VOLUME NO. 43 OPINION NO. 23

CONFLICT OF INTEREST - Enforcement of nepotism laws on Indian reservations;
CONTRACTS - Effect of nepotism statute violation;
CRIMINAL LAW AND PROCEDURE - Enforcement of nepotism laws on Indian reservations;
EDUCATION - Enforcement of nepotism laws against school board members;
INDIANS - Enforcement of nepotism laws on Indian reservations;
NEPOTISM - Enforcement of nepotism laws on Indian reservations;
PUBLIC OFFICERS - Enforcement of nepotism laws on Indian reservations;
SCHOOL BOARDS - Enforcement of nepotism laws on Indian reservations;
SCHOOL DISTRICTS - Enforcement of nepotism laws on Indian reservations;
MONTANA CODE ANNOTATED - Sections 2-1-301, 2-2-301 to 2-2-304, 2-2-302, 2-2-304, 20-3-324, 20-4-201 to 20-4-207;
MONTANA LAWS OF 1987 - Chapter 117;
MONTANA LAWS OF 1933 - Chapter 12;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 91 (1988), 41 Op. Att'y Gen. No. 57 (1986), 39 Op. Att'y Gen. No. 67 (1982), 34 Op. Att'y Gen. No. 3 (1971);
UNITED STATES STATUTES AT LARGE - 57 Stat. 588 (1953).

HELD: Montana's nepotism statutes apply to members of public school boards for districts lying wholly or partially within an Indian reservation. Criminal prosecution of nepotism law violations by members who are Indians with respect to decisions made and implemented wholly on-reservation may be initiated only in federal court by the United States except for those violations occurring on the Flathead Indian Reservation. Finally, contracts entered into in contravention of the nepotism statutes are voidable.

July 11, 1989

James C. Nelson
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Dear Mr. Nelson:

You have requested my opinion concerning the following question:

> Does the prohibition against nepotism in section 2-2-302(1), MCA, apply to members of a public school board whose district is located wholly or partially within an Indian reservation and, if so, what enforcement mechanisms are available against such members who are Indians?

I conclude that the Montana nepotism statutes, §§ 2-2-301 to 304, MCA, apply uniformly to all persons specified thereunder and that such statutes are not preempted by federal law. I further conclude that, while criminal prosecution in state court under section 2-2-304, MCA, is unavailable in some instances, other remedies exist for violation of the nepotism prohibition, including possible criminal prosecution by the United States pursuant to 18 U.S.C. § 13 and employment termination of the person to whom the board member is related.

Your question arises with respect to a state school district located within the exterior boundaries of the Blackfeet Indian Reservation. Information submitted with the opinion request indicates that school district employees have been employed despite the fact that, at the time their employment commenced, they were related by consanguinity within the fourth degree to a member of the school district's board of trustees. Section 2-2-302(1), MCA, states, however, that "[i]t 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 related or connected by consanguinity within the fourth degree or by affinity within the second degree." There is no dispute that the nepotism prohibition in section 2-2-302(1), MCA, facially applies to employment decisionmaking by members of a school board. See State ex rel. Hoagland v. School District No. 13, 116 Mont. 294, 298-99, 151 P.2d 168, 169-70 (1944); 41 Op. Att'y Gen. No. 57 (1986); 39 Op. Att'y Gen. No. 67 at 250 (1982); 34 Op. Att'y Gen. No. 3 at 89 (1971). The school board has nonetheless suggested that a 1987 amendment to section 2-2-302, MCA, validates at least some initial hiring determinations which, when made, conflicted with such statute, and that, as discussed below, federal preemption issues exist.

First, the 1987 amendment to section 2-2-302 (1987 Mont. Laws, ch. 117) added subsection (2)(b) which excepts from the prohibition in subsection (1) "the renewal of an employment contract of a person who was initially hired before the member of the board, bureau, or commission or the department head to whom he is related assumed the duties of the office." (Emphasis added). The amendment's purpose was to overturn 41 Op. Att'y Gen. No. 57 at 233 (1986) to the extent it held that contract renewal decisions were subject to the general nepotism prohibition even though, at the time the affected employee was first employed, no nepotism violation had occurred. Neither the purpose nor the literal language of the amendment justifies a construction, such as has been urged by the school board, that subsection

(2)(b) encompasses renewals of contracts which were proscribed by subsection (1) when initially made; i.e., the clause "before the member ... assumed the duties of his office" refers only to those periods of time when the involved public official was not serving and is not intended to insulate from the nepotism prohibition an otherwise invalid initial hiring decision made by the official during a previous term in office.

Second, federal preemption issues are present since the involved school board members are Indians, their employment decisions were made within the exterior boundaries of their reservation, and such decisions relate to individuals whose employment occurs on such reservation. Preemption may derive from interference with a specific federal statutory scheme or, under somewhat more limited circumstances, from infringement on tribal self-government authority. E.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980); Williams v. Lee, 358 U.S. 217, 220 (1959). Under either preemption prong the applicability of the nepotism statutes to tribal members must be determined by balancing state, federal and tribal interests. E.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-16 (1987); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156-57 (1980). In this case, the material facts and underlying interests are quite well defined and lead inevitably to the conclusion that the nepotism provisions do apply.

Montana's nepotism laws date back to 1933 (1933 Mont. Laws, ch. 12) and reflect a basic public policy against even the appearance of impropriety attendant to the use of contracting authority by public officers to benefit their relatives. See 41 Op. Att'y Gen. No. 57 at 234 ("[t]he intent of the [nepotism] statutes is to prevent favoritism and conflicts of interest by public agencies in hiring, and to concentrate on the applicant's merit and qualifications"). Like any statute which speaks broadly and admits few exceptions, these provisions may occasionally penalize a worthy applicant, but such a penalty has been legislatively deemed necessary to ensure against the possibility of conflicted decisionmaking. Nepotism prohibitions directly promote confidence in the integrity of elected or appointed officials' discharge of their statutory responsibilities and therefore touch upon matters of a uniquely state and local governmental concern.

In contrast, no federal statutory scheme is affected by the Montana nepotism statutes, and the state statutes govern activities over which tribes have no sovereign responsibility. This is accordingly not a situation where state law interferes with comprehensive federal, joint federal-tribal or purely tribal regulation. E.g., California v. Cabazon Band of Mission Indians, supra (on-reservation tribal gaming enterprise); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (on-reservation federal-tribal resource management program); White Mountain Apache Tribe v. Bracker, supra (on-reservation tribal timber harvesting management by Bureau of Indian Affairs). The State is also not seeking through the guise of its nepotism

provisions to exact an economic benefit from reservation activities which it has declined to provide pursuant to its own laws. See Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 843 (1982). These provisions instead reflect an important state public policy uniformly and nondiscriminatorily applicable to individuals who, by their own choice, have assumed positions of trust under Montana law.

Enforcement of state nepotism statutes is nonetheless affected by whether the challenged conduct has occurred on-reservation by a public officer who is an Indian. Section 2-2-304, MCA, subjects public officers to criminal prosecution for violation of section 2-2-302(1), MCA, with a maximum penalty of a $1,000 fine and/or six months' imprisonment. Decisional law has further established that contracts entered into in contravention of nepotism laws are voidable. State ex rel. Hoagland v. School District No. 13, supra. The second of these remedies is administrative in nature, and its use is governed by statute. See §§ 20-3-324(2), 20-4-201 to 207, MCA. The somewhat more complex issue is whether the criminal sanctions under section 2-2-304, MCA, may be applied to the reservation-based conduct of a public officer who is an Indian.

It is settled that state criminal laws have no application to Indians for crimes committed within Indian country, as defined by 18 U.S.C. § 1151, unless expressly made so by Congress. E.g., United States v. John, 437 U.S. 634, 651 (1978); United States v. Antelope, 430 U.S. 641, 646 (1977); Seymour v. Superintendent, 368 U.S. 351 (1962); State v. Greenwalt, 204 Mont. 196, 205-07, 663 P.2d 1178, 1182-83 (1983); State ex rel. Irvine v. District Court, 125 Mont. 398, 404, 239 P.2d 272, 275 (1951). Thus, except for the Flathead Indian Reservation over which criminal jurisdiction has been assumed pursuant to section 6 of Public Law No. 280, 67 Stat. 588, 590 (1953) (§ 2-1-301, MCA), Montana has no authority to prosecute Indians with respect to violation of section 2-2-302(1), MCA, if the challenged decision is made on-reservation and relates to employment or other services to be rendered there. Nonetheless, because nepotism is against the State's public policy (42 Op. Att'y Gen. No. 91 (1988)) and is prohibited rather than merely regulated, such violations are subject to prosecution in federal court by the United States pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13. See Cabazon, 480 U.S. at 211 n.10. Such prosecution is thus a matter subject to the discretion of the United States Attorney, not the involved county attorney, and the former is, of course, not bound by my view of the federal law issues addressed above.

THEREFORE, IT IS MY OPINION:

> Montana's nepotism statutes apply to members of public school boards for districts lying wholly or partially within an Indian reservation. Criminal prosecution of nepotism law violations by members who are Indians with respect to decisions made and implemented wholly

on-reservation may be initiated only in federal court by the United States except for those violations occurring on the Flathead Indian Reservation. Finally, contracts entered into in contravention of the nepotism statutes are voidable.

Sincerely,

MARC RACICOT
Attorney General