VOLUME NO. 39 OPINION NO. 67

EDUCATION - Protection of teachers against employment discrimination based on relationship by marriage;
EMPLOYEES, PUBLIC - Application of nepotism laws and Human Rights Act to employment involving relationships by marriage;
MARRIAGE AND DIVORCE - Relationship by affinity;
NEPOTISM - Nepotism law impliedly repealed by Human Rights Act;
SCHOOL DISTRICTS - Human Rights Act, preventing employment discrimination;
SCHOOL DISTRICTS - Nepotism laws as affecting employment of teachers;
TEACHERS - Human Rights Act, protection against employment discrimination for employees related by marriage;
MONTANA CODE ANNOTATED - Sections 1-1-219, 2-2-302, Title 40, 49-2-303(1)(a), 49-3-101(1)(b), 49-3-201(1), 72-11-105;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 49.

HELD: The Human Rights Act prohibits the board of trustees of a school district from refusing employment to a teacher solely on the basis of her relationship by affinity to a board member.

21 July 1982

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Dear Mr. Nelson:

You requested an opinion concerning whether a board of trustees for a school district would be in violation of the nepotism law if it hired as a teacher the sister-in-law of one of the members of the board.

Section 2-2-302, MCA, of the nepotism statutes prohibits any person or any member of a governmental agency to "appoint to any position of trust or emolument any person related or connected by...affinity within the second degree." The language of this section appears, on its face, to clearly prohibit the hiring in question. However, the Human Rights Act, Title 49, MCA, appears to conflict with this nepotism law with respect to employment of persons related by marriage. Section 49-2-303(1)(a), MCA, provides in pertinent part:

> (1) It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, marital status, color, or national origin or because of his age, physical or mental handicap, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, or sex distinction. [Emphasis added.]

Section 49-3-201(1) of the Governmental Code of Fair Practices provides in pertinent part:

> (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital

> status, physical or mental handicap, or national origin. [Emphasis added.]

School boards are governed by the latter section, as well as the former. § 49-3-101(1)(b), MCA.

The Montana Supreme Court has recently construed these two sections as they apply to employment of persons related by marriage. In Thompson v. Board of Trustees, School District No. 12, 38 St. Rptr. 706, 627 P.2d 1229 (1981), two school administrators (a principal and a superintendent) had wives who were tenured teachers in the school district. The board terminated the superintendent and demoted the principal because of a school district policy prohibiting school administrators from having spouses employed by the school system. The Supreme Court broadly construed the term "marital status" in the above-quoted sections and held that "a liberal definition of the term 'marital status' includes the identity and occupation of one's spouse." The Court rejected a narrower interpretation of the term, concluding that it would lead to absurd results: "if plaintiff and his wife were simply to dissolve their marriage, both could keep their jobs. But for the fact this plaintiff is married, he would still be working. The term 'marital status' as a protected classification in the statutes was included to cover this type of unjustified discrimination."

The facts in issue in Thompson led to a holding that addressed employment situations involving spouses. It is my opinion that the protection afforded under the Human Rights Act on the basis of marital status cannot be strictly limited to spouses, or relationship by affinity in the first degree, because such a narrow construction would lead to absurd results, and would be in contravention of the objectives of the Human Rights Act as well as the nepotism law.

A husband and wife are related by affinity in the first degree. A person and his brother-in-law or sister-in-law are related by affinity in the second degree. §§ 1-1-219, 72-11-105, MCA.

The nepotism statute prohibits the hiring of a person related by affinity within the second degree. Thus, if the Human Rights Act were construed to protect only the hiring of a person related by affinity of the first

degree, the result would be that an employer may have to hire his wife in a situation where he would be prohibited from hiring his wife's sister. The nepotism law was enacted to prevent abuses by public officials appointing relatives to the public payrolls, on the basis of relationship rather than merit. 38 Op. Att'y Gen. No. 49. Clearly there is a greater potential for such abuse between spouses than in-laws. The Human Rights Act was enacted to promote hiring based on merit. Clearly the nepotism law's prohibition against hiring an in-law contravenes that objective.

Another difficulty that arises with a limited construction of the Human Rights Act is the inconsistent effect of the test in Thompson upon employment situations involving relationships in the second degree of affinity. The Court held that the employment practice was discriminatory because "but for the fact this plaintiff is married he would still be working." Strict application of this test will protect only half of the applicants related in the second degree of affinity. For example, assume Mr. X is a member of the school board. His brother's wife applies for a job with the school system. "But for the fact that she is married" to her spouse she would be hired. However, assume that Mr. X's wife's brother applies for a job. In this situation the applicant's marriage is not the cause of his problem, rather Mr. X's marriage is. In this situation the "but for" test does not fit, and the applicant is not protected under the limited construction of the Human Rights Act, even though he is related to Mr. X in the second degree of affinity, the same as the applicant in the first example. Such inconsistent application of statutory protections against employment discrimination cannot be the intent of either the Legislature or the Supreme Court.

The reasonable construction of "marital status" in the Human Rights Act is any marital relationship that, but for its existence, the applicant would be employed. This interpretation is consistent with the objectives of the Human Rights Act as well as the decision in Thompson. Employers would be further encouraged to consider the merits of the applicant as opposed to relationships. The holding in Thompson does not appear to be self-limiting. The Court held that the term "marital status" includes the identity and occupation of one's spouse. It did not expressly limit the definition

of the term. It is readily apparent that the definition of "marital status" must be flexible for further interpretation as the need arises, to further the objectives of the Human Rights Act.

The nepotism law was not at issue in Thompson, however, and consequently the conflict between the nepotism law and the Human Rights Act was not addressed. The Supreme Court did however address a similar problem, a conflict between the Human Rights Act and the mandatory retirement law for teachers, section 20-4-203(2), MCA, in Mary Dolan v. School District No. 10, 38 St. Rptr. 1903 (1981). That section provided for mandatory retirement for teachers at age 70; it also permitted the schools to retire the teachers at age 65. The Human Rights Act, however, forbids employment discrimination based on age unless there is bona fide occupational qualification. §§ 49-2-303, 49-3-103, 49-3-201, MCA.

In dealing with these conflicting statutes, the Supreme Court applied several considerations.

It first noted that the mandatory retirement law was enacted before the Human Rights Act. It also noted that the Human Rights Act is general legislation, of which one facet concerns the area of employment, whereas section 20-4-203(2), MCA, is a specific one. The Court considered two pertinent rules of statutory construction: (1) where statutes irreconcilably conflict, the later statute supersedes the earlier, and (2) specific statutes normally prevail over general ones. If the first rule were applied, the Human Rights Act prevails; if the second were applied, the retirement law prevails. The Court then turned to the guidance of a quotation from 50 Am. Jur. at 566-67, cited in State v. Board of Examiners of State, 121 Mont. 402, 194 P.2d 633 (1948):

> [A] later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation

> upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal. [121 Mont. at 417, 194 P.2d at 641. Emphasis added.]

The Court concluded that the rule that the later legislative enactment prevails over the earlier was the better rule to apply because to hold otherwise "would materially dilute the effect of Montana's antidiscrimination legislation." The Court explained that the legislative intent of the Human Rights Act is that "[t]here shall be no discrimination in certain areas of the lives of Montana citizens, employment being one such area, except under the most limited of circumstances." The retirement law clearly violates this intention because it permits discrimination in employment based solely upon age. The Court concluded that the mandatory retirement law was impliedly repealed by the Human Rights Act. This same reasoning guides my conclusion that the Human Rights Act must prevail over the nepotism law. The nepotism law was enacted in 1933 and 1935; the Human Rights Act in 1974 and 1975. The earlier Act is specific, and the later one general. The intent of the Human Rights Act is stated above. The nepotism law clearly violates that intent because it permits discrimination in employment based solely on marital status. On this basis, the Human Rights Act must prevail over the nepotism law.

The Legislature may want to review the conflicts between these two acts to accomplish their stated goals while avoiding inconsistent applications of their statutory protection.

THEREFORE, IT IS MY OPINION:

> The Human Rights Act prohibits the board of trustees of a school district from refusing employment to a teacher solely on the basis of her relationship by affinity to a board member.

Very truly yours,

MIKE GREELY
Attorney General