

No. 387

**SHERIFF—OFFICES AND OFFICERS—NEPOTISM
ACT—MILITARY SERVICE**

Held: When a sheriff leaves his position to enter the armed forces, the incumbency of his undersheriff continues since—under Section 8 of Chapter 47 of the Laws of 1941—no vacancy occurs and—under Section 7 of said Chapter—the successor to such resigned sheriff is “acting” sheriff only. Therefore, if a relative of the incumbent undersheriff is appointed “acting” sheriff, the Nepotism Law has no application, since the undersheriff holds under the appointment of the elected sheriff and not under the “acting” sheriff.

April 3, 1942.

Mr. Edison W. Kent
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Kent:

You have asked the opinion of this office whether the Nepotism Act, Sections 456.1 to 456.3 of the Revised Codes of Montana, 1935, is applicable under the following state of facts to disqualify Fred Superneau from holding the office of undersheriff of Granite County:

“On February 17th Angus McDonald, Sheriff of Granite County, was called into the service of the Army of the United States, whereupon he filed with the Clerk and Recorder an unconditional resignation of his position as Sheriff, which resignation was duly accepted by the Board of County Commissioners on the 4th day of March, 1942, at their regular meeting, at which time the Board appointed Clarice McDonald, wife of Angus McDonald, to fill the unexpired term of Angus McDonald as Sheriff of Granite County.

“Angus McDonald appointed Fred Superneau as undersheriff upon his election as sheriff in November, 1938, which term commenced January 2nd, 1939, the appointment reading ‘for the term commencing January 1st, 1939, to January 1st, 1941.’ Thereafter the Montana Supreme Court held the term of office of Sheriff was extended two years by reason of the constitutional provision adopted at the same election as the one at which sheriffs were elected. No new appointment was ever filed but Superneau has continued to serve in the capacity of undersheriff up until the present time. Angus McDonald married Clarice Superneau, sister to Fred Superneau, his undersheriff, in January, 1941.”

The principal in public office cannot appoint his deputy for a longer term than he himself serves, for deputies, whether common law or statutory, are—where their terms are not fixed by statute—supposed to be appointed at the pleasure of the appointing power and their deputation expires with the office on which it depends. (46 C. J. 1062; Throop on Public Officers, Sec. 304.)

It is impossible there be two incumbents to the same office. However, under the provisions of Chapter 47, Laws of 1941, an officer who “leaves” his position remains in office, as no “vacancy” occurs and the person appointed in his stead is merely an “acting” officer.

Section 423 of the Revised Codes of Montana, 1935, provides as follows:

“Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified.”

In the case of *State ex rel. Neill v. Page*, 20 Mont. 238, 248, 50 Pac. 719, it is stated this section is applicable only where the term of office of an incumbent has expired and not to a vacancy caused by resignation. It would appear, therefore, that if the position is taken that the term of Fred Superneau as undersheriff expired, under the appointment of Angus McDonald, on January 1st, 1941, still he is required to hold over “until his successor has qualified.” This would mean that, upon being appointed for a definite term, the undersheriff is entitled to hold until a successor has qualified. The situation might be otherwise if the resignation of Angus McDonald caused a vacancy in the office of Sheriff for—in that event—the office of undersheriff would also be vacant; but—under our construction of Chapter 47 of the Laws of 1941—the resignation does not create a vacancy. The appointment of Superneau, when made, was valid and no appointment of this incumbent has been attempted since he became ineligible to appointment due to his relationship to the sheriff.

The prohibition in the Nepotism Act is with respect to **appointing** “to any position of trust or emolument.” Here the holdover undersheriff is not appointed contrary to the Nepotism Act. The situation is somewhat similar to the case where an officer was appointed prior to the passage of the Nepotism Act who, if appointed after the act’s passage, would be ineligible. In such a case it was held that the Nepotism Act was not retroactive. (Vol. 15, Opinions of the Attorney General, p. 65.) Similarly, it would appear the valid appointment of a subordinate officer would not be vacated by the subsequently arising relationship of the appointing officer and the appointee.

It is my opinion that, when a sheriff leaves his position to enter the armed forces of the United States, the incumbency of his undersheriff continues, since—under Section 8 of Chapter 47, Laws of 1941—no vacancy occurs and—under Section 7 of said Chapter 47—the successor to such resigned sheriff is “acting” sheriff only. Therefore, if a relative of the incumbent undersheriff is appointed “acting” sheriff, the Nepotism Law has no application, since the undersheriff holds under the appointment of the elected sheriff and not under the “acting” sheriff.

Sincerely yours,

JOHN W. BONNER
Attorney General