

VOLUME NO. 34

Opinion No. 3

**NEPOTISM - School boards. Sections 59-519 and 75-6103, R.C.M. 1947.**

- HELD:**
- 1. A trustee of a school board, whose relative was hired during a previous board term, may serve without violation of Montana nepotism statutes if the relative's employment is continuous and not subject to rehiring.**
  - 2. An employee hired prior to the election of his relative to the school board, and whose employment is continuous and not subject to rehiring, may serve without violation of nepotism statutes.**
  - 3. It is a violation of the nepotism statutes for the board to initially appoint or reappoint a relative of a board member, even if the related board member abstains from voting.**
  - 4. Where a contract of employment for a tenured teacher is to be renewed by the board and a board member is a relative of said teacher, there is no violation of nepotism statutes.**

March 29, 1971

Mr. Larry Stimatz  
Silver Bow County Attorney  
Courthouse  
Butte, Montana 59701

Dear Mr. Stimatz:

The following opinion is submitted in response to your inquiry of March 11, 1971. Your inquiry contains four issues which I have formulated as follows:

1. Whether a newly-elected trustee of a school board, whose relative was hired or appointed during a previous term, may serve without violating the Montana nepotism statutes.
2. In the case of an employee who was hired prior to the election of his relative to the school board and whose employment is continuous and not subject to rehiring or reappointment, may the employee continue to serve without violating the nepotism statutes?
3. Where the initial appointment or reappointment of employment of a relative of a board member is considered by the board, and the related board member abstains from voting, is there a violation of the nepotism statutes?
4. Where the contract of employment for a tenured teacher is to be renewed by the board when one of the members thereof is a relative, does this constitute a violation of the Montana nepotism statutes?

The answers to the first three questions are contained in previous opinions of this office, and no sound reasons exist for the modification or overruling of the previously-published opinions. 20 **Opinions of the Attorney General**, No. 17, page 22, states:

“Where there is no legal duty on the part of a board to terminate a contract of employment at the time a relative of an employee becomes a member of the Board, there is no violation of the Nepotism Act in retaining such employee.”

The rationale for that opinion is based upon the language of section 59-519, Revised Codes of Montana, 1947, which prohibits any person or member of a board from appointing or entering into an agreement with other board members to appoint a relative, within the degree specified, to any position of trust or emolument. It has been determined, therefore, that where the employee was appointed during a previous board's administration, that the employment may continue despite the fact that a relative has become a member of the board.

Abstention from voting by the related board member does not circumvent the prohibition of the act. The Montana Supreme Court in **Williams, et al. v. Board of Commissioners of Broadwater County**, 28 Mont. 360, 72 Pac. 755, stated at page 365, “The statutes do not vest the power of the county in three commissioners acting individually, but in

them as a single board; and the board can act only when legally convened." This rule was applied to a nepotism situation in 18 **Opinions of the Attorney General**, No. 23, page 24, which prohibited individual action by commissioners in the employment of personnel. Therefore, as stated in 18 **Opinions of the Attorney General**, No. 96, page 108, "Any member of the Board of County Commissioners violates . . . the Nepotism Act, when he votes to appoint as county surveyor a son of one of the members."

Where, however, the contract of employment is continuous and not subject to review, reappointment or rehiring, the employee who was hired prior to the assumption of office by his relative may continue without violating the act. See 19 **Opinions of the Attorney General**, No. 263, page 435, which stated:

"Where there is no legal duty on the part of a board of county commissioners to terminate a contract of employment entered into by a former board, there can be no violation of the Nepotism Act by the newly elected board in retaining such a person in said employment, where said person happens to be related to the newly elected commissioner. The Nepotism Act prohibits the appointment and not the continuation of appointment previously made."

Therefore, a trustee whose mother-in-law works for two hours a day on the hot lunch program, and whose employment is continuous, may continue in office without violating the Act. See **Barton v. Alexander**, 148 Pac. 471 (Idaho).

This office has not previously determined whether the Nepotism Act is violated where a board, composed of new members, one of whom is related to a tenured teacher previously appointed, considers the reappointment of that teacher for another term. A strict interpretation of the statute in respect to a teacher who has been employed for a number of years, who has achieved "tenure" status as defined in section 75-6103, R.C.M. 1947, as amended, and who has contributed a substantial amount of money to a teachers' retirement fund, would be highly inequitable. In **Backman v. Bateman**, 263 P.2d 561 (1953), the Supreme Court of Utah held unconstitutional a nepotism statute similar to Montana's insofar as it affected a teacher in public schools who had been employed many years before her brother was elected to the school board, and who would have forfeited her interests in the teachers' retirement fund if she lost her position. The Florida Supreme Court reached the same position in **State ex rel. Robinson, et al. v. Keefe, et al.**, 149 S. 638 (1933), holding the nepotism statute inapplicable to teachers holding "life certificate". I therefore conclude that the act is not violated when a trustee votes to "reappoint" a relative-teacher who was initially appointed during the administration

of a previous board, when such teacher has achieved “tenure” status. As stated in the Florida case, at page 638:

“The reason for not applying a statute of this kind to a class of appointees such as school teachers, whose merit must be established before they are permitted to be employed at all, is found in the fact that the Legislature has by other complete statutes . . . provided a special system for the appointment and tenure of employment for school teachers. The requirement of this separate code of laws afford adequate protection against appointments other than upon proved merit, which is all that an ‘anti-nepotism’ law can constitutionally be supposed to cover and still remain within the police power, under the guise of which it is enacted.”

In summary, the nepotism statute is violated only when a non-tenured teacher is appointed initially or reappointed by a board of which one of the members is a relative within the degree specified by statute.

THEREFORE, IS IS MY OPINION that:

1. A newly-elected trustee of a school board, whose relative was hired or appointed during a previous board term, may serve without a violation of the Montana nepotism statutes if the relative’s employment is continuous and not subject to rehiring.
2. An employee, who was hired or appointed prior to the election of his relative to the school board and whose employment is continuous and not subject to rehiring or reappointment, may continue to serve without violation of the nepotism statutes.
3. It is a violation of the nepotism statutes for the board to initially appoint or reappoint a relative of a board member, even if the related board member abstains from voting.
4. Where a contract of employment for a tenured teacher is to be reviewed by the board, when one of the board members is a relative of said teacher, there is no violation of the nepotism statutes.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General