

VOLUME NO. 37

OPINION NO. 49

CITIES AND TOWNS - Nepotism, appointment of son-in-law by Mayor; NEPOTISM - Appointment of son-in-law by mayor of city or town prohibited; REVISED CODES OF MONTANA, 1947 - Section 59-519.

HELD: The appointment of the son-in-law of an appointing mayor to the position of Chief of Police would violate the nepotism prohibition of section 59-519, R.C.M. 1947, even though he may be the most qualified applicant for the position.

25 July 1977

Olive R. Hagadone, Mayor
Town of Boulder
Boulder, Montana 59632

Dear Mayor Hagadone:

You have requested my opinion concerning the appointment of a police chief for Boulder. Specifically, you have asked whether the appointment of your son-in-law, who is the only full-time peace officer on the Boulder police force whose salary is paid by the town, would violate the nepotism prohibitions of section 59-519, R.C.M. 1947. I understand that your son-in-law is well qualified and merits the promotion and that his application is favored by other town officials and aldermen. Boulder City Attorney Allen LeMieux, to whom I am authorized to render an official opinion under section 82-401, R.C.M. 1947, joins in requesting my opinion concerning this question.

Section 59-519, R.C.M. 1947, 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 related or connected by consanguinity within the fourth degree, or by affinity within the second degree; except that the provisions of this section shall not apply to sheriffs in the appointment of persons as cooks and/or attendants. 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.

This statute has been a part of Montana laws since 1933. See chapter 12, Laws of 1933. The purpose of the provision

"is to eliminate abuses by public officials appointing relatives to the public payrolls (on the basis of relationship rather than merit)." 37 OP. ATT'Y GEN. NO. 6. That purpose has been effected through a broad and flat prohibition against public officials appointing their relatives to office or public employment. No exceptions are set forth and none can be interpolated by me. See Security Bank & Trust Co. v. Connors, 550 P.2d 1313 (1976). The statute bars the appointment of a relative even if he or she is the most qualified candidate for the position. The prohibition is a comprehensive one. It prohibits not only a direct appointment of relatives but also proscribes agreements and schemes designed to effect an appointment without the direct appointive action of the appointing officer. 37 OP. ATT'Y GEN. NO. 6, (wherein it was held that the promotion of a school board trustee's sister-in-law violated the nepotism statute where the trustee resigned her position and the remaining trustees promoted the sister-in-law and then appointed the original trustee to the vacant trustee's position).

Section 59-519 applies to the appointment of a police chief by the mayor of a city or town. Cities and towns are "political subdivisions" of the state. See 62 C.J.S. Municipal Corporations, § 3, p. 69 and City of Billings v. Herald, 130 Mont. 138, 141, 296 P.2d 263 (1956). In the case of a police chief, the mayor is authorized to make the appointment. Sections 11-703, 11-802(1), 11-810 and 11-1802, R.C.M. 1947. For purposes of section 59-519, the mayor is considered the appointing officer even though selection must be confirmed by the City Council. See State ex rel. Kurth v. Grinde, 96 Mont. 608, 614-615, 32 P.2d 15 (1934). The word "emolument" includes the job of police chief. It is a comprehensive term meaning the profit arising from any office or employment, whether received in the form of salary, fees or other advantage. It comprehends even laborers employed at will on an hourly basis. 19 OP. ATT'Y GEN. NO. 201 (1941).

I further conclude that the relationship of son-in-law and mother-in-law is one of affinity within the first or second degree. The word "affinity" is commonly employed to signify the relationship which, upon marriage, arises between the husband and his wife's blood relatives and the wife and her husband's blood relatives. 24 OP. ATT'Y GEN. NO. 49; 2A C.J.S., Affinity p. 512-513. The usual rule for determining the degree of affinity is that the husband is related by affinity to his wife's blood relatives in the same degree as

his wife is related to her blood relatives by consanguinity. Id. Thus, a mother is related by consanguinity to her daughter in the first degree and therefore to her daughter's husband by affinity in the first degree. See 24 OP. ATT'Y GEN. NO. 49; and see also sections 91-406 through 91-410, R.C.M. 1947. However, at least one Montana Supreme Court decision has applied a modified rule of determining degree of affinity, counting the relationship of a husband to his wife as affinity within the first degree, State ex rel. Hoagland v. School District No. 13 of Prairie County, 116 Mont. 294, 298, 151 P.2d 168 (1944) (compare with 24 OP. ATT'Y GEN. NO. 49); this method would make the son-in-law relationship one of affinity within the second degree. Employing either method of counting, it is clear that son-in-law is at least a second degree relation by affinity whose appointment is prohibited by section 59-519.

THEREFORE, IT IS MY OPINION:

The appointment of the son-in-law of an appointing mayor to the position of Chief of Police would violate the nepotism prohibition of section 59-519, R.C.M. 1947, even though he may be the most qualified applicant for the position.

Very truly yours,

MIKE GREELY
Attorney General