Opinion No. 154.

Public Welfare—Merit System—Nepotism—County Commissioners.

HELD: The provisions of the nepotism statutes apply to appointments of personnel of state and county departments of public welfare under the Merit System.

October 18, 1939.

Honorable I. M. Brandjord, Administrator
Department of Public Welfare
Helena, Montana

My Dear Mr. Brandjord:

You have requested my opinion as to whether the Nepotism Act applies to employment of personnel of the State and County Departments of Public Welfare, in view of the provisions of the Merit System set up under the Welfare Act. In your letter you give a specific fact case as follows: Prior to September 15, 1939, the daughter of a county commissioner was employed as caseworker; on that date she resigned her position to pursue post graduate work, intending thereafter to seek employment in some county other than the county wherein her father was commissioner, but has changed her mind and now seeks appointment in the county wherein her father is a commissioner. The two commissioners, other than the father of the applicant, desire to appoint her to a position on the personnel of that county.

Subsection (b), Section III, Part I of Chapter 82, Laws, 1937, requires that a Merit System shall be established and maintained in the State and County Departments of Public Welfare. In accordance with this statutory provision, such Merit System was established on March 1, 1938, and ever since has been in full force and effect. Under this Merit System, as I understand it, applicants for positions with the state or county departments are required to submit to an examination. As the result of such examination they are rated and classified for the various positions. The personnel for the county departments are appointed by the county commissioners acting ex-officio as a County Board of Public Welfare, but appointments may only be made from a list certified as qualified through the State Department in accordance with the rules and regulations of the Merit System. Rule 2 of the Merit System provides:

> "* * * When a vacancy occurs in the classified service in a county department of public welfare, the county board shall request the committee on personnel to certify names from the appropriate eligible list. The personnel committee shall certify to the county board the five highest names on the list. Selection shall be made from those certified except as provided in these rules and regulations. The county board may consider all information available bearing on the fitness of the candidate. The county department shall notify the Director of Public Assistance, representing the committee on personnel the name of the person selected to fill the vacancy. * * *"

Section 456.1, R. C. M., 1935, defines nepotism as, "the bestowal of political patronage by reason of relationship rather than of merit." Section 456.2 prohibits, "any member of any board, bureau or commission, or employee at the head of any department of this state or any political subdivision thereof," from appointing to any position of trust or emolument any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree, or by affinity within the second degree.

This office has many times held that when any board is authorized to make an appointment, such appointment is the act of the entire board acting as a unit and not individually, and further that an appointment of a person related to one member of the board, within the restricted degree, by the other members, the related member not being present or not voting for such appointment, is a violation of the provisions of the Nepotism Act. (See Opinions 23 and 96, Vol. 18, Official Opinions of Attorney General.) This office has also held that appointment on the basis of merit rather than relationship would not be a defense in a prosecution for violation of the Act. (See Opinions of Attorney General, Vol. 15, pp. 88 and 128.)

It is well to note here the purpose and aim of nepotism legislation. This is best expressed by the Supreme Court of Oklahoma in the case of Reddell v. State, 170 Pac., at page 274, where the court said, "The question naturally arises, What was the intent and purpose of the foregoing statutes? It is within the knowledge of the members of this court that, prior to the adoption of anti-nepotism statutes in this country, a practice had arisen wherein

it was the custom of elected officials to appoint their relatives to subordinate positions and employments in their department of state and municipal government. It was this practice that led undoubtedly to the adoption of such statutes and this is the practice we think it was clearly intended to abolish."

Had the legislature in adopting the Welfare Act and providing for a merit system intended that the Nepotism Act should not apply to appointment of personnel in the welfare departments, it could easily have so provided by specific language, or by repealing Section 456.2. This it failed to do, although by Sections I, II, and III, Part VII of the Act it did repeal certain other sections of the code. It is further significant, in this connection, that notwithstanding the merit system had been in operation for more than a year the legislature of 1939 did not see fit to amend the Act in this respect, or to repeal the nepotism statutes, although it did adopt many amendments to Chapter 82.

We cannot say, after considering both statutes, that a repeal by implication has been effected. Our supreme court has many times held that repeals by implication are not favored. (See Nichols v. School Dist., 87 Mont. 181; State v. Board of Commissioners, 89 Mont. 37; State ex rel. Wilson v. Wier, 106 Mont. 527). It is a well established rule of statutory construction, adopted by our court in the case of State v. Quinn, 40 Mont. 472, that "where two or more statutory provisions relate to the same subject-matter, they should be construed, if possible, so as to give effect to all." In construing statutes, the courts have no concern with the wisdom or effect of the provisions, as was said in the case of Fergus Motor Co. v. Sorenson, 73 Mont. 122, at 133, "As to the public, in those instances where it might be affected, we are concluded by the rule that even though the practical application of a law which is capable of enforcement fails to meet the needs of a particular class, it is not permitted to construe its Act by omission or insertion, and thus to substitute our judgment as to proper legislation, even though we might in instances prefer it otherwise * * *."

It might be contended that because appointments under the merit system are made on the basis of merit rather than relationship, the Nepotism Act does not apply. However, in view of our opinion that merit is no defense to a prosecution under the Nepotism Act, we must conclude that this contention has no merit.

When the provisions of the Merit System are considered in connection with the neoptism statutes and keeping in mind the aims and purposes of such legislation as herein pointed out, it cannot be said that the two are in irreconcilable conflict, but the provisions of both may be given effect.

It is, therefore, my opinion that a county board of public welfare may not appoint to a position on the personnel of the county department a person related to any member of the board, or to the board as a whole, within the restricted degrees of kinship, as set forth under Section 456.2, R. C. M., 1935. The same applies to appointments by the State Board of Public Welfare.