

Opinion No. 215.**Nepotism Statutes—County Commissioners—County Attorney—Employment, Special Counsel.**

Held: A county attorney cannot employ his brother to assist him in the job of county attorney, nor can he make any agreement or promise with the board of county commissioners to employ his brother, even though such employment be without compensation.

October 31, 1946.

Mr. Thomas R. Marron
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Marron:

You have submitted the question whether or not to employ your brother to assist you in the job of county attorney would violate the nepotism statute.

I must first call your attention to Section 4486, Revised Codes of Montana, 1935, entitled "Special counsel to assist county attorneys." This statute provides:

"The board of county commissioners has the power, except in counties of the first class, whenever, in its judgment, the ends of justice or the interests of the county require it, to employ . . . special counsel to assist in the prosecution of any criminal case pending in such county, or to represent said county in any civil

action in which such county is a party.”

It must be noted from the above statute the power to employ special counsel resides in the board of county commissioners. Thus, no initial action may be taken by you in the employment or appointment of such special counsel. That brings us to the nepotism statute to which you refer in your letter.

Section 456.2, Revised Codes of Montana, 1935, 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.”

Taking into consideration the second sentence of the above quoted statute, it is my opinion it prohibits any agreement between yourself and the members of the board of county commissioners with the purpose of appointment of your brother.

Elucidating, you are thus prohibited from appointing your brother yourself even though authorized by the board of county commissioners to appoint a special counsel, and you are further prohibited from making any agreement with the board of county commissioners to appoint your brother.

If the board of county commissioners were to appoint your brother upon its own initiative and without any suggestion on your part and without any concurrence between the commissioners

and yourself, it is quite possible he could be hired for this position without violating the nepotism statute.

It will be noted from the wording of the statute, the question of nepotism has nothing to do with compensation, but rather is dependent upon placing any such person in a position of “trust” or “emolument.” At your suggestion I have referred to Volume 46 Corpus Juris, page 941, Section 45, in relation to this question. However, upon investigation, the citation noted by that section in reference to nepotism statutes was referred to in the case of *Reddell v. State* (Okla.), 170 Pac. 273 (1918) which in turn cites an Oklahoma nepotism statute quite unlike the statute of this state in that it is not all inclusive of every position of “trust” or “emolument.” It would not appear that that case or that section of Corpus Juris would have proper precedent for your problem.

The nepotism statutes go to the appointing power, the individuals, the members of a board or commission. The nepotism statutes do not refer merely to permanent positions, but refer to any and all jobs, no matter whether permanent, temporary, ministerial or otherwise. It has been so held in Opinion No. 270, Volume 15, Report and Official Opinions of the Attorney General.

The board of county commissioners may appoint any qualified person to such position so long as such person is not related to any member of such board in the prohibited degrees.

It is therefore my opinion you cannot employ your brother to assist you in the job of county attorney, nor can you make any agreement or promise with the board of county commissioners to employ your brother, even though such employment be without compensation.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General