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April 3, 1943.

Mr. Marshall Murray
County Attorney
Flathead County
Kalispell, Montana

Dear Mr. Murray:

Since writing Opinion No. 17, Volume 20, Report and Official Opinions of the Attorney General, you have further advised me concerning the facts, and have called my attention to the fact the contract between the federal agency and the school district covering the employment of the instructor in question, differs in many of its terms from the form of the contract mentioned in the opinion. The contract under which the board is operating does not contain the provisions quoted in the opinion and which provisions in a large sense influenced the opinion. While these differences do not in my opinion change the decision reached, yet—inasmuch as I have now before me the original contract, and, in addition, the benefit of a conference with you—I deem it advisable to give you the following further opinion based upon the present contract and the further facts supplied.

There have been three district contracts entered into between the board and the federal agency. While these differ somewhat in some provisions, on the whole the difference does not affect in any way the question here to be determined.

Opinion No. 33.

Nepotism—Civil Aeronautic's Administration—Instructors.

Held: The fact that the board is required to furnish a certificate showing, among other things, the name of each instructor certified for the next course, may

The simple facts are: The board of trustees, prior to January, 1943, entered into a contract with the Civil Aeronautics Administration, an agency of the federal government, whereby the board agreed to furnish, among other things, flight and ground school instructors and to instruct a specified number of trainees assigned by the federal agency for a definite period, usually eight weeks for each quota of trainees. At the end of each course there was an interval before the next quota arrived, during which time the instructors had nothing to do and were not compensated. The federal government provided the money with which to pay the salary of each instructor. These funds were deposited in the county treasury, and warrants in payment of the salaries were drawn by the trustees on the fund. Under the provisions of the contract, the board was required, at the beginning of each training period, to furnish the agency with a certificate showing, among other things, the names of instructors selected and available for such period for the several subjects taught. The board had designated, as a matter of convenience, one of its members to execute such certificate.

Article 14 of the contract provided:

"Duration. All services under this contract shall be completed on or before June 30, 1943, unless the contract time therefor is extended by the government."

Prior to the time, January, 1943, when the board member, who is related to the instructor in question, became a member of the board, the board had selected the instructor in question, and on at least two occasions, prior to January, 1943, had certified the name of this instructor as available.

The question here considered arose at the time a certification was to be made and at which time the member, related to the instructor, was serving on the board.

Under the facts above related, then, does the Nepotism Act have application?

The Nepotism Act prohibits any board from appointing to any position of trust or emolument any person or persons related to any member within certain degrees. It is conceded here the instructor is related to a member of the board within the restricted degree.

The controlling fact in determining whether the Nepotism Act applies to the facts here present, is whether there is a continuing employment of the instructor or an employment for a definite period under the contract, to-wit, an employment only for each separate course of training, being a period of some eight weeks.

It will be noted the contract does not expire by its terms until June 30, 1943, unless terminated by notice as therein provided. It would seem clear from a study of the contract itself and considering the purpose, aim and object of the subject, that it was intended by both parties that the terms of the contract, including the selection of instructors should be of a continuing nature. In other words, as related directly to the specific question here, it was the intention that the instructors first selected by the board should continue for the duration of the contract. It is true, of course, the board appoints (or employs) the instructor. It is likewise true, the board has the authority and right under the contract to terminate the services of any instructor and appoint another.

The fact that the board is required to furnish a certificate showing, among other things, the name of each instructor certified for the next course, may seem to indicate a new selection is required. In my opinion, however, this fact alone does not so indicate. I believe the selection in the first instance continues until the board terminates the services of the instructor by formal board action. The only purpose of the certificate, in my judgment, is to inform the agency that—for that course—qualified instructors will be available. It is further my opinion the appointment of all instructors terminates with the termination of the contract, and if a new contract is entered into, new appointments must be made, and, in such event, the board as presently constituted, would be prohibited, under the Nepotism Act, from appointing the instructor in question, if the relationship now existing between the board member and the instructor still exists.

It is therefor my opinion, under the facts as here presented, the Nepotism Act does not apply, under the present contract.

Sincerely yours,
R. V. BOTTOMLY
Attorney General