

January 3, 1939.

Honorable H. A. Lambert
Chairman, Employment Committee
House of Representatives
Twenty-sixth Legislative Assembly
Capitol Building

Dear Sir:

You have submitted the question as to whether the son of one of the members of the House of Representatives of the Twenty-sixth Legislative Assembly is eligible under the Nepotism Law for appointment as enrolling clerk of the House.

The position of enrolling clerk is one of the big positions of the House of Representatives and the employment of such clerk has been delegated to you as one of the standing committees of the House, along with employment of other employees and attaches needed to carry out the work of the Montana Legislature. Any employee hired by your committee is, of course, subject to final approval by the House of Representatives in regular session.

The Nepotism Law is contained in Sections 456.1 to 456.3, Revised Codes of Montana, 1935, Section 456.2 of which provides:

"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."

Opinion No. 10.

Office and Officers—Nepotism—Legislative Employee.

HELD: That the Nepotism Act does not prevent a member of the legislature from voting upon the adoption of the report of the employment committee when such report recommends the employment of any person connected with such member by consanguinity within the fourth degree or affinity within the second degree.

In *State ex rel Kurth et al., v. Grinde et al.*, 96 Mont. 608, our Montana Supreme Court had occasion to pass upon this act and particularly upon Section 456.2, supra. The question before the court in that case grew out of the following facts: The then mayor of Great Falls nominated Edwin A. Pierse, son of Allen Pierse, a Councilman of the City of Great Falls, as Water Registrar. The vote on confirmation resulted in a tie vote and the mayor cast the deciding ballot in favor of his nominee. It was contended that inasmuch as Allen Pierse as councilman had voted for the confirmation of his son the appointment was void as violative of the Nepotism Act. In deciding this question the court declared, (page 614):

"It 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.)

"With these rules of construction in mind, we proceed to ascertain from the language employed in the statute whether it prohibits the appointment of appellant Edwin A. Pierse under the circumstances here shown. No contention is made that the mayor was prohibited by the statute from appointing Edwin A. Pierse; neither is there any claim that there was an agreement or promise made with respect to the appointment. The contention is that Allen Pierse is prohibited by the statute from voting for the confirmation because of his relationship to the appointee. The statute by its terms restrains only the appointing power. Its provisions are not suf-

ficiently broad to affect the power or right of one voting for confirmation. Had it been the intention of the legislature to prohibit one from voting for the confirmation of a person within the prohibited degree, it could easily have done so expressly, as was done under the statute considered in *Fairless v. Cameron County Water Imp. Dist.*, (Tex. Civ. App.) 25 S. W. (2d) 651, or it might possibly have done so by making it unlawful for any one to participate in such an appointment, as was done by the statute involved in *Barton v. Alexander*, 27 Idaho 286, 148 Pac. 471, Ann. Cas. 1917D, 729, or possibly by making it unlawful for one to vote for the appointment of any such person, as in the statute considered in *Reddell v. State*, 14 Okl. Cr. 199, 170 Pac. 273. We cannot read something into the statute which is not there. Its terms do not make it a misdemeanor for one to vote for confirmation of the appointment of another within the degree of relationship mentioned.

"Nor is it of importance that there is just as much reason for condemning a vote on confirmation of one related within the prohibited degree to the appointee as for making the appointment. Remedy must come, if at all, through the legislature.

"Since the statute does not restrain one from voting on the confirmation of an appointment within the prohibited degree of relationship, there is nothing in the statute preventing appellant Allen Pierse from voting in favor of the confirmation of the appointment of his son. In consequence, on the record presented, Edwin A. Pierse is the duly appointed water registrar, and the court erred in finding otherwise. * * *

From an examination of the statute and on authority of the case cited, it is my opinion that the Nepotism Law has no application to the facts you have presented. There is nothing in that law which prevents your committee from suggesting any qualified person for employment and nothing to prevent any member of the legislature from voting on the adoption of the report of your committee recommending the employment of such person.