

Opinion No. 185.**Janitors and Engineers—Nepotism Act
—School District—Consanguinity.**

Held: There is no violation of the Nepotism Act in retaining employee herein mentioned under facts presented.

March 6, 1944.

Mr. Wilbur P. Werner
County Attorney
Glacier County
Cut Bank, Montana

Dear Mr. Werner:

You have asked my opinion on the following facts:

In 1926 "A" was one of the trustees of School District No. 9. In September of that year the school trustees hired "B" who was the brother of "A" in the capacity of engineer and janitor of the high school and grade school buildings in said district. In 1933 our state legislature passed what is known as the Nepotism Act which is covered in Sections 456.1, 456.2 and 456.3 of the Revised Codes of Montana, 1935. "B" has continuously served under said appointment to the present time, and "A" has been continuously serving as a member of the board since 1926 and is now a trustee. Excepting when he was first hired, no mention of "B" or his continuing employment from year to year has ever appeared on the minutes of school district meetings or otherwise. His employment continues without any definite action being taken by the trustees. In other words, there is no hiring of "B" by the board each year for a one year period. His employment is a continuous one commencing prior to the time when the Nepotism Act went into effect. The question is whether or not this employment is a violation of the above act.

From the facts as stated "B" was employed as engineer long before the Nepotism Act was passed for an indefinite term, that is, during the pleasure of the board of trustees, and has continued as engineer at all times since he was originally so employed in 1926.

During all such time "A", a brother of "B", has been a member of the board of trustees, no mention or discussion

by the board of "A's" employment has ever been had by the board since he was first employed, evincing that he has merited the employment.

The said act provides, among other things, that "Nepotism is the bestowal of political patronage by reason of relationship rather than merit." (Emphasis mine.)

Section 456.2, Revised Codes of Montana, 1935, is as follows:

"It shall be unlawful for any person or any member of any board, bureau or commission, or employee at the head of any department of this state or any political subdivision thereof to appoint 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. It shall further be unlawful for any person or any member of any board, bureau or commission, or employee of any department of this state, or any political subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus or commissions, or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree, or by affinity within the second degree." (Emphasis mine.)

It will be noted that the act prohibits the appointment of the designated relative. In the case you have submitted the appointment was made prior to the enactment of the Nepotism Act, which came into our statutes in 1933, and as the act is not retroactive, it would not apply to the facts here presented. It is not questioned but that the board of trustees have authority to discharge "A" as he serves at the pleasure of the board; however, there is no statute requiring that the board discharge "A" and therefore no duty on the board to do so. Hence, in the absence of such duty, it is my opinion there is no violation of the Nepotism Act in retaining such employee under the facts here presented.

The same conclusion has been reached by two former Attorneys General in Opinion No. 204, page 212 of Volume

16, and Opinion No. 263, page 435 of
Volume 19, Report and Official Opin-
ions of the Attorney General.

Sincerely yours,
R. V. BOTTOMLY
Attorney General