

October 26, 1938.

Mr. Charles C. Guinn
County Attorney
Hardin, Montana

Dear Sir:

The Mayor of Lodge Grass, Montana, an incorporated town, appointed her brother as Probationary Town Marshal. A complaint has been filed with you charging the mayor with violating the provisions of the Nepotism Act. To clarify this matter you have asked the following questions:

"1. Is a town properly a political subdivision of the State under the laws of Montana governing the creation and organization of towns?"

Provision is made in the Codes for the establishment of incorporated cities and towns; cities fall in three classes, the lowest of which must have a population of not less than 1,000, while all incorporated municipalities having a population of less than 1,000 are designated as 'towns' in contradistinction to 'cities.'" (Section 4959, R. C. M. 1935; *State v. Board of County Commissioners*, 83 Mont. 540.)

A discussion of the meaning of "town" is found in *Davis v. Stewart* (54 Mont. 429, at 434). There it is held that "town" has both a technical and a popular meaning. The meaning given above is the statutory and technical meaning, and, as far as a town incorporated under the provisions of Chapter 376, R. C. M. 1935, is concerned, there is no doubt that an incorporated town is a political subdivision of the state for governmental purposes, owing its very existence to the legislative will, and capable of exercising only such powers as are granted either directly or by necessary implication. (*Berry v. City of Helena*, 56 Mont. 122; *City of Helena v. Helena Light and Railway Co.*, 63 Mont. 108, 116, and cases therein cited.)

"2. Is the office of Probationary Town Marshal a position of trust or emolument, under the provisions of Section 456.2, R. C. M. 1935?"

This question was discussed in *Reddell v. St. Oklahoma* (170 Pac. 273), as follows:

"It was the intention of the legislature to prevent the filling of sub-

Opinion No. 345.

Cities and Towns—Officers—Appointment and Removal—Nepotism Act—Town Marshal.

HELD: 1. An incorporated town as defined by Section 4959, R. C. M. 1935, is a political subdivision of the State.

2. The office of town marshal is a position of trust and emolument.

3. The Nepotism Act is equally applicable to all political subdivisions of the state.

4. Section 5015, R. C. M. 1935, is the only statute governing the removal of city and town officers.

ordinate offices, positions, employments or duties of trust which are of a continuous nature, either provided by law or necessarily required to carry out the duties required by law on any such department. * * * The intent was to prevent the filling of such offices and subordinate employments by relatives of the person making the appointment. That was the practice that had grown to be disreputable prior to the enactment of the statute."

A position of emolument would be a position that yielded a profit in fees, salary, etc., as a result of such employment. It has been uniformly held that law enforcement officers, such as sheriffs, constables, personal guardians, patrolmen, etc., hold positions of trust. (See *Cavanaugh v. Essex County* (N. J.), 33 Atl. 943.) Then, it is my opinion that a town marshal holds a "position of trust or emolument" as that phrase is used in Section 456.2, Revised Codes of Montana, 1935.

"3. Was it the intent of the Legislature, in adopting the Nepotism Act, to control small communities where it became necessary, as above stated, to carry out the laws governing such communities, as an emergency to appoint a relative of some head of the governing body of such community, where no one else except a relative was available for such services?"

The Montana Supreme Court has laid down a guide for the construction of the Nepotism Law in *State ex rel. Kurth v. Grinde* (96 Mont. 609, at 614):

"* * *Is urged by appellants that, since this is a penal statute, it must be strictly construed. To this we cannot assent. Section 10710, Revised Codes 1921, provides: 'The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.' (Compare *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 Pac. (2d) 133.) Our duty is but to ascertain the intention of the legislature. (Sec. 10520, Rev. Codes 1921.) But this intention is

to be ascertained from the terms of the statute, and we may not 'insert what has been omitted, or * * * omit what has been inserted.' (Sec. 10519, Id.)"

Applying these rules of construction, neither omitting nor inserting extraneous matter into the statute, I am of the opinion that the Nepotism Law applies to all political subdivisions alike. Having held an incorporated town to be a political subdivision, it is plain that the law is applicable to all incorporated towns.

"4. Do the provisions of Section 5015, R. C. M. 1935, for the removal of town and city officers, apply where the charge is a violation of the Nepotism Act?"

The penalty for violation of the Nepotism Act is found in Section 456.3, R. C. M. 1935. Section 5015, R. C. M. 1935, is the only section on the removal of city and town elected officials.