members of the Legislative Assembly who serve in leadership roles to employ relatives in caucus offices or in the offices of presiding officers."

Although the OLC report describes the rationale for the adoption of the exception for legislators, it does not appear to illuminate its scope. Instead, the statements and recommendations in the OLC report are consistent with the conclusion the Commission draws from the text and context of ORS 244.177 and ORS 244.179: that the "personal legislative staff of the member of the Legislative Assembly" is limited to Member Office Staff.

Accordingly, the Commission construes the term "personal legislative staff of the member of the Legislative Assembly" to apply exclusively to the legislators' Member Office Staff, and not to Caucus Office Staff or Leadership Office Staff.

That does not, however, fully resolve the matter. The Commission recognizes that the state and federal constitutions may have a role to play in this matter. *See also* ORS 244.260(3) ("...If the person who is the subject of the [complaint or own motion] is a member of the Legislative Assembly, the executive director [of the Commission] shall determine whether the alleged violation involves conduct protected by Article IV, section 9, of the Oregon Constitution"). The doctrine of legislative immunity, codified in the respective Speech and Debate clauses, provides jurisdictional and testimonial privileges that relate to those legislative acts that are "clearly a part of the legislative process – the due functioning of that process." *See State v. Babson*, 355 Or 383, 423 (2014), quoting *U.S. v. Brewster*, 408 US 501, 515-516 (1972) (emphasis deleted). In the employment context, federal courts have been reluctant to interpret legislative immunity to bar discrimination lawsuits, unless the suit implicates or relies on a protected legislative act or the motivation for a protected legislative act. *See, e.g., Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F. 3d 1301, 1315 (10th Cir. 2004)(citation omitted)(allowing age discrimination complaint to proceed where "the alleged discriminatory acts by the Senator were not legislative acts. No official Senate action, such as a vote or subpoena, was involved. None of the Senator's alleged misconduct took place 'in either House' of Congress.'") *See also Id.* at 1318 ("A personnel decision is not a 'legislative act,' as defined by the Supreme Court, and is therefore not entitled to immunity. The Speech or Debate Clause therefore provides protections only if legislative acts must be proved to establish the claim challenging the personnel action."). *Fields v. Office of Eddie Bernice Johnson*, 459 F. 3d 1 (D.C. Cir. 2006) (allowing complaints to proceed based on allegations of racial, gender and disability-related discrimination, because it wasn't "necessary to inquire into how the Member spoke, how he debated, how he voted, or anything he did in the chamber or committee in order to make out a violation.").

Here, a similar result likely obtains; neither proof that the person is a "relative" or "member of the household," nor of the employment actions described in the statute, necessarily requires an inquiry into or examination of a protected legislative act or the rational for a protected legislative act. As a consequence, the Commission does not perceive a constitutional bar to enforcing ORS 244.177 or ORS 244.179, consistent with the intent of the Legislative Assembly that enacted those statutes.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. EXCEPT AS OTHERWISE PROVIDED IN CHAPTER 244, THE COMMISSION MAY NOT IMPOSE A PENALTY UNDER ORS 244.350 OR 244.360 FOR ANY GOOD FAITH ACTION OR TRANSACTION TAKEN IN RELIANCE ON THIS ADVISORY OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 16 day of December 2022

David M. Fiskum, Chairperson
Oregon Government Ethics Commission

REVIEWED BY:

Joshua Nasbe, Assistant Attorney General